STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP1645-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ISIAH O. SMITH,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE ELLEN R. BROSTROM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

SARAH K. LARSON
Assistant Attorney General
State Bar #1030446

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-0666
(608) 266-9594 (Fax)
larsonsk@doj.state.wi.us

TABLE OF CONTENTS

CASES

Page

Page

Page

Page

STATUTES

OTHER AUTHORITY

STATE OF WISCONSIN

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

DISTRICT I

Case No. 2015AP1645-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ISIAH O. SMITH,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE ELLEN R. BROSTROM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is warranted. The briefs of the parties adequately develop the law and facts necessary for the disposition of the appeal, and this

case can be decided by applying well-established legal principles to the facts.

ARGUMENT

I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN SMITH'S CONVICTION FOR SECOND-DEGREE RECKLESS HOMICIDE AS A PARTY-TO-A-CRIME.

A. Relevant legal principles and standard of review.

1. When evaluating sufficiency of the evidence, this court must view the evidence in the light most favorable to the conviction, and must sustain the verdict unless no reasonable fact-finder could have found guilt beyond a reasonable doubt.

Well-established principles govern the highly deferential review of a sufficiency of the evidence challenge:

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. 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, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

Although the fact-finder must be convinced that the evidence is sufficiently strong to exclude every reasonable

hypothesis of the defendant's innocence, this is not the test on appeal. *Id.* at 503.

As the Wisconsin Supreme Court explained in *Poellinger*:

> In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered.

Poellinger, 153 Wis. 2d at 507-508. *See also* S*tate v. Dukes*, 2007 WI App 175, ¶ 13, 303 Wis. 2d 208, 736 N.W.2d 515 (only when evidence is inherently or patently incredible should this court substitute its judgment for that of fact-finder).

The Wisconsin Supreme Court recently reaffirmed *Poellinger's* "venerable principle," deeming it inappropriate for this court to replace the fact-finder's evaluation of the evidence with its own. *State v. Smith*, 2012 WI 91, ¶ 33, 342 Wis. 2d 710, 817 N.W.2d 410. Few legal principles are more indisputable than the idea that a jury is in a far better position to evaluate the evidence than is a reviewing court. *Id.*

2. If competing inferences exist in the evidence, this court must adopt the inference that supports the conviction.

Credibility of the witnesses and weight of the evidence are for the fact-finder, not this court, to determine. *State v. Below*, 2011 WI App 64, ¶ 4, 333 Wis. 2d 690, 799 N.W.2d 95. Because inferences and credibility findings are findings

of fact, this court must accept the inferences drawn by the fact-finder, even if other inferences could also be drawn. *State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530.

If more than one reasonable inference can be drawn from the evidence, this court must adopt the inference supporting the conviction. *State v. Long,* 2009 WI 36, ¶ 19, 317 Wis. 2d 92, 765 N.W.2d 557. An inference may be rejected on appeal only if it is unreasonable as a matter of law. *State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W.2d 417.

This court should not substitute its evaluation of the evidence for that of the fact-finder, and cannot disturb a jury verdict simply because this court prefers another inference over the jury's reasonable inference. *Smith*, 342 Wis. 2d 710, ¶ 33. This court looks at whether the totality of the evidence supports the fact-finder's conclusion, not whether a single piece of evidence contradicts it. *Id.* ¶ 36.

3. This court reviews independently whether the evidence was sufficient to sustain the jury's verdict.

Great deference is owed the jury's determination that all of the elements of the charged offense have been proven beyond a reasonable doubt. *State v. Jensen*, 2000 WI 84, ¶ 23, 236 Wis. 2d 521, 613 N.W.2d 170 (appellate review is "highly deferential").

The defendant bears a "heavy burden" in attempting to convince a reviewing court to set aside a jury's verdict on insufficiency of the evidence grounds. *State v. Booker*, 2006 WI 79, ¶ 22, 292 Wis. 2d 43, 717 N.W.2d 676. Whether

the evidence presented was sufficient to sustain the jury's verdict is a question of law, reviewed independently on appeal. *Id*. ¶ 12.

B. Under either theory of party-to-a-crime liability, the State was not required to prove that Smith knew in advance that Kennedy had a gun or that Kennedy was going to commit a reckless homicide.

Smith argues that insufficient evidence existed to convict him of second-degree reckless homicide (Smith's brief at 10-17) because there was no evidence, only inferences from speculation, that he knew his co-defendant Kennedy had a gun (*id.* at 12-14), or that he knew Kennedy was going to commit any crime, let alone a homicide (*id.* at 14-17). Smith's arguments, however, are legally incorrect.

Party-to-a-crime is statutorily defined as a person who either directly commits the crime, or a person who intentionally aids and abets the commission of the crime, *State v. Howell*, 2007 WI 75, ¶ 14, 301 Wis. 2d 350, 734 N.W.2d 48 (citing Wis. Stat. §§ 939.05(1); 939.05(2)(b)).[1]

Thus, to prove that Smith committed second-degree reckless homicide, the State needed to prove either that Smith directly committed the reckless homicide, or that Smith aided and abetted Kennedy in committing the reckless homicide. *Howell*, 301 Wis. 2d 350, ¶ 14. Contrary to Smith's arguments, however, neither theory of party-to-a-crime liability contains an element of Smith's advanced knowledge.

---

[1] A third type of party-to-a-crime liability is conspiracy, *see Howell*, 301 Wis. 2d 350, ¶ 14, but the State did not propound that theory at trial (61:10-11; 66:24 [A-Ap. 161]; 66:45-46).

1. Under a direct actor theory, the State was only required to prove Smith's subjective awareness at the time of the reckless conduct.

For example, under a direct actor theory, the State did not need to prove that Smith himself intended to commit the homicide. *State v. Bernal*, 111 Wis. 2d 280, 283, 330 N.W.2d 219 (Ct. App. 1983) (intent to perform reckless act which caused victim's death is not element of reckless homicide).

The second-degree reckless homicide statute does not contain an intent or advanced knowledge element, but only requires the State to prove that the victim's death was caused by the defendant's criminally reckless conduct. *See* Wis. Stat. § 940.06(1); *State v. Neumann*, 2013 WI 58, ¶¶ 39, 66, 348 Wis. 2d 455, 832 N.W.2d 560 (elements of second-degree reckless homicide).[2]

Criminally reckless conduct, in turn, means that: 1) the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being; and 2) the actor was subjectively aware of that risk. *See* Wis. Stat. § 939.24(2); *Neumann*, 348 Wis. 2d 455, ¶¶ 40, 74.

Importantly, the State was required to prove the actor's subjective awareness of the risk <u>at the time of the conduct,</u> not the actor's subjective awareness of the risk at some time before or after the conduct. *State v. Chapman*, 175 Wis. 2d 231, 243, 499 N.W.2d 222 (Ct. App. 1993) (citing *State v. Borrell,* 167 Wis. 2d 749, 781, 482 N.W.2d 883 (1992)) (State must prove defendant's *mens rea* at time of incident, not his *mens rea* after-the-fact or what he wanted

[2] *See also* (66:43-44) (closing jury instructions on second-degree reckless homicide in Smith's case).

to happen before incident). *See also Neumann*, 348 Wis. 2d 455, ¶ 138 (second-degree reckless homicide statute does not require that actor be subjectively aware that conduct would cause victim's death, only that actor be subjectively aware conduct created unreasonable and substantial risk of death or great bodily harm).

