STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2015AP1651-CR & 2015AP1652-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOE BONDS TURNEY,

DEFENDANT-APPELLANT.

APPEAL FROM JUDGMENTS OF CONVICTION AND AN ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET, PRESIDING

# BRIEF OF THE PLAINTIFF-RESPONDENT

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## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be resolved on the briefs by applying well-established legal principles to the facts of the case. Accordingly, the State does not request oral argument. The case does not meet criteria for publication.

## STATEMENT OF THE CASE

### A. Procedural history.

The State filed a criminal complaint on August 23, 2013, charging Turney with one count of felon in possession of a firearm, one count of endangering safety with a dangerous weapon by discharging a firearm into a building with a domestic abuse enhancer and one misdemeanor count of endangering safety with a dangerous weapon by pointing a firearm at a person with a domestic abuse enhancer (2).[1] That same day, the circuit court issued a warrant for Turney's arrest (3). Turney was arrested on September 24, 2013, at 1:19 p.m. at 2151 North 35th Street in Milwaukee (3).

On October 2, 2013, the State filed a separate criminal complaint charging Turney with three counts of first-degree recklessly endangering safety by use of a dangerous weapon and one count of felon in possession of a firearm (2015AP1652:3:3-4). Turney demanded a speedy trial; the circuit court set a trial date for January 6, 2014 (2015AP1652:5, 7).

On December 5, 2013, the State moved to consolidate the two cases (6; 2015AP1652:9). At the time both cases were set for trial on January 6, 2014 (44:2; 2015AP1652:47:2). On that same day, the State amended the information in Case

[1] The State will cite primarily to the record in Case No. 2015AP1651-CR. When citing to Case No. 2015AP1652-CR, the State will include the case number prior to the document number.

No. 2015AP1652-CR to include armed robbery as party to the crime and to add an additional endangering safety with a dangerous weapon by discharging a firearm into a vehicle charge (2015AP1652:8). The circuit court held a hearing on December 13, 2013, and granted the motion to join the cases (44:4-13; 2015AP1652:47:4-13).[2]

Turney never moved to sever the charges. The consolidated cases went to trial on January 6-13, 2014 (45-53). At the close of the State's case-in-chief, the State dismissed the endangering safety with a dangerous weapon by pointing a firearm at a person with a domestic abuse enhancer in 2015AP1651-CR, for want of evidence (51:27). The jury convicted Turney of endangering safety with a dangerous weapon by discharging a firearm into a building and felon in possession of a firearm in Case No. 2015AP1651-CR (18; 19), and three counts of first-degree recklessly endangering safety by use of a dangerous weapon, felon in possession of a firearm, endangering safety with a dangerous weapon by discharging a firearm into a vehicle, and armed robbery as party to the crime in Case No. 2015AP1652-CR (2015AP1652:15-20).

The circuit court sentenced Turney to prison terms totaling twenty-five and a half years, bifurcated into

[2] The complaint and information in 2015AP1652-CR include a co-defendant, Steven Lamar Thomas (2015AP1652:3, 4). The amended information charges only Turney (2015AP1652:8).

eighteen and a half years of initial confinement and seven years of extended supervision (54:36-37).

Turney filed a post-conviction motion alleging his attorney provided ineffective assistance of trial counsel.[3] The circuit court denied the motion in a written decision (40; 2015AP1652:40). This appeal followed.

**B. Factual background to the charges.**

At trial, the State presented the following evidence on the consolidated charges.

LB testified TB is her twin sister. TB and Turney share a child (48:75-76). On August 22, 2013, LB picked TB up at work and took her home (48:76). TB and Turney live at 3545 North 10th Street in Milwaukee, Wisconsin (48:77). When LB and TB arrived, TB and Turney began to argue (48:77-78). Inside the house, the argument escalated and LB got involved (48:82). TB attempted to break up the argument (48:84). Turney then pulled a black gun and fired a single shot into the wall of the building (48:84, 87). Both LB's and TB's children were present (48:86). LB grabbed the children and went outside to her car (48:87). Turney came out as a car pulled up (48:88). LB identified Exhibit 3 as a picture of the car (48:88-89). She also identified a picture of the bullet hole in the wall (48:90-91). Officer Kevin Zimmerman recovered a shell casing from 3545 North 10th Street and also photographed the bullet hole in the wall (48:113).

[3] The post-conviction motion does not appear in either appellate record.

