STATE OF WISCONSIN

COURT OF APPEALS

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

It is important to remember that while a jury is permitted to draw inferences from the evidence, (1) those inferences must be *reasonable* and (2) those inferences must add up to guilt beyond a reasonable doubt. *See, e.g.,* ***In re Paternity of A.M.C.***, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988); ***State v. Hayes***, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203. Mr. Smith agrees with the State that this Court cannot substitute its judgment for that of the fact-finder. At the same time, the standard of review for challenges to the sufficiency of the evidence—albeit highly deferential—neither requires nor permits this Court to uphold a guilty verdict derived from unreasonable inferences and speculation simply because it is the verdict the jury returned.

Here, the evidence was indeed "so insufficient in probative value and force that no jury acting reasonably could be convinced beyond a reasonable doubt." *See* ***State v. King***, 120 Wis. 2d 285, 293, 354 N.W.2d 742 (Ct. App. 1994). The State devotes a significant portion of its Response to attempting to explain how the jury could have reached its guilty verdict from the facts it presented at trial. In so doing, however, the State mischaracterizes speculative possibilities as reasonable inferences.

For example, the State suggests that the fact of the video showing Mr. Smith getting out of a car with Mr. Kennedy, and then shortly thereafter getting back in "the getaway car" with Mr. Kennedy—with neither man getting into the driver's seat—allowed the jury to reasonably infer that this was in essence a murder which Mr. Smith knowingly

planned with Mr. Kennedy. (Response Brief at 14-16). But the logical gap missing from this line of reasoning is the same crucial piece of evidence missing from the State's case: evidence reflecting that Mr. Smith at any point knew of a crime Mr. Kennedy would be or was committing and assisted with it or was ready to assist with it. *See* Wis. JI-CRIM 400.

Consider a hypothetical situation: A man is seen entering an office building. The car he arrived in remains outside. A bomb goes off in the building. After the explosion, the man is seen running out of the building. It would be reasonable for a jury to infer from this information that the man was inside the building at the time of the explosion—he is seen entering the building before, and is not seen leaving until after. It would *not* be reasonable for a jury to infer from this evidence alone that he set off the bomb. That would be speculation.

If anything, the lengths to which the State must go to try and cumulate the possible conclusions it believes the jury could have reached here to get to a guilty verdict reflects just how little probative value its evidence had.

The State also seems to place great emphasis on the notion that it did not need to prove that Mr. Smith had knowledge that Mr. Kennedy would be committing a homicide *before* the homicide occurred, but only *at the time* of the homicide. *See, e.g.,* (Response Brief at 10)("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…").

Mr. Smith agrees. But this does not remedy the State's lack of evidence: the State presented *no evidence* to reflect what occurred *during* the homicide, other than that M.A. was shot in the hallway of his apartment building and told his girlfriend before he died that the "n*ggers off 38th" shot him."

(62:95). But this again only puts Mr. Smith at the scene with Mr. Kennedy, who had the gun. As such, the only actions the State had to even try and point to were Mr. Smith's actions before and after the shooting. And try as the State might before the jury and now this Court to offer speculative possibilities about what *could* have happened, the State cannot, under the law, transform speculation into proof beyond a reasonable doubt.

The State in its response also repeatedly misstates Mr. Smith's arguments. The State writes: "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." (Response Brief at 20). In fact, Mr. Smith acknowledged that it would have been reasonable for the jury to infer that he had been present at the scene: "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." (Smith Initial Brief at 15-16). But again, the heart of Mr. Smith's argument is that his simple presence at the scene with the person who leaves with a gun in hand does not allow a jury to reasonably infer beyond a reasonable doubt that he was a knowing and willing participant in the shooting.

The State also incorrectly asserts that Mr. Smith 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)." (Response at 16). On the contrary, Mr. Smith acknowledged that—even though the jury was not instructed to this point—an aider and abettor may be guilty of not only "the particular crime that to his knowledge his confederates intend to commit, but also for different crimes that are a natural and probable consequence of that particular act that the defendant knowingly aided". (Smith Initial Brief at 16). Mr. Smith's point was instead that even this standard required the State to prove what particular

crime Mr. Kennedy intended to commit, and that Mr. Smith had knowledge that Mr. Kennedy intended to commit that particular crime; the jury's acquittal on the Attempted Armed Robbery charge reflects that the State did not prove that Mr. Smith was party to a crime from which a natural and probable consequence would be homicide.