Here, Smith does not argue that the State failed to prove either cause of death or the recklessness of the conduct. Rather, Smith only argues that he himself had no awareness or knowledge of the crime beforehand (Smith's brief at 12-17). Under a direct actor theory of liability, however, the State only needed to prove that, at the time of the criminally reckless conduct, Smith had the subjective awareness that his conduct created a substantial risk of the victim's death. *Neumann*, 348 Wis. 2d 455, ¶¶ 39-40; *Chapman*, 175 Wis. 2d at 243.

2. Under an aiding and abetting theory, the State was only required to prove that Smith's actions assisted Kennedy in committing the reckless homicide, and that Smith intended for his actions to assist Kennedy.

Similarly, under an aiding and abetting theory, the State did not need to prove that Smith was aware beforehand that Kennedy was going to kill the victim, that Kennedy had a gun, or even that Kennedy's conduct was criminally reckless. *Neumann*, 348 Wis. 2d 455, ¶ 138. *See also State v. Sharlow*, 110 Wis. 2d 226, 238-239, 327 N.W.2d 692 (1983) (same mental state required for conviction as direct perpetrator not required for conviction as aider and abettor).

Rather, the State only needed to prove that Smith aided and abetted Kennedy in committing the criminally reckless homicide. *Howell*, 301 Wis. 2d 350, ¶ 14. And under an aiding and abetting theory, the State only had to prove two elements: 1) that Smith undertook some conduct, either verbal or overt, that as a matter of objective fact aided Kennedy in the execution of the homicide; and 2) that Smith had a conscious desire or intent that the conduct would in fact yield such assistance. *State v. Rundle*, 176 Wis. 2d 985, 1005, 500 N.W.2d 916 (1993).

Stated differently: "[W]here one person knew the other *was committing* a criminal act, he should be considered a party thereto when he acted in furtherance of the other's conduct, was aware of the fact that a crime *was being committed*, and acquiesced or participated in its perpetration." *State v. Hecht*, 116 Wis. 2d 605, 620, 342 N.W.2d 721 (1984) (emphasis added) (internal citations and quotations omitted).

As the Wisconsin Supreme Court explained in *Hecht*, Smith could be found guilty of aiding and abetting the reckless homicide if the evidence showed that between them, Smith and Kennedy "performed all the necessary elements of the crime with *mutual awareness* of what the other [was] doing." *Hecht*, 116 Wis. 2d at 620 (emphasis in original).

Moreover, Smith's intent to provide assistance to Kennedy could be inferred from Smith's conduct itself. *Hecht*, 116 Wis. 2d at 623. Indeed, a defendant is presumed to intend the natural consequences of his acts. *See, e.g., State v. Cydzik*, 60 Wis. 2d 683, 698, 211 N.W.2d 421, 430 (1973); *State v. Asfoor*, 75 Wis. 2d 411, 428, 249 N.W.2d 529 (1977).

Thus, for example, in *Cydzik*, the Wisconsin Supreme Court held that a defendant who drove the getaway car for an armed robbery aided and abetted the co-defendant to commit the homicide that happened during the robbery. *Cydzik*, 60 Wis. 2d at 696-698. The defendant in *Cydzik* argued that his acts only showed his willingness to assist in the armed robbery, not his willingness to assist in the murder. *Id.* at 696.

But the *Cydzik* court rejected this argument, and reasoned that "it [was] reasonable to infer on the part of each [co-defendant armed robber] an intention to assist the other in the event that there [was] a shooting or killing as well as an intention to assist the other in the emptying of the cash register." *Cydzik*, 60 Wis. 2d at 697. As the court noted, "[h]ere to be ready and willing to render aid, if needed … [was to undertake] conduct … which as a matter of objective fact aids." *Id.* at 698 (internal quotations omitted).

The Wisconsin Supreme Court then used a football metaphor to describe the defendant's aiding and abetting liability:

> The defendant was more than a reserve lineman sitting on the bench waiting to be sent into the game. He was in the game, on the field, playing a position or performing a function as to the commission of the murder, as well as of the robbery. Like a tailback or safety man on defense, by being ready and willing to render aid, if needed, he was as a matter of objective fact aid(ing) another person in the execution of a crime.

Cydzik, 60 Wis. 2d at 699 (internal quotations omitted).

Similar to *Cydzik*, the Wisconsin Supreme Court later held in *Asfoor* that a defendant who drove a getaway car and allowed the use of one of his guns was an aider and abettor in helping the co-defendant commit a reckless injury,

because the defendant's overt acts demonstrated that the defendant was willing to assist in the crime and whatever it entailed. *Asfoor*, 75 Wis. 2d at 428. As the *Asfoor* court explained, the defendant's overt acts:

> demonstrated that if assistance became necessary in the commission of a crime he was ready to provide it. In fact, he did provide assistance by allowing the use of one of his guns and by driving [the two other co-defendants] to the motel [where the crime took place]. Without his assistance the crime could not have taken place. When he set out he aided his companions and must be held responsible for the natural consequences of his act.

Asfoor, 75 Wis. 2d at 428.

Thus, to prove that Smith aided and abetted Kennedy in committing the second-degree reckless homicide, the State only had to prove that Smith knew—at the time of the criminally reckless conduct, not beforehand—that Kennedy was committing the reckless homicide, and that Smith acquiesced in the reckless homicide or participated in its perpetration by acting in furtherance of Kennedy's actions. *Hecht*, 116 Wis. 2d at 620. Moreover, the jury was entitled to infer, from Smith's conduct itself, Smith's intent to provide assistance to Kennedy. *Id.* at 623.

C. Sufficient evidence existed that Smith either directly committed second-degree reckless homicide himself, or aided and abetted in Kennedy's commission of second-degree reckless homicide.

Under the very deferential standard of review for sufficiency of the evidence challenges on appeal, this court should find that the evidence in Smith's case was sufficient to sustain the jury's verdict that Smith either directly committed, or aided and abetted Kennedy in committing, the second-degree reckless homicide. *Poellinger*, 153 Wis. 2d at

507-508 (this court views evidence and inferences in light most favorable to State and conviction).

The evidence was sufficient to show either that Smith was the direct actor, or that Smith aided and abetted Kennedy in the shooting. *Hecht*, 116 Wis. 2d at 620. The jury, however, was not required to agree unanimously as to which theory of party-to-a-crime liability the evidence supported, but only needed to unanimously agree as to Smith's *participation in the crime*. *Id.* at 619.

1. Under a direct actor theory, the evidence showed that Smith had the requisite subjective awareness of the shooting.

If the jury believed that Smith was the shooter, then the evidence at trial clearly showed that Smith had the requisite subjective awareness of the homicide at the time the homicide was committed. *Chapman*, 175 Wis. 2d at 243 (actor's subjective awareness must exist at time of criminally reckless conduct, not before or after).

Smith does not argue that the State failed to prove that the victim's death was caused by the actor's criminally reckless conduct of shooting the gun (Smith's brief at 12-17). Thus, under a direct actor theory, the only issue on appeal is the sufficiency of the evidence to show Smith's subjective awareness at the time of the shooting. *Neumann*, 348 Wis. 2d 455, ¶¶ 40, 66; *Chapman*, 175 Wis. 2d at 243.