LW testified she owns a 2000 Honda Accord (2015AP1652:51:4-5). She identified Exhibit 3 as a picture of her car (2015AP1652:51:5). She lent her boyfriend, Stephen Brooks, the car (2015AP1652:51:5-6). In July 2013, Brooks was arrested (2015AP1652:51:6). After Brooks' July arrest, Turney, who was Brook's friend, had the 2000 Honda (2015AP1652:51:7-8). LW had given Turney permission to drive the car (2015AP1652:51:8). Later, she asked Turney to return the car (2015AP1652:51:9). She left notes for Turney at TB's house (2015AP1652:51:9-10).

On September 18, 2013, LW told Turney she wanted the Honda returned but Turney claimed the car was being repaired (2015AP1652:51:45). Brooks' mother told LW she had seen some girl driving the Honda (2015AP1652:51:45). On September 19, 2013, LW got off work and, with her brother and her brother's friend, went looking for the 2000 Honda (2015AP1652:51:10-11). LW did not have the key to the car (2015AP1652:51:11-12). They found the car at 2215 North 36th Street in Milwaukee (2015AP1652:51:12). Eventually, LW called a locksmith (2015AP1652:51:17). Shortly before the locksmith arrived, LW noticed a group of men in hoodies gathering at the end of the block (2015AP1652:51:21). LW identified one of the men in the gathering group as Turney and another as a person she knew as "Savage" (2015AP1652:51:22). LW testified Savage had a revolver and Turney had a black semi-automatic handgun (2015AP1652:51:25-26).

When the locksmith arrived, he had another person with him (2015AP1652:51:20). At this point the locksmith was attempting to make a key for the 2000 Honda (2015AP1652:51:25). Turney walked up, shut one of the Honda's doors and said, "ain't nobody taking this car" (2015AP1652:51:23). Turney then said, "This his hood" (2015AP1652:51:27). LW identified a recording of a 911 call she made (2015AP1652:51:30, Exhibit 14). The State played Exhibit 14 for the jury, in which shots could be heard (2015AP1652:51:35). LW ran from the scene (2015AP1652:51:37). During this altercation, at Turney's direction, a young man drove the 2000 Honda away (2015AP1652:51:39-41).

The locksmith testified that he was called to a job on September 19, 2013, at 2215 North 36th Street (50:5). At the time he was having dinner with EA (50:5). When the locksmith and EA arrived at the 36th Street location, the locksmith parked just ahead of the Honda (50:8). The locksmith identified Exhibit 3 as the Honda he worked on (50:7). Before he began to manufacture a key, the locksmith obtained information from LW and filled it into his receipt book (50:10). He identified Exhibit 19 as his receipt book (50:10). The locksmith made a test key for the Honda to make sure the key worked (50:11-12). He went back to his car to make the actual key when someone drove the Honda off (50:11-12). During this time, EA was seated in the passenger seat (50:13). The locksmith heard someone yelling

and then heard six to eight shots (50:13, 16). The locksmith's car was hit by bullets (50:16). As the locksmith drove off, EA told him he had been hit (50:17). The locksmith identified Exhibit 43 as a photograph of EA's wounded left ear (50:17). Detective Juanita Carr processed the locksmith's car (50:35). She also observed EA at Columbia-St. Mary's Hospital (50:32-33). She testified EA had a graze wound on the lower part of his left ear (50:34). She identified several photographs of the locksmith's car showing the shattered rear window and a bullet hole in the passenger seat headrest (50:36).

Detective Jeffery Sullivan testified that on September 24, 2013, he was dispatched to 2151 North 35th Street in Milwaukee (49:40). When he arrived, he saw Turney who had been stopped by a uniformed officer (49:41). Detective Sullivan determined that Turney had an outstanding warrant for his arrest from a domestic violence incident on August 20, 2013 (49:43).[4] He took Turney into custody and conducted a search incident to Turney's arrest (49:41). In Turney's pocket he discovered a vehicle registration for a 2000 Honda Accord, the Honda registered to LW (49:41). Police found the car in an alley several blocks from where Turney had been arrested (49:42).

[4] Detective Sullivan was mistaken about the date of the incident involving LB and TB. The warrant return for the August 22 incident establishes that Detective Sullivan arrested Turney on the outstanding warrant in that case (3).

