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COURT OF APPEALS

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OF WISCONSIN**

DISTRICT I

Case No. 2016AP0055-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT MARIO WHEELER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND
ORDER DENYING POSTCONVICTION RELIEF
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE DENNIS J. FLYNN,
PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. The circuit court did not deny Wheeler due process when it entered a verdict on the felon in possession of a firearm charge without a separate closing argument and before the jury decided the first degree reckless injury charge.	3
A. Procedural background related to Wheeler’s due process challenge.	3
B. General legal principles related to due process claims.	6
C. The circuit court’s actions did not deprive Wheeler of either his substantive or procedural due process rights.	7
D. The circuit court considered Wheeler’s closing argument on the related charge and, in any event, he forfeited his right to make a closing argument on the felon in possession charge.....	9
II. The circuit court properly denied Wheeler’s request to apply the doctrine of retroactive misjoinder	

and grant him a new trial on the felon in possession of a firearm charge.	12
A. General legal principles related to retroactive misjoinder.....	12
B. The doctrine of retroactive misjoinder does not apply to Wheeler’s case.	13
III. Sufficient evidence supported the circuit court’s guilty verdict on the felon in possession of a firearm charge.	16
A. General legal principles related to a sufficiency of the evidence challenge.	16
B. Sufficient evidence supports Wheeler’s conviction for possession of a firearm by a felon.	17
CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998).....	7
<i>Herring v. New York</i> , 422 U.S. 853 (1975).....	9
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	7

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>McCoy v. May</i> , 255 Wis. 2d, 38 N.W.2d 15 (1949)	14
<i>State v. Alger</i> , 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346	7
<i>State v. Cathey</i> , 32 Wis. 2d 79, 145 N.W.2d 100 (1966)	14
<i>State v. Harling</i> , 44 Wis. 2d 266, 170 N.W.2d 720 (1969)	14
<i>State v. Hebert</i> , 132 P.3d 852 (Haw. Ct. App. 2006)	11
<i>State v. Luedtke</i> , 2015 WI 42, 362 Wis. 2d 1, 863 N.W.2d 592	6
<i>State v. McAttee</i> , 2001 WI App 262, 248 Wis. 2d 865, 637 N.W.2d 774	5
<i>State v. McCausland</i> , 124 Ohio St. 3d 8, 2009-Ohio-5933, 918 N.E.2d 507	11
<i>State v. McGuire</i> , 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996)	12, 13
<i>State v. Mertes</i> , 2008 WI App 179, 315 Wis. 2d 756, 762 N.W.2d 813	17

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>State v. Ndina</i> , 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612	11
<i>State v. Poellinger</i> , 153 Wis. 2d 493, 451 N.W.2d 752 (1990)	16
<i>State v. Salinas</i> , 2016 WI 44, 369 Wis. 2d 9, 879 N.W.2d 609	13
<i>State ex rel. Greer v. Wiedenhoeft</i> , 2014 WI 19, 353 Wis. 2d 307, 845 N.W.2d 373, <i>reconsideration denied sub</i> <i>nom.</i> , <i>Greer v. Wiedenhoeft</i> , 2014 WI 50, 354 Wis. 2d 866, 848 N.W.2d 861	6
<i>United States v. Bell</i> , 770 F.3d 1253 (9th Cir. 2014).....	11
 Statutes	
Wis. Stat. § 941.29(2)(a)	17
Wis. Stat. § 971.12(1).....	12
Wis. Stat. § 971.12(3).....	13
Wis. Stat. § 971.12(4).....	12

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The State will supplement Wheeler's statement of the case and facts as appropriate in its argument.

SUMMARY OF THE ARGUMENT

The State charged Wheeler with first degree reckless injury and possession of a firearm by a felon.¹ (2.) To avoid the prejudice that might arise if the jurors knew about Wheeler's prior felony conviction, Wheeler waived his right to a jury trial on the felon in possession charge. (98:12, 15-16.) Wheeler understood that the jury's decision on the reckless injury charge would not bind the circuit court when it decided the felon in possession charge. (98:13-14.)

While the jury deliberated on the reckless injury charge, the circuit court found Wheeler guilty of the felon in possession charge. (110:8-14.) The circuit court declared a mistrial after the jury deadlocked. (111:6.) The State later dismissed the reckless injury charge when witness issues prevented it from retrying that charge. (121:2-3.)