It is undisputed that the victim died as the result of a homicide, bleeding out from a gunshot wound to the abdomen (64:60-66). It is also undisputed that Smith accompanied Kennedy into the victim's apartment building,

that Smith and Kennedy both ran out of the building after the victim had been shot, and that Kennedy exited the building holding the gun (62:70-75, 97, 127-134; 63:16-26, 41).

The jury could draw only two reasonable inferences under those facts: either Smith shot the victim or Smith was there when Kennedy shot the victim. Either way, the evidence was clear that Smith had the requisite subjective awareness that the shooting occurred, that the shooting was criminally reckless, and that the shooting created an unreasonable and substantial risk of death or great bodily harm to the victim. *Neumann*, 348 Wis. 2d 455, ¶¶ 40, 66; *Chapman*, 175 Wis. 2d at 243.

Thus, sufficient evidence existed to the jury's conviction for reckless homicide. *See, e.g., State v. Barksdale*, 160 Wis. 2d 284, 290, 466 N.W.2d 198 (Ct. App. 1991) (evidence supported defendant's conviction for first-degree reckless homicide as party-to-a-crime because defendant and his accomplice together brought guns into victim's home, pointed their guns at the residents therein, and Barksdale or his accomplice shot victim).

That more than one inference existed as to who was the shooter does not render the evidence insufficient to convict Smith. *Barksdale*, 160 Wis. 2d at 290. Rather, there was ample evidence to support the jury's findings that the shooting occurred, that the shooting created an unreasonable and substantial risk of death, and that Smith was aware of that risk. *Id. See also State v. Groth*, 2002 WI App 299, ¶ 14, 258 Wis. 2d 889, 655 N.W.2d 163 (defendant engaged in criminally reckless behavior by providing

accomplice with gun to shoot into group of people; death was particularly foreseeable under those circumstances).[3]

2. Under an aiding and abetting theory, the evidence showed that Smith had the conscious desire to assist Kennedy in the reckless homicide, and participated in its perpetration by committing overt acts in furtherance of Kennedy's actions.

If the jury relied on an aiding and abetting theory to convict Smith, this court must also sustain that conclusion under the evidence. *Poellinger*, 153 Wis. 2d at 507-508. The jury here was entitled to infer, from Smith's conduct itself, that Smith intended to provide assistance to Kennedy in committing the crimes, and participated in its perpetration by committing overt acts in furtherance of Kennedy's actions. *Hecht*, 116 Wis. 2d at 620-623; *Rundle*, 176 Wis. 2d at 1005.

Therefore, this court must accept the jury's inferences, because those inferences support the conviction. *Long,* 317 Wis. 2d 92, ¶ 19. Even if other innocent inferences existed, the jury's inferences were not unreasonable as a matter of law. *Routon*, 304 Wis. 2d 480, ¶ 17; *Wenk*, 248 Wis. 2d 714, ¶ 8. Accordingly, this court should conclude that the totality of the evidence supports the jury's conclusions. *Smith*, 342 Wis. 2d 710, ¶ 36.

[3] *Groth* was abrogated on other grounds by *State v. Tiepelman,* 2006 WI 66, ¶ 2, 31, 291 Wis. 2d 179, 717 N.W.2d 1.

a. The jury was entitled to infer that Smith had arranged for the getaway car before the shooting.

For example, a reasonable inference existed that Smith arranged the getaway car for the crime, showing his intent to provide assistance to Kennedy in the crime. *Cydzik*, 60 Wis. 2d at 696-698; *Asfoor*, 75 Wis. 2d at 428. Even if Smith's original intent was only to assist Kennedy in the armed robbery, not the homicide, Smith's willingness to help in the armed robbery was sufficient, in and of itself, to demonstrate Smith's willingness to help in the homicide as well. *Id.* The jury could infer that Smith intended the natural consequences of his actions, and one natural consequence of an armed robbery is that someone could get shot and killed. *Id.*

It was undisputed that the getaway car was Smith's girlfriend's car (63:69-70; 64:94-97), and that the car was missing during the crime, but had been returned after the crime (63:75-76; 64:13, 17-20). Importantly, the testimony (62:70-75, 112-114; 63:16-20) and the video (62:127-134; 63:20-26) also showed the following:

- The vehicle parked in an alleyway near the front gate to the victim's apartment complex, not in the parking spots near the front of the building;

- The vehicle's headlights and brake lights were on at first, but then all of the lights turned off as the car turned off;

- Smith and Kennedy both emerged from the vehicle and walked on the sidewalk towards the victim's building;

- Less than a minute later, Kennedy emerged from the building holding a gun, walking in circles, and Smith emerged after him;

- Before they reached the vehicle, the brake lights and headlights came on; and

- When arriving at the vehicle, Smith went to the passenger side, either the front or back, and Kennedy went to the back seat behind the driver's door, such that neither man was in the driver's seat when the vehicle took off.

From this evidence, it was reasonable for the jury to infer that Smith arranged for his girlfriend's vehicle to be the getaway car. It was also reasonable for the jury to infer that the men told the third party getaway driver to wait there in the alley down the street, rather than in the parking lot of the residence, so that the vehicle would not be seen and so that the men could get into the vehicle quickly after committing the crime.

Moreover, the jury could also infer that Smith's girlfriend's cousin was the getaway driver, because the girlfriend allowed both the cousin and Smith to use her vehicle as needed (64:91). In fact, the cousin used her vehicle "[a]ll the time," and she often left the keys in a place at the cousin's house where he could use them (64:15-16).

Smith argues that the evidence about the getaway car was speculative and did not prove anything about Smith's knowledge of the crimes (Smith's brief at 14-16). But this court must adopt the inferences that the jury adopted, because those inferences support the conviction. *Long,* 317 Wis. 2d 92, ¶ 19. Moreover, the innocent inferences that

Smith wanted the jury to adopt make no sense under the facts of this case.

For example, if Smith were just innocently tagging along and had no knowledge that the crimes were going to be committed, why was he not driving his girlfriend's vehicle to the victim's house himself instead of the third party? Why did the driver park down the street in the alley instead of in the parking lot at the victim's residence? Why did the driver stay in the car instead of coming in? Why did the driver turn off the lights, but then turn on the lights when Smith and Kennedy emerged from the building?

Smith also argues that, because the jury acquitted him of the attempted armed robbery, the State was required to prove that he intended to assist in the homicide (Smith's brief at 16-17). The Wisconsin Supreme Court, however, rejected that argument in *Cydzik* and *Asfoor*, holding that the defendants who arranged for getaway cars intended to assist in the homicides, even if they originally intended to assist only in the robberies, not the homicides. *Cydzik*, 60 Wis. 2d at 696-698; *Asfoor*, 75 Wis. 2d at 428.