Detective Jason Dorava processed the scene at 2215 North 36th Street (49:4-5). He found the locksmith's logbook or workbook and nine 9mm shell casings (49:10-11). He identified Exhibit 19 as the logbook he recovered at the scene (49:9-10). All of the casings were RDP 9mm Rugers (49:14). Mark Simonson, a firearm and tool mark expert from the Milwaukee Crime Laboratory testified that he examined the 9mm shell casings from both TB's and LW's cases (49:53-58). In his opinion, all nine shell casings from the LW case were fired from the same gun (49:60). The shell casing in TB's case was fired from a different gun than the one in LW's case (49:61).

Bridget Schuster, a forensic investigator with the Milwaukee Police Department, processed a 2000 Honda Accord that she identified as Exhibit 3 (49:63-66). She recovered four latent fingerprints, three from the exterior surface of the driver's side window and one from the surface of a plastic one liter bottle of Brisk peach-flavored iced tea discovered in the interior of the Honda (49:67-68). Douglas Knueppel, the chief latent prints examiner at the Milwaukee Police Department, testified he examined the fingerprints Officer Schuster had lifted (49:71-73). One of the lifted fingerprints matched Turney's right middle finger (49:75). One of the lifted fingerprints belonged to Tatiana Gentry (49:78). One of the lifted fingerprints belonged to Cedric Glosson (49:79). Detective Shannon Lewandowski testified LW identified a picture of Cedric Glosson as the person who

drove the Honda away during the September 20 incident (51:23). Detective Lewandowski also testified LW identified Tatiana Gentry as the woman who answered the door at 2215 North 36th Street when she inquired whether Turney was at that address (51:10-11).

Turney and the State stipulated he had been convicted of a felony prior to the August 22 incident (51:25).

## STANDARDS OF REVIEW

Whether the circuit court properly joined charges in the two criminal informations at issue presents a question of law. *State v. Davis*, 2006 WI App 23, ¶ 13, 289 Wis. 2d 398, 710 N.W.2d 514. Appellate courts review questions of law de novo. *See In re Commitment of Christopher S.*, 2016 WI 1, ¶ 50, 366 Wis. 2d 1, ___ N.W.2d ___.

This Court reviews a trial court's denial of substitution under Wis. Stat. § 971.20 de novo. *State v. Dwyer*, 181 Wis. 2d 826, 836, 512 N.W.2d 233 (Ct. App. 1994).

Appellate review of an ineffective-assistance-of-counsel claim presents a mixed question of fact and law. *State v. McDowell*, 2004 WI 70, ¶ 31, 272 Wis. 2d 488, 681 N.W.2d 500. Appellate courts will not disturb the trial court's findings of fact unless they are clearly erroneous. *Id.*; *State v. Champlain*, 2008 WI App 5, ¶ 19, 307 Wis. 2d 232, 744 N.W.2d 889. The ultimate determination of whether counsel's performance falls below the constitutional minimum, however, is a question of law subject to

independent review. *McDowell*, 272 Wis. 2d 488, ¶ 31; *Champlain*, 307 Wis. 2d 232, ¶ 19.

## ARGUMENT

### I. The circuit court properly joined the two criminal complaints for Turney's trial.

Turney first argues the circuit court erred in joining two separate pending criminal cases.

Wisconsin Stat. § 971.12(4) provides:

> The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

In turn, Wis. Stat. § 971.12(1) provides:

> Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.

The joinder statute must be interpreted broadly. "A broad interpretation of the joinder provision is consistent with the purposes of joinder, namely trial convenience for the state and convenience and advantage to the defendant." *Francis v. State*, 86 Wis. 2d 554, 558, 273 N.W.2d 310 (1979). "[J]oinder [of charges] will be allowed in the interest of the

public in promoting efficient judicial administration and court fiscal responsibility in conducting a trial on multiple counts in the absence of a showing of substantial prejudice." *State v. Hall*, 103 Wis. 2d 125, 141, 307 N.W.2d 289 (1981).

Subsection (1) of the statute provides three separate criteria for joining crimes, and subsection (4), by reference, provides the same criteria for consolidating separate charging documents. Wis. Stat. § 971.12(1) and (4). Those criteria are: (1) the crimes charged are of the same or similar character; (2) the charges are based on the same act or transaction or on two or more acts or transactions connected together; and (3) the crimes constitute parts of a common scheme or plan.