¹ The State will refer to the charge of first degree reckless injury as the "reckless injury" charge and the possession of a firearm by a felon charge as the "felon in possession" charge.

Wheeler raises three claims on appeal. First, he argues that the circuit court violated his substantive and procedural due process rights when it decided the felon in possession charge without the opportunity for a closing argument and before the jury reached a verdict on the reckless injury charge. Wheeler's Br. 11-15. The circuit court did not violate Wheeler's due process rights. It provided Wheeler with a meaningful time and opportunity to present his case. The circuit court did not reach its verdict in an arbitrary way. Instead, it decided the felon in possession charge based on the evidence presented at trial.

Wheeler did not object when the circuit court issued its decision without the opportunity for a separate closing argument on the felon in possession charge. By failing to object, Wheeler forfeited his right to raise this claim. Wheeler also forgets that he made a closing argument to the jury on the reckless injury charge and that the circuit court considered that closing argument when it decided the felon in possession charge. (83:2.)

Second, Wheeler contends that the doctrine of retroactive misjoinder should apply and that he should receive a new trial on the felon in possession charge. He asserts that the evidence presented to the jury on the reckless injury charge prejudiced Wheeler in his bench trial on the felon in possession charge. Wheeler's Br. 15-20. Retroactive misjoinder does not apply to his case. Once Wheeler waived his right to a jury on the felon in possession charge, the two charges were not joined for trial before the same factfinder. Further, Wheeler cannot demonstrate that the evidence that the circuit court heard during the jury trial so prejudiced the circuit court that he is entitled to a new trial on the felon in possession charge.

Third, Wheeler challenges the sufficiency of the evidence that the State offered in support of the felon in possession charge. Wheeler's Br. 20-23. The record reflects that the circuit court carefully weighed the evidence and considered Wheeler's defense before it found Wheeler guilty. (110:8-13.) As the State will demonstrate, the evidence supports the circuit court's guilty verdict.

ARGUMENT

I. The circuit court did not deny Wheeler due process when it entered a verdict on the felon in possession of a firearm charge without a separate closing argument and before the jury decided the first degree reckless injury charge.

Wheeler raises both procedural and substantive due process challenges to the circuit court's guilty verdict on the felon in possession of a firearm charge. His primary complaint focuses on the circuit court's decision to enter a guilty verdict on the felon in possession charge before the jury had reached a verdict on the reckless injury charge. Wheeler also argues that the circuit court deprived him of an opportunity to make a closing argument on the felon in possession charge even though he made a closing argument on the reckless injury charge. Wheeler's Br. 11-15. As the record demonstrates, the circuit court's actions violated neither Wheeler's substantive nor procedural due process rights.

A. Procedural background related to Wheeler's due process challenge.

The State charged Wheeler with first degree reckless injury and felon in possession of a firearm. (2:1.) The charges arose out of an incident in which the victim, C.F., alleged that Wheeler shot him. (2:2.)

Before trial and through his counsel, Wheeler expressed concern that the jury would learn about his felony status as it related to a charge of felon in possession of a firearm. He asked the circuit court to bifurcate the trial with the jury deciding the reckless injury charge and the circuit court deciding the possession of a firearm charge. (98:12.) Wheeler did not dispute that the incident occurred, but asserted that the issue was one of identification as to both charges. (98:13.) Trial counsel explained:

We are just saying it wasn't Mr. Wheeler who did it.

So, after the jury renders its verdict, the Court having heard all the evidence, will—can then make its own determination as to felon in possession of a firearm.

I would suggest that if the jury find him not guilty of him being the shooter, then I would expect that the verdict on the felon in possession of a firearm would be not guilty.

If the jurors find him guilty of being the shooter, then I would expect that he would be found also guilty of felon in possession of [a] firearm.

(98:13.)

The prosecutor consented to the jury waiver. (98:15.) But he observed that the jury's verdict would not bind the circuit court. Wheeler's counsel agreed: "I agree with [the prosecutor] that Your Honor does not have to be bound by the jury's verdict in theory. I agree and I am mindful of that possibility." (98:14.). Following a colloquy with Wheeler, the circuit court found that Wheeler had freely, voluntarily, and knowingly waived his right to a jury trial on the felon in possess charge. (98:15-16).