Here, the jury was entitled to infer that Smith intended to assist in the crimes, and Smith must be held accountable for his actions which, as a matter of objective fact, did assist Kennedy. *Cydzik*, 60 Wis. 2d at 697-698. Like the *Cydzik* tailback or safety man on defense, Smith was more than just a reserve lineman sitting on the bench waiting to be sent into the game, with no control over whether he was participating or not. *Id.* at 699. Smith was in the game, on the field, playing a position and performing a function that as a matter of objective fact aided Kennedy in the execution of the crime. *Id.*

Similarly, like the *Asfoor* defendant, Smith's overt actions demonstrated that, if assistance became necessary in the commission of the crime, he was ready to provide assistance, whatever that entailed. *Asfoor*, 75 Wis. 2d at 428. Smith's overt actions also showed that Smith did, in fact, provide assistance by arranging for the getaway car. *Id.* Because Smith set out to aid Kennedy, he must be held responsible for the natural consequences of his actions. *Id.*

b. The jury was entitled to infer that Smith had a motive for the crimes, and helped Kennedy in luring the victim to the narrow hallway.

Smith also argues that the jury could not have found that Smith had the gun (Smith's brief at 13-14), but as already discussed, it did not matter who had the gun under an aiding and abetting theory.[4] In order to convict Smith as a party-to-a-crime for the homicide, the jury did not need to believe that Smith actually had the gun or shot the victim. *Cydzik*, 60 Wis. 2d at 696-698. Rather, under the law, the jury properly held Smith accountable for the homicide as a natural and probable consequence of the attempted armed robbery. *Id.*

Even though Smith was ultimately acquitted of actually committing the armed robbery, the jury was still entitled to infer that Smith had the motive or plan to go to the victim's residence in order to commit the robbery—an action which, in turn, led to the reckless homicide. For

[4] Moreover, notwithstanding the victim's girlfriend's testimony that she was just guessing that Smith had a gun (62:74-75, 78, 98), the jury still could have found that Smith had a gun based on the video.

example, the victim's girlfriend testified there were drugs at the victim's apartment, because he sold drugs (62:61-62).

The victim's girlfriend also testified the men were gambling the night of the homicide (62:78-82, 91). Another man who had been gambling at the victim's residence had approximately $2,000 on his person when he was patted down for his witness interview (63:14-15, 32-34). The victim's girlfriend also told police that, before the murder, the victim had given her approximately $3,200, and that she had given the money to the third man (63:64-65).

Smith, Kennedy, and the third man all knew each other (63:40), and there was no bad blood between them (63:47, 78). The victim's girlfriend also testified that Smith and Kennedy were friends, and that she had known Smith for a few years before that (62:68). They were her younger sister's friends (62:68-69) from around the neighborhood (62:76).

From this evidence, the jury could have inferred Smith's motive to commit the robbery, even if the jury ultimately acquitted Smith of the robbery. The jury could also infer that the men made a phone call to the victim before entering the victim's building, in order to lure the victim into the hallway.

For example, the jury saw footage in which Smith approaches the victim's gate, and one of the men looked like he was putting his phone away (63:21). The victim then comes to the door, and "obviously [is] anticipating their arrival" (63:22). Smith is later seen exiting the building with a cell phone (63:43).

Moreover, the attack on the victim occurred in a back hallway by the back door (62:72). The shell casing from the bullet was found only a foot or two from where the victim was lying (62:43, 119, 122-124).[5] Based on the stippling or gunshot residue on the victim's body (64:68-70) and on his shirt (62:105, 125-126), the forensic pathologist and the detective both testified that the shooting occurred at very close range, within a few feet, suggesting that no objects, such as a door or a window, were in between the victim and the shooter.

Further, the victim told his girlfriend while he was dying, "I can't breathe. Give me mouth-to-mouth. I think I'm going to die" (62:93). When she asked him who shot him, the victim told her it was "the little niggers off 38th" (62:94). She knew who he meant already, that he was talking about Smith and Kennedy (62:94-95). She could not believe that it was them, because she and the victim knew them (62:96-97).[6]

From this evidence, the jury was entitled to infer that more than one person was involved—that it was Smith and Kennedy, not just Kennedy alone. The jury was entitled to conclude that Smith and Kennedy had planned the attempted robbery together, or at least, that Smith intended to help Kennedy commit the crimes when Kennedy committed them. The jury could have also reasonably concluded that the men wanted to isolate the victim, luring him into the narrow hallway so they could commit the

---

[5] The bullet casing came from a 40 caliber semi-automatic rifle, but the gun itself was never found (64:36-40).

[6] The responding officer also asked the victim who shot him, but by then, the victim was no longer able to communicate (62:47-48).

crimes without the victim being able to get back into his apartment to get help.

c. The jury was entitled to infer that Smith had engaged in a struggle with the victim before the shooting, and that Smith lost his cell phone in the process.

Moreover, whether Smith or Kennedy intended the crime to be a homicide, a scuffle nevertheless ensued during the attempted armed robbery, and the shooting occurred as the result of that scuffle, such that Smith should be held accountable for aiding and abetting the homicide. *Cydzik*, 60 Wis. 2d at 696-698 (jury can presume defendant intended natural and probable consequences of his actions).

Smith argues that the jury had no basis to infer that Smith had been at the scene of the struggle (Smith's brief at 15-16), but the evidence clearly belies this contention. For example, the autopsy showed the victim had abrasions and lacerations on his lower lip and on both of his hands, including in the webbing between his thumb and forefinger (64:67-68). The victim also had blood on his hands when the victim's girlfriend found him (62:88-89).

Moreover, it was also reasonable for the jury to conclude that the shooting occurred during the tussle. The victim was shot in the abdomen, near his belt area, and the shot went straight through to his right buttock (64:62-63), suggesting a struggle rather than an intentional aiming of the gun towards an area that was more likely to kill the victim, such as his chest or head.

Finally, it was undisputed that Smith left the building holding a cell phone, but that the phone was the victim's, not

his.[7] Right after the shooting, the victim's girlfriend reported to the police that she had recovered a cell phone—later determined to be Smith's cell phone—which she found either underneath or right next to the victim (62:67; 63:9-10). Smith's cell phone got left behind at the crime scene (62:67, 75), and Smith was found with the victim's phone on his person (64:27-28, 108).

From this evidence, it was reasonable for the jury to infer that Smith engaged in the struggle with the victim, and was not just an innocent bystander, because he lost his own phone during the struggle or during the shooting.

d. The jury was entitled to infer that Smith had a guilty conscience, because Smith put up the hood on his sweatshirt, fled the scene after the shooting, and later sought out information about the shooting.

Smith argues that the jury should not have made inferences of his guilt based on his after-the-fact actions (Smith's brief at 14, 20-21), but the jury had the benefit of seeing Smith's demeanor and actions on the video, from which they could have properly concluded that Smith had a guilty conscience. *Below*, 333 Wis. 2d 690, ¶ 4 (credibility of witnesses and weight of evidence are for fact-finder to determine); *Smith*, 342 Wis. 2d 710, ¶ 33 (jury is in far better position to evaluate evidence than reviewing court).

The jury saw that, about 50 seconds after both men entered the building, Kennedy emerged from the building,

[7] The victim had an iPhone (62:75) whereas Smith had a Japanese phone with a cracked screen (63:8-11; 64:82-83).

alone, without Smith, and was walking around in circles (62:133).[8] Smith then emerged, and both men ran towards the getaway car (62:134; 63:23-24).