Here, the two consolidated cases satisfy the second criteria: the charges are based on the same act or transaction or two or more acts or transactions connected together. Turney does not claim that the counts in each separate complaint do not satisfy the second criteria. Rather, he argues that the felon in possession, the endangering safety and the misdemeanor in 2015AP1651-CR do not meet any of the statutory criteria to join those crimes with the felon in possession, the three first-degree recklessly endangering safety, the armed robbery and the endangering safety by shooting into a vehicle in 2015AP1652-CR.

As the circuit court recognized, the crimes comprised two or more transactions "connected together." Turney committed the first-degree reckless endangering safety

violation against LB on August 22, 2013 (48:76). He committed the first-degree reckless endangering safety violations against LW, the locksmith and EA in the early morning hours of September 20, 2013 (2015AP1652:51:10-12). LW left notes for Turney demanding the return of the Honda at TB's house (2015AP1652:51:9-10). The first-degree reckless endangering safety violations occurred in the 2200 block of North 36th Street (2015AP1652:51:12). On September 24, 2013, police executed the arrest warrant from the August 22 incident by taking Turney into custody in the 2100 block of North 35th Street, a location close to the location of the September 20 incident (3). In a search incident to that arrest, police discovered the registration document for the 2000 Honda LW attempted to recover in Turney's pocket (2015AP1651:49:41). This evidence connects the series of acts in the August 22 incident to the September 20 incident.

It is true that the overlap of evidence is not great. But overlapping evidence is a part of the first criteria, crimes of the same or similar character, not the second criteria a series of acts "connected together." The case law is not always careful about separating the three criteria from one another. That is not surprising since the acts or transactions at issue frequently fall into more than one category. For instance, *Frances* refers to both the second and third criteria in the same sentence.

> [T]he phrase 'connected together or constituting parts of a common scheme or plan' has been interpreted to mean inter alia that the crimes charged have a common factor or factors of substantial factual importance, e.g., time, place or Modus operandi, so that the evidence of each crime is relevant to establish a common scheme or plan that tends to establish the identity of the perpetrator.

*Francis*, 86 Wis. 2d at 560.

Modus operandi refers to the third criteria, the crimes constitute parts of a common scheme or plan. Time and place may refer to all three of the criteria depending on the individual circumstances of a given case. More than time, place or modus operandi may connect disparate acts or transactions. For instance, property taken in one crime may be recovered in a search for an unrelated crime. Or questioning on a crime may produce perpetrators of an unrelated crime. These disparate acts are nevertheless connected.

"In determining whether the offenses are based on acts or transactions connected together a significant consideration is whether joinder would serve the goals of trial economy and convenience." *Id.* at 560. Here the joinder severed those goals well. Both cases were scheduled for jury trial on the same day in different branches of the circuit court. Turney had requested a speedy trial on the five counts in 2015AP1651-CR. The joinder permitted the circuit court to meet the speedy trial request in one case without disturbing the January 6 trial setting in the other case.

Turney argues that he suffered prejudice because the jury may have convicted him of both series of crimes because it heard he twice wielded a gun. Because the offenses met the criteria for joinder, the law presumes that Turney would suffer no prejudice as a result of one trial on all of the charges. *See State v. Linton*, 2010 WI App 129, ¶ 20, 329 Wis. 2d 687, 791 N.W.2d 222.

Turney claims the evidence of these two episodes would not be admissible under Wis. Stat. § 904.04, as "other acts." To determine whether other acts evidence should be admitted, courts employ a three-step analysis. *State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). Courts ask (1) whether the evidence is offered for a permissible purpose under § 904.04(2); (2) whether the evidence is relevant under § 904.01; and (3) whether the probative value of the evidence outweighs any prejudice or confusion, as contemplated by § 904.03. *See Sullivan*, 216 Wis. 2d at 783-90.

The evidence of the two series of crimes was necessary to a full presentation of the State's case. *See State v. Jensen*, 2011 WI App 3, ¶ 77, 331 Wis. 2d 440, 794 N.W.2d 482 ("Accepted bases for the admissibility of evidence of other acts not listed in the statute arise when such evidence provides background or furnishes part of the context of the crime or case or is necessary to a full presentation of the case."). LW had attempted to contact Turney at LB's house. Turney was arrested on the outstanding warrant from the

August 22 incident involving LB. The Honda, prominent in the September 20 incident, was the same car picking up Turney after the August 22 incident.

The series of acts from these two incidents were connected together. Turney suffered no prejudice. The circuit court did not err by granting the State's motion to join the cases.