Following closing arguments, the circuit court asked the parties to remind it to decide the felon in possession of the firearm count. It stated, “[B]ut it’ll be after the jury has reached its verdict.” (108:135.) The circuit court asked the parties if they disputed Wheeler’s felony status. Trial counsel responded that the parties had stipulated that the element of a prior felony conviction had been met. (108:135.)²

A day later, the jury still had not reached a verdict and the circuit court released it for the evening. (110:13.) Because the circuit court anticipated that it would not be available the following day, it decided the felon in possession of a firearm charge. (110:8.) The circuit court reviewed the evidence in light of the offense’s elements. Based on the parties’ stipulation, it found that Wheeler had a felony conviction. (110:8-9.) The circuit court then focused its attention on the element of possession. It reviewed the witnesses’ testimony that resulted in their identification of Wheeler as the shooter and found it “to be both credible and believable.” (110:10-11). It also rejected Wheeler’s theory of defense that the witnesses had mistakenly identified Wheeler as the shooter. (110:11-12.) The circuit court then found beyond a reasonable doubt that Wheeler possessed a firearm as a convicted felon as alleged in the complaint and information. (110:12.)

² The stipulation has been marked and received as an exhibit. (25:3, ex. 47). The exhibits are not part of the record, but this Court should assume that they support the circuit court’s guilty verdict. *See State v. McAttee*, 2001 WI App 262, ¶ 5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (“It is the appellant’s responsibility to ensure completion of the appellate record and when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court’s ruling”) (citation and quotations omitted).

Wheeler never asked to make a separate closing argument on the felon in possession charge. And he never objected to the circuit court’s decision to enter a verdict prior to the jury’s decision on the reckless injury charge. (110:8-14.)

The following day, the jury returned to deliberate on the first degree reckless injury charge. (111:1.) The jury remained deadlocked and the circuit court declared a mistrial. (111:6.) Over a year later, the State moved to dismiss the reckless injury count when it determined that the witnesses necessary to prove the case were unavailable. (121:2-3.)

B. General legal principles related to due process claims.

“The Due Process Clauses of the United States and Wisconsin Constitutions protect both substantive and procedural due process rights.” *State v. Luedtke*, 2015 WI 42, ¶ 74, 362 Wis. 2d 1, 863 N.W.2d 592 (citations and quotations omitted).

Substantive due process protects against arbitrary, wrongful, or oppressive government action. It forbids the government’s “exercise[e of] power without any reasonable justification in the service of all legitimate governmental objective[s].” *Id.* (citations and quotations omitted). State conduct violates substantive due process “if the conduct shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty.” *State ex rel. Greer v. Wiedenhoef*t, 2014 WI 19, ¶ 57, 353 Wis. 2d 307, 845 N.W.2d 373, *reconsideration denied sub nom.*, *Greer v. Wiedenhoef*t, 2014 WI 50, 354 Wis. 2d 866, 848 N.W.2d 861) (internal quotations omitted). “[O]nly the most egregious executive action can be said to be arbitrary

in the constitutional sense.” *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (internal quotations omitted).

Procedural due process requires that the government provide an “opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoted source omitted). Under a procedural due process analysis, a court must determine: (1) whether the government’s action has deprived the person of a liberty interest; and (2) whether the government used constitutionally sufficient procedures to deprive the person of his or her interest. *State v. Alger*, 2015 WI 3, ¶ 39 n.15, 360 Wis. 2d 193, 858 N.W.2d 346.

C. The circuit court’s actions did not deprive Wheeler of either his substantive or procedural due process rights.

The State agrees with Wheeler that the circuit court’s guilty verdict on the felon in possession charge had an impact on his liberty interest. Wheeler’s Br. 14. But the circuit court’s entry of a guilty verdict alone does not automatically trigger a due process violation.

Wheeler’s substantive due process claim. Wheeler has simply failed to articulate how the circuit court’s verdict undermined his substantive due process rights. He has identified nothing egregious about the circuit court’s conduct that rendered it arbitrary in a constitutional sense.

Wheeler asserts that the circuit court should have waited for the jury’s verdict on the reckless injury charge before deciding the felon in possession charge. Wheeler’s Br. 13. The circuit court was under no obligation to do so. By waiving the right to a jury, Wheeler agreed to allow the

circuit court to decide his guilt on the felon in possession charge. Based on the discussion between trial counsel and the prosecutor, Wheeler knew that the jury's verdict would not bind the circuit court's determination on the felon in possession charge. (98:14.) So it made no difference if the circuit court decided the felon in possession charge before or after the jury reached its verdict.