Smith also had his sweatshirt hood down when entering the building, and then less than a minute later, exited the building with his hood up (62:74-75, 130, 133-134; 63:23, 48-49). From this evidence, the jury was entitled to infer that Smith was complicit in the crime, because he tried to hide his identity and ran from the scene of the crime. The jury also could have reasonably inferred that Smith lagged behind Kennedy, not because Smith was trying to help the victim, but because Smith was trying to find his phone, in order to get rid of any evidence implicating him in the crime.

Smith's girlfriend also testified that when Smith came home to her cousin's house that night, she heard someone unfamiliar screaming her name outside, but then saw Smith and saw that her vehicle had been returned (64:18-19, 92). She asked Smith why he had not called her, and Smith said that he lost his phone or broken it (64:20-21, 90-91).

That week, the police were also "popping up" often, looking for her truck (64:23). Five days later, she hid in her closet when she saw the police coming with their guns (64:24-26). Both Smith and Kennedy were arrested together at her house, and Smith was found in the same bedroom where his girlfriend was hiding in the closet (64:45-48).

Smith's girlfriend denied that she used Google on her phone to do any searches on her phone, two days after the

[8] The jury also apparently saw in the video that Kennedy looked around for Smith who had not come out, and then shouted something to Smith (67:59-60), but there was no audio or testimony to this effect.

homicide (64:27). But after the crime, detectives analyzed her phone upon her consent (64:108-110; 65:27), and found that, on March 6, 2013, her phone had performed a number of Google searches using the search terms "Milwaukee shooting," "Monday," and "March 4, 2013" (64:110-112; 65:29-35). The user also clicked on one link to an online news article entitled "Milwaukee man shot [and] killed Monday night" (65:35-36).

Using DNA tests, the DNA analyst could include Smith as a possible contributor to the DNA evidence on the phone, but definitively excluded Kennedy (65:45-46). The probability of randomly selecting an individual as a contributor for the phone was approximately one in 1,215 individuals (65:47).

From this evidence, the jury could have inferred that either Smith or the girlfriend used the girlfriend's phone to do Google searches about the crime. Whether Smith did the searches to see what the media was saying about the crime, or whether Smith's girlfriend did the searches to see if she was sleeping with a murderer, either way the jury could have used the evidence to infer that Smith had a guilty conscience about the crime, particularly when the jury could also see Smith running from the crime scene with his hood up and could infer that he was hiding in his girlfriend's house to avoid being arrested.

In summary, the record is replete with evidence from which the jury could reasonably conclude that Smith aided and abetted Kennedy in committing the reckless homicide, because the evidence—and reasonable inferences from the evidence—clearly showed Smith had the conscious desire to assist Kennedy in the crime, and participated in its perpetration by committing overt acts in furtherance of

Kennedy's actions. *Hecht*, 116 Wis. 2d at 620; *Rundle*, 176 Wis. 2d at 1005.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN REJECTING SMITH'S "MERE PRESENCE" JURY INSTRUCTION.

A. Relevant legal principles and standard of review.

1. The circuit court has broad discretion in instructing the jury.

A trial court has broad discretion in instructing a jury, but must exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law. *Groth*, 258 Wis. 2d 889, ¶ 8. *See also State v. Dodson*, 219 Wis. 2d 65, 86, 580 N.W.2d 181 (1998) (court may exercise discretion regarding language and emphasis of instruction).

A defendant is only 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 (1983). In support of a requested jury instruction, the defendant has the initial burden of producing evidence to establish a defense to criminal liability. *State v. Coleman*, 199 Wis. 2d 174, 181-182, 544 N.W.2d 912 (Ct. App. 1996).

Where the defendant does not meet this burden, the circuit court does not erroneously exercise its discretion in refusing to instruct the jury on the invalid defense. *State v. Dundon*, 226 Wis. 2d 654, 675, 594 N.W.2d 780 (1999).

2. This court independently reviews whether jury instructions were appropriate in the context of the overall charge.

Whether a jury instruction is appropriate is a legal issue subject to independent review. *Groth*, 258 Wis. 2d 889, ¶ 8. But this court should not view the challenged words or phrases in isolation, but should view the instructions in the context of the overall charge. *Id.* ¶ 9. *See also Coleman*, 199 Wis. 2d at 182 (ultimate resolution of appropriateness of instruction turns on case-by-case review of evidence, with each case necessarily standing on its own factual ground).

Relief is not warranted unless this court is persuaded that the given instructions, when viewed as a whole, misstated the law or misdirected the jury in the manner asserted by the challenger. *Groth*, 258 Wis. 2d 889, ¶ 9. *See also Dodson*, 219 Wis. 2d at 87-88 (this court examines context in which jury received instructions to determine whether verdict itself inspires confidence).

If the given instructions adequately cover the law applicable to the facts of the case, this court will not find error in the refusal of special instructions, even if the refused instructions would not be erroneous. *State v. Skaff*, 152 Wis. 2d 48, 59-60, 447 N.W.2d 84 (Ct. App. 1989).

B. The circuit court properly rejected Smith's proposed "mere presence" instruction, because it was not supported by credible evidence or controlling case law.

Smith argues the circuit court erred in rejecting the Seventh Circuit's "mere presence" instruction (Smith's brief at 17-21), because even if he took acts that "inadvertently

advanced the crime," the jury should have been instructed that those acts were insufficient without Smith's knowledge that the crime was going to occur (*id.* at 20-21). This argument, however, fails both as a matter of fact and a matter of law.

1. The proposed jury instruction was not supported by credible evidence.

First, the court properly rejected the proposed instruction based on the facts of the case, because the instruction was not supported by credible facts. *Bernal*, 111 Wis. 2d at 282. As discussed above, the record is replete with evidence from which the jury could conclude that Smith knew about the crime, helped execute it, and intended for his actions to assist Kennedy. Because the evidence did not support Smith's proposed defense, the circuit court properly exercised its discretion in denying the instruction that Smith lacked any knowledge of the crimes. *Dundon*, 226 Wis. 2d at 675.

Smith also contends that the burden was not on him to disprove his knowledge (Smith's brief at 21). But in order to be entitled to a jury instruction that he had no knowledge of the crime, the initial burden was on Smith to show he had no knowledge. *Coleman*, 199 Wis. 2d at 181-182 (in support of proposed jury instruction, defendant has initial burden of producing evidence to establish defense).[9]

As the circuit court properly held, the "mere presence" instruction was not warranted because no evidence in the

[9] Obviously, the State had the ultimate burden to prove the crime, including Smith's intent to assist Kennedy. But as already discussed, the State did not have to prove Smith had advanced knowledge of Kennedy's crimes in order to prove Smith's intent to assist.

record supported "the proposition that Mr. Smith had no knowledge that the crime was being committed or about to be committed" (66:14 [A-Ap. 151]). To the contrary, there was strong circumstantial evidence that Smith did know about the crime and intended to assist in its commission:

> The fact that it appears there was a getaway driver. That to me is a very key circumstantial fact in terms of what were they really intending to do and what did Mr. Smith think they were intending to do? Running away from the scene of a crime, we've already talked about that. The State's gonna argue it shows his guilt. The defense is gonna argue it showed that he was terrified by what was unfolding in front of him to his complete surprise.
>
> … [T]hat set of facts can be argued both ways, but … *[i]t's not true that there is no evidence. There's circumstantial evidence from which the jury could infer the defendant's knowledge.*

(66:15-16 [A-Ap. 152-153]) (emphasis added).