## II. The circuit court correctly held Turney did not have a statutory right to substitute Judge Dallet.

Turney next argues the circuit court erred in denying his request to substitute Judge Dallet. Turney filed the substitution request after the court granted the State's motion to consolidate (47:16).

Wisconsin Stat. § 971.20 provides a statutory right to peremptorily substitute a judge upon a timely request. *See State v. Harrison*, 2015 WI 5, ¶ 2, 360 Wis. 2d 246, 858 N.W.2d 372 (citing *State v. Holmes,* 106 Wis. 2d 31, 34–35, 315 N.W.2d 703 (1982)). The statute grants criminal defendants the right to substitute a judge without providing a reason for the requested substitution. *Harrison*, 360 Wis. 2d 246, ¶ 39. Generally, as a statutory right, a defendant (and the courts) must strictly adhere to the statutory procedure. *See, e.g.*, *State v. Austin,* 171 Wis. 2d 251, 257, 490 N.W.2d 780 (Ct. App. 1992) (holding deviation from the then existing requirements for withdrawal of a

substitution request would allow for substantial problems that are prevented by strict adherence to the statute).

Turney argues he is entitled to substitute Judge Dallet because she is a "new judge" under Wis. Stat. § 971.20(5), which provides, "If a new judge is assigned to the trial of an action and the defendant has not exercised the right to substitute … a written request for substitution may be filed … within 15 days …." Wis. Stat. § 971.20(5). Turney reasons that Judge Dallet was a "new judge" in Case No. 2015AP1651-CR, so he filed a timely written request to substitute her.

This Court gives statutory language "its common, ordinary, and accepted meaning," and gives "technical or specially-defined words or phrases" "their technical or special definitional meaning." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

Turney's argument is flawed. A "new judge" is a judge who substitutes for the assigned judge. *State v. Bohannon*, 2013 WI App 87, ¶ 21, 349 Wis. 2d 368, 835 N.W.2d 262 (citing *State ex rel. Warrington v. Circuit Court for Shawano Cnty.*, 100 Wis. 2d 726, 730, 303 N.W.2d 590 (1981)). It is true that Judge Dallet first became the judge presiding over the trial after granting the motion to consolidate from the point of view of Case No. 2015AP1652-CR. But from the point of view of Case No. 2015AP1651-CR, Judge Dallet was the judge originally assigned, not a new judge. *See* Wis. Stat.

§ 971.20(4) ("A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.").

The statute is silent on whether a substitution right exists upon consolidation. But Wis. Stat. § 971.20(6) addresses the right of substitution upon severance in cases involving multiple defendants. In view of the section addressing a severance situation, it is unlikely, in the State's view, that the Legislature would have overlooked addressing consolidations had it intended to create a right to substitute where courts consolidated cases.

Turney's argument also does not comport with the policy underlying the statute. He had an opportunity to substitute Judge Dallet when she first substituted for Judge Flanagan in Case No. 2015AP1651-CR (1:2). *See Bohannan*, 349 Wis. 2d 368, ¶ 23 (citing *State ex rel. Mace v. Circuit Court for Green Lake Cnty.,* 193 Wis. 2d 208, 222 n.1, 532 N.W.2d 720 (1995) (Wilcox, J., concurring) ("Section 971.20 ... is not to be used for delay nor for 'judge shopping,' but is to ensure a fair and impartial trial for the defendants.")).

The circuit court correctly denied Turney's request for substitution.

## III. Turney failed to prove he received ineffective assistance of counsel when his trial attorney did not object to Detective Jeffrey Sullivan's testimony.

During the trial, Detective Jeffrey Sullivan testified on direct examination:

> Q: So Mr. Turney was arrested by 2151 North 35th Street. Do you know if he lived at that address?
>
> A: When I stopped him, when myself and the officers stopped him, we already knew his name. So as a procedural thing, we ask people their name and their address, he wouldn't give me his address.
>
> Q: Okay.
>
> A: So we had no idea where he actually listed his address was. He wouldn't answer any questions I asked him.

(2015AP1651:49:43-44).

On re-cross examination, defense counsel asked;

> Q: And did you ask Mr. Turney how he came into possession of that registration?
>
> A: No, I didn't. Not at that time he was not asked, he was under arrest. Questions I asked him - I knew his name - his address, and he didn't answer any of those questions.

(2015AP1651:49:48).