Wheeler also ignores other factors that arose after jury deliberations began. First, the jury deliberated for an entire day without a verdict. The circuit court anticipated that it would be unavailable the following day. (110:8.) It decided to render its verdict, and Wheeler did not object. (110:8-13.)

Second, Wheeler overlooks the obvious. The jury never reached a verdict on the reckless injury charge. The jury was deadlocked and the circuit court declared a mistrial. (111:3-6.) Neither the parties nor the circuit court anticipated a mistrial. But the mistrial on the reckless injury count would not have deprived the circuit court of its authority or responsibility to decide the felon in possession charge.

Finally, the circuit court's actions hardly constitute egregious official conduct in the due process sense. It did what circuit courts regularly do when deciding cases. It discussed the offense's elements. It identified the key witness testimony. It weighed the evidence. It considered Wheeler's theory of defense. And it found Wheeler guilty of felon in possession of a firearm. (110:8-13.) The circuit court would have used the same process had it waited until after the jury decided the reckless injury charge. Wheeler is unable to identify anything arbitrary, wrongful, or oppressive about the process that the circuit court used to find him guilty. Wheeler has not demonstrated that the circuit court violated his substantive due process rights.

Wheeler's procedural due process claim. The circuit court provided Wheeler with a meaningful opportunity to be heard and did so in a meaningful manner. The circuit court did nothing to foreclose Wheeler's trial rights. It allowed him to present his case. As demonstrated by how it handled objections during closing arguments (108:97-98, 116, 118, 123), the circuit court listened to the parties' arguments on the reckless injury charge. The circuit court had the benefit of this closing argument to the jury when it decided the felon in possession charge. (83:1-2.) Wheeler did not request to make a separate closing argument on the felon in possession charge and he did not object when the circuit court issued its decision. The circuit court used constitutionally sufficient procedures to deprive Wheeler of his liberty interest.

D. The circuit court considered Wheeler's closing argument on the related charge and, in any event, he forfeited his right to make a closing argument on the felon in possession charge.

Wheeler suggests that the circuit court's failure to allow him to present a closing statement violated his due process rights. Wheeler's Br. 15. The right to present a closing argument actually relates to a defendant's Sixth Amendment trial right to present a defense. *Herring v. New York*, 422 U.S. 853, 856-58 (1975). In *Herring*, the trial court denied the defendant the opportunity to make a closing argument despite his affirmative request to make one. *Id.* at 856. "[T]he total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense." *Id.* at 858-59. But the Supreme Court also recognized that a defendant may waive his or her right to make a closing argument. *Id.* at 860.

For two reasons, the circuit court’s entry of a guilty verdict on the felon in possession of a firearm charge without a separate closing statement on that charge did not violate Wheeler’s right to present a defense. First, Wheeler actually made a closing argument to the jury on a companion reckless injury charge. Wheeler argued that he did not shoot or possess the firearm that resulted in the injury, but that someone else discharged the weapon that injured C.F. (108:88, 90, 99-100.) In requesting a bench trial on the felon in possession charge, Wheeler believed that by convincing the jury that he was not guilty of first degree reckless injury, he was not guilty of felon in possession of a firearm. (98:13.)

When the circuit court decided the felon in possession charge, it already had the benefit of Wheeler’s closing argument on the reckless injury charge. Wheeler has not identified any additional arguments that he would have made with respect to the possession of the firearm charge that he had not already presented to the jury on the reckless injury charge.³ So unlike *Herring*, Wheeler made a closing argument related to his core claim that witnesses misidentified him as the person who possessed the firearm and whose discharge of the firearm injured C.F. (108:99-100.) In denying his postconviction motion, the circuit court acknowledged hearing “closing arguments with regard to the entire incident.” (83:2.)

Second, Wheeler neither asked to make a closing argument on the felon in possession charge nor did he object when the circuit court discussed the evidence and reached

³ Wheeler did not dispute the element that he had a prior conviction. Wheeler stipulated to this element (108:135), so the only issue the circuit court had to decide was whether Wheeler possessed the firearm that resulted in the reckless injury.

its verdict. (110:6-13.) Wisconsin case law does not address how a defendant may waive or forfeit his or her right to make a closing argument. But the Ohio Supreme Court has held that “a criminal defendant waives the right to present a closing argument when he or she neither requests a closing argument nor objects to its omission.” *State v. McCausland*, 124 Ohio St. 3d 8, 12, 2009-Ohio-5933, ¶ 16, 918 N.E.2d 507; see also *United States v. Bell*, 770 F.3d 1253, 1258 n.1 (9th Cir. 2014) (citing federal cases that recognize a defendant may implicitly waive closing argument); *State v. Hebert*, 132 P.3d 852, 858-61 (Haw. Ct. App. 2006) (reviewing case law for assessing waiver of closing argument).⁴

Wheeler never asked to make a closing argument or objected when the circuit court proceeded to render its decision. Wheeler forfeited any right that he may have had to make a closing argument on the felon in possession charge. The circuit court did not deprive Wheeler of the right to present his defense by deciding the felon in possession charge without a separate closing argument.