2. The proposed jury instruction was not supported by controlling case law.

Second, the circuit court also properly rejected Smith's proposed jury instruction, because the instruction was not supported by controlling case law. *Skaff*, 152 Wis. 2d at 59-60. Contrary to Smith's assertion (Smith's brief at 19-20), *Skaff* is directly on point.

In *Skaff*, the defendant requested a similar instruction that his mere presence, even when coupled with his knowledge of the presence of cocaine, was insufficient to support a guilty verdict of possession with intent to deliver. *Skaff*, 152 Wis. 2d at 59. The circuit court, however, rejected that instruction in favor of the same pattern instruction that was given in Smith's case (66:46-48; 67:71-72), Wis. JI-Criminal 400 (2005), indicating that 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 the crime." *Skaff*, 152 Wis. 2d at 59.

As the *Skaff* court explained, the two instructions were basically the same:

> We are hard pressed to find any essential difference between Skaff's requested charge and that submitted by the court. Both advised the jury that a bystander, or a person merely present at a crime scene *who has no unlawful intent and takes no action to assist commission of the crime*, is not an aider or abettor. Skaff's proposed charge that his knowledge of the presence of cocaine is not sufficient to support a conviction paraphrases the court's charge respecting a spectator's nonassistance or nonencouragement of the crime. The court's charge clearly instructs the jury that a spectator, though aware of the happening, cannot be guilty *unless he has an unlawful intent and takes some action to further the crime.*

Skaff, 152 Wis. 2d at 60 (emphasis added).

So too here, the court's pattern jury instructions properly instructed the jury that Smith, even if present at the scene as a bystander, could not be convicted of aiding and abetting unless Smith took some action with the intent or purpose of assisting Kennedy in furthering the crime (66:46-48; 67:71-72).

Contrary to Smith's contention that the word "bystander" implied that he could be convicted by inadvertently helping Kennedy (Smith's brief at 20), the jury instructions here—taken as a whole—did not imply that Smith could be convicted by taking innocent actions which happened to further the crime. Rather, the instructions were clear that Smith could only be found guilty if his actions furthered the crime, and if he *intended* for those actions to further the crime (66:46-48; 67:71-72).

Accordingly, the given instructions adequately covered the law applicable to the facts of the case, and the circuit court here did not erroneously exercise its discretion in refusing the proposed instructions, even though the refused instructions themselves may not have been erroneous. *Skaff*, 152 Wis. 2d at 59-60.

As the circuit court further explained, unlike the Seventh Circuit cases upon which the proposed instructions were based (A-Ap. 139-141), here there was no conflicting testimony or evidence about what Smith knew (66:19 [A-Ap. 156]). Thus, under Smith's facts, the Seventh Circuit would not have even sanctioned the proposed instructions (66:13-15 [A-Ap. 150-152]). The only evidence of Smith's intent was Smith's actions themselves, because Smith did not testify and Smith's actions were not the subject of conflicting testimony (66:19-23 [A-Ap. 156-160]).

C. Even if the circuit court improperly rejected Smith's proposed jury instruction, the error was harmless.

Smith also argues he is entitled to a new trial based on the circuit court's failure to give the requested instruction (Smith's brief at 17, 21). But jury instruction errors are subject to harmless error analysis. *State v. Hoover,* 2003 WI App 117, ¶¶ 29-34, 265 Wis. 2d 607, 666 N.W.2d 74 (harmless error when verdict would not be different under correct instruction).

Here, it is wholly speculative that the result of the trial would have been different, had Smith's requested instruction been given. Indeed, Smith's closing argument explained to the jury the very same theory of defense that Smith wanted the proposed jury instructions to explain—

namely, that Smith should not be held accountable for the crime if he was merely an innocent bystander or a person who set actions into motion without knowing that those actions would assist Kennedy (67:44-50). As Smith's counsel argued, "we don't have any evidence in this record that Isiah Smith knew that Unquail Kennedy was gonna do anything.… That's not enough to convict a person simply for being present when something bad happens" (67:44-45).

As Smith's trial counsel later reiterated, "[I]f you believe, all of you, 100 percent that Mr. Smith is … innocent -- all of you believe 100 percent totally innocent and no knowledge, nothing to do with it, that obviously requires a not guilty finding" (67:47). He concluded, "[There is] [n]o indication that [Smith] knew that anything was going to transpire.… [T]here's somebody running out of the building with a gun, but that doesn't prove Mr. Smith knew a darn thing" (67:50).

The jury understood Smith's theory of defense, and the jury instructions properly outlined the controlling law. The jury simply chose to reject Smith's innocent bystander defense. Any error here was harmless. *Hoover*, 265 Wis. 2d 607, ¶ 34.

III. THE RECORD CONCLUSIVELY DEMONSTRATES THAT SMITH WAS NOT ENTITLED TO RELIEF ON HIS INEFFECTIVE ASSISTANCE AND JUROR BIAS CLAIMS.

In the alternative, Smith argues this court should remand for an evidentiary hearing on his ineffective assistance of counsel claim (Smith's brief at 21-31). The circuit court, however, properly denied Smith's postconviction motion without an evidentiary hearing, because the record conclusively shows that Smith's claims

lack merit. *State v. Bentley*, 201 Wis. 2d 303, 309-310, 548 N.W.2d 50 (1996); *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A. Relevant legal principles and standard of review.

1. To show deficient performance, Smith was required to show that his counsel would have succeeded in challenging the circuit court exercise of its discretion in allowing the juror to remain after deliberations had already begun.

Smith was required to show his counsel's challenge to the juror would have succeeded—that the circuit court would have granted his counsel's motion to remove the allegedly biased juror, had Smith's trial counsel actually challenged the circuit court's exercise of discretion in allowing the juror to remain. *State v. Wheat*, 2002 WI App 153, ¶ 23, 256 Wis. 2d 270, 647 N.W.2d 441. If the challenge would not have succeeded, Smith's counsel was not deficient for failing to raise it. *Id.*

During trial proceedings, a circuit court is not required to remove a juror for cause upon counsel's request, but has discretion to discharge or remove the juror. *State v. Lehman*, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982); *State v. Gonzalez*, 2008 WI App 142, ¶ 10, 314 Wis. 2d 129, 758 N.W.2d 153. This court reviews the circuit court's decision only for an erroneous exercise of that discretion, and should uphold the decision if it is based on the facts of record, application of the correct law, and a rational mental process arriving at a reasonable result. *Gonzalez*, 314 Wis. 2d 129, ¶¶ 10-11.

A criminal defendant has the right to a trial by an impartial jury, and the courts are assigned the task of upholding the integrity of juries. *Gonzalez*, 314 Wis. 2d 129, ¶ 9. But a defendant is only entitled to a jury which will insure him a fair and impartial trial, and is not entitled to an unlimited choice in an attempt to secure a jury which will acquit him. *Id.*

In determining whether to discharge a juror, the circuit court must make a careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the juror. *Gonzalez*, 314 Wis. 2d 129, ¶ 12. The inquiry should be made outside of the jurors' presence and in the defendant and all counsels' presence. *Id*. The juror should not be present during counsel's argument on the discharge. *Id.*

Moreover, the circuit court's efforts depend on the circumstances of each case. *Gonzalez*, 314 Wis. 2d 129, ¶ 12. The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner either the juror potentially subject to discharge or the remaining jurors. *Id.*

2. To show prejudice, Smith was required to show that his trial counsel's failure to challenge the juror resulted in the seating of a biased juror on the jury.