Compare the facts of this case with those of ***State v. Cydzik***, 60 Wis. 2d 683, 211 N.W.2d 421(1973), on which the State heavily relies. The testimony in ***Cydzik*** reflected that the defendant met with his co-actor before robbing a supper club; the co-actor informed the defendant of what his role would be during the robbery. ***Id.*** at 685. Testimony further reflected that the defendant discussed the plan to commit this robbery with another man that evening: that "he and a friend had been out target shooting and that 'they had a job to do.'" ***Id.*** The defendant outlined the plan to this man, and also told another man that he had been to this "place before to case it and, after outlining the plan for the robbery, stated [that] he and a friend had guns and knew how to use them." ***Id.*** at 685-686. Both the defendant and his co-actor carried pistols when they entered the supper club. ***Id.*** at 686.

Then, during the robbery, a patron walked towards the co-actor; at this point, the defendant "moved to the exit door." ***Id.*** The co-actor shot the patron. ***Id.*** After the shooting, the defendant waited outside while the co-actor grabbed the money. ***Id.*** They drove away together, and the defendant received half of the money taken in the robbery. ***Id.*** at 687.

The defendant argued that he only aided and abetted the robbery, not the homicide. ***Id.*** at 698-699. The Wisconsin Supreme Court disagreed and concluded that the evidence established that the defendant "prevented others from aiding the victim" by standing near the door and lessening the likelihood of others interfering as this unfolded. ***Id.*** Thus, the Court explained: "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 the robbery." ***Id.*** at 699.

Using the same analogy, here, on the other hand, the State failed to prove that Mr. Smith had any knowledge of what game was even being played, let alone that he was an active participant in the game.

The State claims that "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. Thus, sufficient evidence existed to the jury's conviction for reckless homicide." (Response at 12)(internal citations omitted). But this incorrect assertion of the law again omits the fact that—as the State provided no evidence to establish that Mr. Smith was the direct actor—the State had to prove *beyond a reasonable doubt* that Mr. Smith "knowingly either assist[ed] the person who commits the crime or [was] ready and willing to assist and the person the person who commit[ted] the crime knows of the willingness to assist." (67:71); Wis. JI-CRIM 400. The State failed to meet this burden.

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

The State asserts that, "in order to be entitled" to the jury instruction requested, "the initial burden was on Smith to show he had no knowledge." (Response at 26). The State cites as support for this assertion ***State v. Coleman***, 199 Wis. 2d 174, 181-182, 544 N.W. 912 (Ct. App. 1996). But the State overlooks a critical distinction between ***Coleman*** and this case: ***Coleman*** addressed a defendant's request to have an instruction on the *affirmative defense* of self-defense. ***Id.*** at 181-185. Courts have long held that courts may place a burden on a defendant to prove an affirmative

defense. *See* ***Patterson v. New York***, 432 U.S. 197 (1977). Importantly, placing this burden on a defendant is constitutionally permissible only if the defense does not serve to negate any elements of the crime which the State must prove. ***State v. Schultz***, 102 Wis. 2d 423, 429, 307 N.W.2d 151 (1981). It is constitutional error to place the burden of persuasion upon a defendant asserting a negative defense. ***Id.*** at 429-430.

The instruction sought by Mr. Smith was *not* for an affirmative defense and *did* directly go to an element which the State had to prove: that Mr. Smith knowingly committed or knowingly aided and abetted in the homicide. Thus, it would be unconstitutional burden-shifting to hold that Mr. Smith had the burden to prove lack of knowledge in order to receive this instruction.