⁴ While case law from other jurisdiction uses the term “waiver,” the term “forfeiture” may be more appropriate. The supreme court has explained the difference between forfeiture and waiver. A defendant “forfeits” his right to appeal an issue through a failure to make a timely assertion of a right. A defendant “waives” his right to appeal an issue by intentionally relinquishing or abandoning a known right. *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612.

II. The circuit court properly denied Wheeler’s request to apply the doctrine of retroactive misjoinder and grant him a new trial on the felon in possession of a firearm charge.

A. General legal principles related to retroactive misjoinder.

Wisconsin Stat. § 971.12(1) and (4) governs the joinder and severance of charges before trial. In *State v. McGuire*, 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996), this court recognized the doctrine of “retroactive misjoinder.” Under this doctrine, subsequent, post-trial developments in a case may render improper a joinder of charges that were previously and properly joined for trial. For example, this may occur when an appellate court reverses some, but not all, of a defendant’s convictions. *Id.* at 379.

To obtain relief under the doctrine of retroactive misjoinder, the defendant must demonstrate that he or she has suffered “compelling prejudice.” *Id.* A defendant suffers compelling prejudice if prejudicial spillover from evidence was admitted to prove a dismissed count. *Id.* In determining whether prejudicial spillover has occurred, courts consider three factors.

1. whether the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the jury to convict on the remaining count;
2. the degree of overlap and similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count; and
3. the strength of the case on the remaining count.

Id. at 379-80. If a defendant shows compelling prejudice arising from the evidence introduced to support the vacated

counts, the defendant is entitled to a new trial on the remaining counts. *Id.* at 381.

Standard of Review. In *McGuire*, this Court did not articulate the standard of review applicable to a circuit court's decision granting or denying relief for retroactive misjoinder. In *State v. Salinas*, 2016 WI 44, 369 Wis. 2d 9, 879 N.W.2d 609, the supreme court clarified the proper standards of review that apply to joinder and severance questions. An appellate court applies a *de novo* standard of review to the initial joinder decision. But it applies the erroneous exercise of discretion standard to review a severance motion after initial joinder. *Id.*, ¶ 30.

This Court should apply an erroneous exercise of discretion standard to a circuit court's decision to grant or deny relief under the doctrine of retroactive misjoinder. Like severance, the doctrine of retroactive misjoinder focuses on the issue of prejudice. *See* Wis. Stat. § 971.12(3) (“relief from prejudicial joinder”) and *McGuire*, 204 Wis. 2d at 379 (“compelling prejudice”). Just as the erroneous exercise of review standard applies to severance questions, so too should it apply to a circuit court's retroactive misjoinder determination. Based on its participation in the trial, the circuit court is best situated to assess whether “compelling prejudice” existed.

B. The doctrine of retroactive misjoinder does not apply to Wheeler's case.

For several reasons, retroactive misjoinder is simply inapplicable to Wheeler's case. First, retroactive misjoinder appears to apply when a single factfinder finds a defendant guilty of multiple charges. Here, the charges could not have been improperly joined for trial because Wheeler's waiver of

his right to a jury trial on the felon in possession charged effectively severed the charges. The jury only considered the reckless injury charge and the circuit court only decided the felon in possession charge. The charges were not joined for trial, a prerequisite to the application of the retroactive misjoinder doctrine.

Second, Wheeler waived his right to a jury trial on the felon in possession charge precisely to avoid any prejudice effect that his felony status would have on the jury's reckless injury deliberations. (98:12-13.) And Wheeler has not identified anything in the record that suggests that the testimony presented to the jury prejudiced the circuit court when it decided the felon in possession charge. To the contrary, the circuit court explained why it found Wheeler guilty of the felon in possession charge. Nothing within its explanation suggests it based its decision on extraneous, inflammatory evidence irrelevant to its determination of whether Wheeler, as a convicted felon, possessed a firearm. (110:8-13.)