In juror bias claims, the required showing of prejudice under *Strickland* does not mean Smith must show that a differently composed jury would have acquitted him, or that there was a reasonable probability of a different result. *State v. Koller*, 2001 WI App 253, ¶¶ 13-14, 248 Wis. 2d 259, 635 N.W.2d 838 (defendant is entitled to unbiased jury,

regardless of outcome of trial). Rather, Smith needed to show that his counsel's performance actually resulted in the seating of a biased juror. *Id.* ¶ 14.

Thus, Smith's postconviction motion needed to allege how and/or why the impaneled juror's answers to the court's questions showed that the juror was subjectively biased. *State v. Carter*, 2002 WI App 55, ¶ 15, 250 Wis. 2d 851, 641 N.W.2d 517. Smith needed to allege that the juror "openly admitted" his biases, and unambiguously stated he could not set aside those biases. *Id.* ¶¶ 13-14.

If, however, the juror expressed only ambivalence, then Smith cannot show that his counsel's performance actually resulted in the seating of a biased juror. *Koller*, 248 Wis. 2d 259, ¶¶ 14-15.

3. This court independently reviews ineffective assistance of counsel claims.

This court independently reviews the legal questions of whether counsel acted deficiently and whether counsel's acts prejudiced the defendant, but reviews the circuit court's factual findings under a clearly erroneous standard. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115. *See also Bentley*, 201 Wis. 2d at 310 (independent review of whether postconviction motion entitles defendant to relief).

B. Smith's counsel did not render deficient performance in "allowing" the juror to remain on the jury after jury deliberations had already begun.

1. The circuit court properly exercised its discretion in declining to discharge the juror.

Smith argues his trial counsel rendered deficient performance by failing to challenge the circuit court's exercise of discretion, and "allowing" an allegedly biased juror to remain on the jury panel after deliberations had already begun (Smith's brief at 27-29).

Smith's counsel did, however, jointly move with the prosecutor for the court to address the issue (69:3, 8 [A-Ap. 163-164]). Therefore, Smith's ineffective assistance claim cannot be premised on the fact that his counsel initially failed to move to discharge the juror, as Smith contends (Smith's brief at 28).

Smith's counsel later agreed with the circuit court and the State that the juror was impartial, and specifically requested that the court allow the juror to continue deliberating (69:35 [A-Ap. 171]). Thus, Smith's ineffective assistance claim can only flow from his counsel's failure to later challenge, or agreeing with, the court's exercise of discretion in allowing the juror to remain.

The record is clear, however, that the circuit court properly exercised its discretion in declining to discharge an already-impaneled juror after the jury had already begun its deliberations. *Lehman*, 108 Wis. 2d at 299; *Gonzalez*, 314 Wis. 2d 129, ¶¶ 10-12. This court should find not only that the circuit court properly exercised its discretion in declining to remove the juror, but also that Smith's counsel

was not ineffective in failing to challenge that exercise of discretion. *Id.*

First, the circuit court properly made careful inquiry into the substance of the request, and exerted reasonable efforts to avoid discharging the juror. *Gonzalez*, 314 Wis. 2d 129, ¶ 12; *Lehman*, 108 Wis. 2d at 300. As is required by *Lehman/Gonzalez*, the court made this inquiry outside all the jurors' presence and in the defendant and all counsels' presence, and the juror was not present during arguments on the issue (69:3-24, 34-36 [A-Ap. 163-168, 171]). *Gonzalez*, 314 Wis. 2d 129, ¶ 12.

Second, the circuit court properly took into account the circumstances of the case, and approached the issue with extreme caution in order to avoid a mistrial or prejudicing the remaining jurors. *Gonzalez*, 314 Wis. 2d 129, ¶ 12. After closing the gallery and excusing the jurors to mitigate any intimidation to the juror in question, the court asked the bailiff to tell the jury not to start deliberating, that they should wait for the court's orders (69:7, 12 [A-Ap. 164-165]).

The court indicated it had read the controlling case law, including *Lehman*, 108 Wis. 2d at 313, and *State v. Avery*, 2011 WI App 124, ¶ 52, 337 Wis. 2d 351, 804 N.W.2d 216, which dictated the procedure:

> *First we need to ascertain whether or not Juror 4 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 [A-Ap. 165]) (emphasis added).

This sequence of events was proper, because if the questioning revealed that the juror was not biased, then there was no need to move on to the alternative options. *Gonzalez*, 314 Wis. 2d 129, ¶ 12 (court should exert reasonable efforts to avoid discharging juror). Here, the court properly exercised its discretion in finding the juror was impartial and not biased. *Id.* ¶¶ 9-11 (proper exercise of discretion if court arrives at reasonable result using rational process to apply facts of record to correct law).

The ADA testified the juror's parents texted her in a panic because the juror feared potential retaliation against him if he found Smith guilty (69:15-16 [A-Ap. 166]). But when the court asked the juror himself if he had concerns of retaliation in the event of a guilty verdict, the juror responded "[i]t crossed my mind" (69:25 [A-Ap. 168]). The juror later testified, it "wasn't like a really true concern" and 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 [A-Ap. 169]). This exchange followed:

> THE COURT: Okay. And was there anything about what was happening out in the audience during the trial that made you have that concern?
>
> JUROR 4: Not necessarily, no.
>
> THE COURT: Okay. Maybe not necessarily but anything at all?
>
> JUROR 4: Just things running through my mind, like what might happen. I don't know.

(69:29 [A-Ap. 169]).

The juror indicated he had not spoken to any of the other jurors about his concern or about the conversation with his parents (69:30 [A-Ap. 170]). When asked if he had

any discussions with his parents about evidence he had seen throughout the trial, the juror replied, "No, no, sir" (69:32 [A-Ap. 170]). This exchange followed:

> THE COURT: I think it's very unrealistic that anybody would be able to track you down personally or any of the other jurors, and there's no method to kind of recreate that after the fact. So at this point, do you feel comfortable being a juror?
>
> JUROR 4: I'm fine, yes, yes, ma'am.
>
> THE COURT: Do you feel you can be fair and impartial?
>
> JUROR 4: Yes.

(69:32-33 [A-Ap. 170]).

The court then questioned the juror further about the nature of his concern—whether it was "idle wondering" or a more "specific, like, I'm really scared" of the "people in the gallery that are doing things that are more concerning to me and I'm afraid to serve in this role" (69:33 [A-Ap. 170]). The juror replied, "No," that it was more "how serious it was and not knowing, you know, what were the precautions of leaving and all that type of stuff" (*id.*). This exchange followed:

> THE COURT: Oh, like leaving the courthouse, you meant?
>
> JUROR 4: Yes, yes.
>
> THE COURT: Have you had any concerns or any interactions with anyone that caused you concerns upon leaving?
>
> JUROR 4: No, no.