Turney claims he received ineffective assistance of counsel when his trial attorney failed to object to Detective Sullivan's answer to the prosecutor's question and when he asked the follow-up question on re-cross examination.

A claim of ineffective assistance of counsel requires a defendant to show that counsel performed deficiently and

that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). An attorney performs deficiently if he/she performs outside the range of professionally competent assistance, meaning the attorney's acts or omissions were not the result of reasonable professional judgment. *Id.* at 690. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson,* 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

The prejudice prong of the *Strickland* test is satisfied when the attorney makes errors of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine the court's confidence in the outcome of the trial. *Id.* "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" *State v. Thiel*, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted); *State v. Prineas*, 2012 WI App 2, ¶ 21, 338 Wis. 2d 362, 809 N.W.2d 68.

To prevail on his ineffective-assistance-of-counsel claim, Turney must demonstrate both that his trial attorney's failure to object to Detective Sullivan's testimony fell below the reasonable standard for professional judgment and he was prejudiced by the failure to object.

> The test for determining if there has been an impermissible comment on a defendant's right to remain silent is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent. The court must look at the context in which the statement was made in order to determine the manifest intention that prompted it and its natural and necessary impact on the jury.

*State v. Cooper*, 2003 WI App 227, ¶ 19, 267 Wis. 2d 886, 672 N.W.2d 118 (citation omitted).

In *State v. Wedgewood*, 100 Wis. 2d 514, 302 N.W.2d 810 (1981), the Wisconsin Supreme Court addressed a claim of comment on Wedgewood's right to silence very similar to Turney's situation. At trial Kuehn testified only that in response to a question about his address the defendant said "4220, and stopped." *Id.* at 526. The supreme court concluded:

> The words "and stopped" do not imply the defendant's guilt, nor do they "'turn on the red light of potential prejudice'" respecting the defendant's right to remain silent. Rather, we believe the words were merely a necessary explanation for the partial answer which, if left unexplained, would have suggested the defendant lived at an address other than the one involved in the case. Because we view this language as explanatory and not intended to suggest "a tacit admission of guilt on the part of the defendant," we conclude that it did not constitute an impermissible comment upon the defendant's exercise of his fifth amendment rights.

*Id.* at 526-27 (citation omitted).

Since Turney must demonstrate his attorney performed deficiently, the question before this Court is not whether the circuit court would have committed error by refusing to strike Detective Sullivan's answer but whether

trial counsel's failure to object to the answer was an unreasonable strategic decision in the circumstances of this case. Both *Cooper* and *Wedgewood* stand for the proposition that not all testimony about a defendant's refusal to answer police questions amounts to an impermissible comment on the right to remain silent. The "manifest[] inten[t]," or the jury's "natural[] and necessar[y] impact" on the question must be evaluated. *Cooper*, 267 Wis. 2d 886, ¶ 19.

Here, the prosecutor's question did not call for Detective Sullivan's testimony about Turney's silence. The question merely asked if the detective knew whether or not Turney lived at the address where the detective executed the arrest warrant. The manifest intent of the question, then, was not to elicit a comment on Turney's failure to answer the detective's question but to explain why the detective did not know if Turney lived at 2151 North 35th Street (2015AP1651:49:43-44). The circumstances here are analogous to the circumstances in *Wedgewood*.

Nor was the jury likely to take Turney's refusal to answer as "a tacit admission of guilt." *Wedgewood*, 100 Wis. 2d at 527. The police were executing an arrest warrant for the August 22 incident which had not occurred near that location. And while the location was close to the location of the shooting on September 20, Turney's refusal to answer was not nearly as damaging as the police discovery of the Honda's registration in his pocket, which had nothing to do with where Turney lived. Thus, Turney has failed to

establish any prejudice from his attorney's failure to object or the follow up.

Nor should the brief statement concerning Turney's refusal to answer undermine the court's confidence in the outcome of the trial. There was abundant evidence demonstrating Turney had possessed and fired a gun in both incidents. He was identified by victims familiar with him who were unlikely to mistake him for someone else.

Turney fails to establish either deficient performance or prejudice.

## CONCLUSION

For the reasons stated above, this Court should affirm Turney's judgments of conviction and the order denying his post-conviction motion.

Dated at Madison, Wisconsin, this 22nd day of February, 2016.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,894 words.

Dated this 22nd day of February, 2016.

_____
Warren D. Weinstein
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 22nd day of February, 2016.

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Warren D. Weinstein
Assistant Attorney General