Third, Wisconsin courts have long recognized that the risk of prejudice is significantly reduced in bench trials. An appellate court reviews errors in the receipt of evidence at a bench trial less critically on the issue of prejudice than when the case is tried to the jury. "[T]he burden of showing prejudice because of procedural or evidentiary error is considerably greater than a trial before a jury." *State v. Harling*, 44 Wis. 2d 266, 277, 170 N.W.2d 720 (1969) (citations omitted). "[W]hile rules of evidence apply on actions tried to the court it will be presumed if there is proper evidence to support the findings of the trial court that the court disregarded any evidence improperly admitted." *McCoy v. May*, 255 Wis. 20, 25, 38 N.W.2d 15 (1949); *see also State v. Cathey*, 32 Wis. 2d 79, 90, 145 N.W.2d 100 (1966) (a reviewing court assumes that the trial

judge identified the competent evidence and ignored the remainder even when the circuit court wrongly admits evidence in a bench trial). Wisconsin appellate courts have long presumed that circuit courts make decisions without relying on improper, prejudicial information. Wheeler does not explain why this Court should not apply this deferential presumption when it reviews his case.

Even if retroactive misjoinder applies, Wheeler has not demonstrated “compelling prejudice” warranting a new trial. The evidence regarding the witness’ identification of Wheeler as a shooter was simply not of such an inflammatory nature that it would have tended to incite the circuit court to convict him on the felon in possession count. As Wheeler observes, the elements of the two offenses differ. Reckless injury does not require proof of possession of a firearm. Wheeler’s Br. 17-18. But here, the State and Wheeler relied on the same evidence to make their point about whether Wheeler (a) was the person whose discharge of a firearm recklessly injured C.F.; and (b) possessed a firearm as a convicted felon. Finally, the State presented strong evidence in support of the felon in possession of the firearm charge, evidence that the circuit court found credible and believable.⁵ (110:11-12.)

Wheeler has not demonstrated the evidence offered in support of the reckless injury charge prejudiced the circuit court’s determination of the felon in possession charge. Under the circumstances, the circuit court did not erroneously exercise its discretion when it denied Wheeler’s

⁵ In support of this argument, the State relies on the testimony cited in response to Wheeler’s challenge to the sufficiency of the evidence. *See* Section III. B., below.

request to grant him a new trial under the doctrine of retroactive misjoinder.⁶

III. Sufficient evidence supported the circuit court’s guilty verdict on the felon in possession of a firearm charge.

Wheeler contends that the State did not present sufficient evidence that supports the circuit court’s guilty verdict on the felon in possession charge. As the State will demonstrate, the record supports the circuit court’s finding that Wheeler possessed a firearm as a convicted felon.

A. General legal principles related to a sufficiency of the evidence challenge.

A court reviews a challenge to the sufficiency of the evidence in the light most favorable to the conviction. A reviewing court should not reverse a conviction based upon the insufficiency of the evidence unless the evidence is “so lacking in probative value and force” that no reasonable jury could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one reasonable inference may be drawn from the evidence, the reviewing court must adopt the inference that supports the verdict. *Id.* at 503-04.

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.

Id. at 507 (citation omitted).

⁶ Even if this Court were to apply the *de novo* review standard, the State asserts that this Court would conclude that Wheeler is not entitled to a new trial on the grounds of retroactive misjoinder.

“Once the jury accepts the theory of guilt, an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict.” *State v. Mertes*, 2008 WI App 179, ¶ 11, 315 Wis. 2d 756, 762 N.W.2d 813 (citation omitted).

B. Sufficient evidence supports Wheeler’s conviction for possession of a firearm by a felon.

The circuit court found Wheeler guilty of possession of a firearm by a felon under Wis. Stat. § 941.29(2)(a). This offense requires proof that Wheeler (1) possessed a firearm, and (2) was previously convicted of a felony. *Id.* Wheeler does not dispute that he is a convicted felon. He stipulated to this element at trial. (110:9-10.)

In reaching its verdict, the circuit court reviewed the testimony. It noted that the victim, C.F., and another witness, S.J., identified Wheeler as the person who possessed the firearm and shot at C.F. (110:10.) Shortly after the shooting, C.F. told a third person, O.B, that Wheeler shot him. (110:10-11.) The circuit court also noted that Wheeler’s sister, Nina, told Wheeler about an altercation that she had had with C.F. (110:11.) The circuit court found C.F. and S.J. to be credible and believable. It also rejected Wheeler’s defense that C.F. and S.J. mistakenly identified him as the shooter. (110:11-12.)