(69:33-34 [A-Ap. 170-171]).

The court ruled that, although it felt the juror had "really minimized" the original text communications, it still believed the juror's "explanation was, first off, sincere, and second off, satisfactory, that it was more sort of a theoretical concern" (69:35 [A-Ap. 171]). The court also found "his vagueness [about the texts] may be more a lack of recollection than a specific desire to mislead the Court" (*id.*).

The court concluded the juror was "sincere" and "very credible" in testifying that he would be impartial:

> He does seem to me to be comfortable. He doesn't seem to be afraid. *He seems sincere when he said that he could deliberate in a fair and impartial manner. And I do think he was very credible* when he said this was a pretty limited communication, no communications with other jurors, no communications with anyone else. So if everyone else is satisfied, I'm satisfied that he can continue as well.

(69:35-36 [A-Ap. 171]) (emphasis added). In denying Smith's postconviction motion, the court also found "there was nothing to suggest the juror had a made-up mind about the case" (51:5 [A-Ap. 109]).

Thus, the record does not support Smith's contention that the circuit court was "concerned that the juror was not being truthful" (Smith's brief at 28). This court should affirm the circuit court's explicit credibility determination that the juror was credible and not biased. *Below*, 333 Wis. 2d 690, ¶ 4 (credibility of witness is for fact-finder, not this court, to determine).

Although the juror may have equivocated as to some details, the court found the juror was "sincere" in his belief that he could "deliberate in a fair and impartial manner,"

and any factual discrepancies in his testimony could be attributed to the juror's "lack of recollection," rather than a desire to mislead (69:35 [A-Ap. 171]).

The circuit court properly found the juror could still be credible about his impartiality, despite his equivocation about other facts. *In re Commitment of Wolfe*, 2001 WI App 136, ¶¶ 31-33, 246 Wis. 2d 233, 631 N.W.2d 240 (inappropriate to strike juror simply because she provided equivocal answers). The courts expect jurors' honest answers to be, at times, less than unequivocal, and those jurors can still be properly impaneled. *Id*.

The circuit court's decision not to discharge the juror was based on the facts of record, application of the correct law, and a rational mental process arriving at a reasonable result. *Gonzalez*, 314 Wis. 2d 129, ¶¶ 10-11. Smith's counsel was not deficient in failing to challenge the court's decision. *Wheat*, 256 Wis. 2d 270, ¶ 23.

2. Smith has not shown that the proposed alternative options were available at the time Smith's counsel made his decisions.

Smith also argues his counsel's failures cannot be viewed as strategic, because his counsel failed to seek out, or stipulate to, the other alternative options available to Smith (Smith's brief at 28). *Lehman*, 108 Wis. 2d at 313 (alternative options after discharging juror).[10] But that

[10] Smith concedes he did not want to move for a mistrial (Smith's brief at 28).

argument fails outright, because those options were only available if the court had found the juror to be biased, which it did not.

Further, Smith's postconviction motion did not allege an adequate factual basis for entitling Smith to relief on any of those bases. *State v. Allen*, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 682 N.W.2d 433 (postconviction motion must state with particularity factual and legal grounds for motion, and provide good faith argument that relevant law entitles defendant to relief). Smith's motion failed to adequately allege, with factual specificity, that these alternative options were even available to Smith at the time Smith's counsel made his decisions. *Id.* ¶ 23 (defendant must allege sufficient material facts in order to secure evidentiary hearing).

For example, as to stipulating to eleven jurors, Smith's postconviction motion alleges generally that he could have stipulated to proceeding with eleven jurors, but his motion does not allege that he would have stipulated to proceeding with eleven jurors (45:15-16 [A-Ap. 124-125]). Without this factual allegation from either Smith or his trial counsel, Smith's postconviction motion does not entitle him to relief. *Allen*, 274 Wis. 2d 568, ¶ 23.

Similarly, as to proceeding with one of the dismissed alternates, the motion does not allege that Smith would have stipulated to proceeding with an alternate, only that he could have (45:15-16 [A-Ap. 124-125]). As a matter of law, Smith is not entitled to relief, because the alternate jurors had already been dismissed before the jury began to deliberate (67:83; 69:19), rendering it reversible error to substitute an alternative juror in the absence of a stipulation from Smith's trial counsel. *Lehman*, 108 Wis. 2d at 313.

Smith argues his postconviction motion adequately alleged that his counsel did not even discuss the possibility of moving forward with eleven jurors (Smith's brief at 29), but this argument also fails. As Smith conceded in his postconviction motion (45:15-16 [A-Ap. 124-125]), the court explained to Smith that, with Smith's consent, Smith could proceed with eleven jurors or with an alternate juror if the court found that the juror in question was biased (69:12-13 [A-Ap. 165]).

Smith's counsel also told the court, "*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 [A-Ap. 171]) (emphasis added).

Thus, the record shows that Smith's counsel and Smith himself were aware of the options, that Smith's counsel discussed the matter with Smith, and that Smith's counsel had strategic reasons for not pursuing the alternative options. *Avery*, 337 Wis. 2d 351, ¶ 72 (no deficient performance when counsel testified that defendant was informed of his options under *Lehman*). In light of the facts proffered at the hearing, Smith was not deprived of a fair trial because of his counsel's actions. *Id.*

C. Smith's counsel's performance did not prejudice Smith, because the record conclusively shows that the juror was not biased.

Finally, Smith contends he was prejudiced by his counsel's failures, because the juror who was allowed to remain was subjectively biased (Smith's brief at 29-31). But

as already discussed, the court found no evidence that the juror was biased, and found the juror credible in his testimony that he was impartial (51:5 [A-Ap. 109]); 69:35 [A-Ap. 171]).

Although Smith concedes that the circumstances in *Carter* and in his case "differ in certain respects," he still argues the juror was biased under *Carter* (Smith's brief at 30). It is clear, however, that Smith did not—and could not—make a showing of bias under *Carter*, because Carter is completely distinguishable.

In *Carter*, the juror "openly admitted" his biases and unambiguously stated that he could not set aside those biases. *Carter*, 250 Wis. 2d 851, ¶¶ 13-14. In contrast, the juror here was unequivocal that he was not biased and could remain impartial, saying "yes, yes" he was comfortable, and "yes" he could be fair and impartial (69:32-33 [A-Ap. 170). When asked if he had any interactions with anyone that would cause him concerns upon leaving the courtroom, the juror replied, "No, no" (66:34 [A-Ap. 171]).

Far from showing the juror was subjectively biased, the testimony shows the exact opposite: the juror never equivocated in his belief that he could be impartial. Therefore, Smith has failed to show that his counsel's performance actually resulted in the seating of a biased juror, and the circuit court properly denied Smith's motion without a hearing. *Koller*, 248 Wis. 2d 259, ¶¶ 14-15.

CONCLUSION

This court should AFFIRM the judgment of conviction and the order denying Smith's postconviction motion.

Dated this 16th day of March, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

SARAH K. LARSON
Assistant Attorney General
State Bar #1030446

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-0666
(608) 266-9594 (Fax)
larsonsk@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,859 words.

_____
SARAH K. LARSON
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 16th day of March, 2016.

_____
SARAH K. LARSON
Assistant Attorney General