The State further asserts that any error in failing to give this instruction was harmless because "it is wholly speculative that the result of the trial would have been different." But a holding of harmless error requires the *State* to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. ***State v. Jorgensen***, 2008 WI 60, ¶ 23, n.5, 310 Wis. 2d 138, 754 N.W.2d 77. The State's entire case rested on circumstantial evidence through which it attempted to connect Mr. Smith to criminal behavior, though it was Mr. Kennedy who was seen leaving with a gun in hand. The jury's verdicts—rejecting the charge of First Degree Reckless Homicide as Party to a Crime, acquitting Mr. Smith of Attempted Armed Robbery as Party to a Crime, and only finding him guilty of Second Degree Reckless Homicide as Party to a Crime—reflect that the jury was not wholly persuaded by the State's evidence.

The instruction would have clarified for the jury that even if Mr. Smith performed acts that advanced the crime, those acts were not sufficient to establish guilt if he had no knowledge that the crime was being committed or was about to be committed. *See* (47:12-14;65:8-14; Smith Initial Brief

App.139-141). Given these facts, and the nature of the State's evidence, the State cannot meet its burden to show that the circuit court's error in denying the request to provide this instruction was harmless beyond a reasonable doubt.

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.

First, the State improperly characterizes the standard Mr. Smith has to meet to prove deficient performance. Citing ***State v. Wheat***, 2002 WI App 153, ¶ 23, 256 Wis. 2d 270, 647 N.W.2d 441, the State asserts that Mr. Smith has to prove that "counsel's challenge to the juror would have succeeded": "[i]f the challenge would not have succeeded, Smith's counsel was not deficient for failing to raise it." (Response at 31). But ***Wheat*** involved an attorney's alleged failure to raise a suppression motion which this Court concluded would have been *meritless*: "Trial counsel's failure to bring a meritless motion does not constitute deficient performance." ***Wheat***, 2002 WI App 153, ¶ 23.

Mr. Smith's claim does not involve a failure to bring a motion which lacks legal merit. Instead, the question here with regard to deficient performance is whether counsel's decision to proceed with the fearful juror on the panel was the "result of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984).

As it stands, the record does not reflect what reasons, if any, counsel may have had for this decision, as the circuit court denied Mr. Smith's motion without an evidentiary hearing. No apparent strategic reason exists for this decision: the testimony of both the juror himself and of then-Assistant District Attorney (ADA) Protasiewicz reflect that this juror disregarded the court's order not to discuss this matter with anyone else until deliberations and feared people whom he

believed to be Mr. Smith's family. A ***Machner***[1] hearing is both warranted and necessary to determine whether counsel had any viable strategic reason for his decision to allow this juror to remain on the panel.

The State also asserts that Mr. Smith is not entitled to a ***Machner*** hearing because his post-conviction 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". (Response at 40). Mr. Smith's motion alleged that, at a hearing, Mr. Smith would testify that his "attorney did not discuss with him the possibility of moving forward with eleven jurors," and that "he did not wish to have this juror on the panel." (45:16; Smith Initial Brief App.125). These assertions —along with his entire argument of ineffective assistance of counsel on grounds of allowing this juror to continue on the panel—provided the requisite allegations to entitle Mr. Smith to a hearing on this claim.

Turning to prejudice, there is indeed a reasonable likelihood that the outcome of the case would have been different had counsel moved to exclude this juror. The circuit court's comments reflect that it likely would have granted such a request if made: it noted that it was concerned as it believed the juror "really minimized the communications that he must have had to generate the original text message". (69:35; Smith Initial Brief App.171). It nevertheless concluded that the juror seemed sincere when stating that he could be fair, and found that "if everyone else is satisfied," it was also satisfied. (69:36; App.171). While the court agreed to proceed as the State and defense counsel wished, these comments suggest that the court would have been willing to remove this juror if counsel had made such a request.

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

The weaknesses of the State's evidence (as reflected by the jury's verdicts), together with a juror who expressed a fear of retaliation over a guilty verdict and violated court order, are sufficient to undermine confidence in the outcome of Mr. Smith's trial.

CONCLUSION

For these reasons, and those set forth in his Initial Brief, 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 14th day of April, 2016.

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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 2,815 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 14th day of April, 2016.

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