Viewed in a light most favorable to the conviction, the evidence supports the circuit court’s guilty verdict. C.F. had known Wheeler for 12 years and had dated his sister Nina during this time. (101:18, 24.) On October 19, 2010, C.F. and Nina got into an argument that led to a physical altercation between them. (101:19-20.) C.F.’s cousin, O.B.,

came to assist C.F. Nina and O.B. then engaged in an altercation. Two other people, R.W. and S.J., attempted to separate them. C.F. then left Nina's residence. (101:22).

Later that evening, C.F. and S.J. were talking with each other on the front porch of a cousin's residence. C.F. saw a person whom he later identified as Wheeler approach from several houses away. (101:23.) Wheeler stopped in front of the porch and asked, "[I]s that Chucky up there[?]" (101:26). C.F. stated that it was. Wheeler then pointed a firearm and started shooting. (101:26.) C.F. claimed that Wheeler fired between 12 and 14 times and one of the shots struck C.F. in the chest and exited his back side. When C.F. got up, he saw Wheeler running away. (101:27.) C.F.'s cousin opened the door and C.F. told her that Wheeler shot him. (101:35.) C.F. later identified Wheeler from a photo array. (104:55-56.)

S.J. also testified that he was with C.F. and O.B. at Nina's home during the altercation. (101:54-55.) They left Nina's home and went to a residence on North 22nd Street. (101:56.) C.F. and S.J. were on the front porch. (101:57.) A man whom S.J. identified as Wheeler approached, stopping approximately 19 feet from the front porch. (101:58-59.) Wheeler pulled out a gun and started shooting. S.J. jumped over the banister and ran to the side of the house. S.J. claimed that he heard six shots. Wheeler then ran from the residence (101:60). S.J. identified Wheeler from a lineup. (101:62.)

O.B. testified about the altercation between C.F., Nina, and herself at Nina's home. (101:73-77.) During the incident, Nina stated that she was going to call her brother. (101:83.) Later that evening, O.B. called C.F., who said that Nina's brother Robert just shot him. (104:9-10.)

Officer Jesse Busshardt responded to the shooting. C.F. had a blood spot on his chest and was seated on the couch. C.F. stated that Robert Wheeler shot him. (104:40-41.)

Nina also testified about the dispute with C.F. and O.B. at Nina's home. (105:53-54.) Nina had called Wheeler before the fighting started and asked him to come get people out of her home who would not leave. Wheeler could not make it. (105:54.) Later that evening Nina learned that C.F. had been shot and that Wheeler was the alleged shooter. (105:55.)

Detective Brian Stott responded to the October 19th shooting on North 22nd Street. (104:109.) Stott recovered bullets and fired casings. Eleven casings were recovered from the sidewalk. (104:111-12, 124-25.) Stott also observed bullet strikes to the residence in the area of the porch where C.F. and S.J. were standing (104:116-17.) Mark Simonson, a crime laboratory firearm and toolmark examiner, concluded that each of the nine millimeter cartridge casings were fired from the same gun. (104:83, 91.)

The evidence was sufficient to support the circuit court's guilty verdict. This is a classic identification case. The circuit court found credible and believable C.F.'s and B.J.'s testimony that Wheeler discharged a gun at them as they stood on a front porch. C.F. was shot. Officers located fired cartridges on the sidewalk and bullet strikes on the porch. The record also provides a motive for Wheeler's actions: he needed to avenge C.F.'s confrontation with Nina earlier in the day. Based on the trial evidence, the circuit court could reach the conclusion that Wheeler possessed a firearm as evidence by Wheeler's discharge of it that resulted in C.F.'s gunshot wound. Based on Wheeler's

stipulation regarding his felony status, the circuit court could conclude that Wheeler was a convicted felon. Viewed in a light most favorable to Wheeler's conviction, the evidence supports the circuit court's decision finding Wheeler guilty of possession of a firearm by a felon.

CONCLUSION

For the above reasons, the State respectfully requests this Court to affirm the entry of the judgment of conviction against Wheeler and order denying his motion for postconviction relief.

Dated this 13th day June, 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), (c) for a brief produced with a proportional serif font. The length of this brief is 5,274 words.

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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 13th day of July, 2016.

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