STATE OF WISCONSIN

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

DISTRICT I

Case No. 2016AP1054-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JAMES D. CARTER
Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit Court,
the Honorable Charles F. Kahn, Presiding and from a
Decision and Order Denying Postconviction Relief, the
Honorable Frederick C. Rosa, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was the burglary count involving the ATM properly joined for trial with the other 19 counts involving possession of firearms and a fraud scheme, where the burglary occurred roughly four months before the other offenses and the only thing linking the burglary to the other offenses was that evidence of the crimes was found at the same address during the execution of a search warrant?

   Circuit court answer: Yes.

2. Did trial counsel provide ineffective assistance when she moved to sever the burglary count from the remaining counts due to unfair prejudice under Wis. Stat. § 971.12(3), but failed to argue that the counts were improperly joined to start with under § 971.12(1)?

   Circuit court answer: No.

3. Did joinder of count five, charging possession of an assault rifle, with the other counts cause unfair prejudice such that the counts should have been severed for trial when there was no evidence that an assault rifle was used in connection with any of the other offenses?

   Circuit court answer: No.

4. Did trial counsel provide ineffective assistance when she failed to move to sever count five from the remaining counts for trial?

Circuit court answer: No.

5. Was there sufficient evidence to support the conviction on count five? Circuit court answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is not warranted as this case, which involves the application of well-settled law to a unique set of facts.

While undersigned counsel anticipates the parties' briefs will sufficiently address the issue raised, the opportunity to present oral argument is welcomed if this Court would find it helpful.

STATEMENT OF THE CASE

As explained more fully below, this case arose out of a series of thefts by fraud, involving the perpetrator answering advertisements for the sale of computers on Craig's List. The perpetrator would make arrangements to meet to purchase the item, and would then pay for the item with counterfeit currency. Investigation of these crimes led police to obtain a warrant to search the home of Mr. Carter's sister. The execution of that warrant disclosed evidence related to the thefts by fraud as well as several firearms and an ATM machine that had been taken in a burglary months before. The prosecution of Mr. Carter ensued.

Procedural History.

Mr. Carter was charged in a single complaint with twenty criminal counts, consisting of one count of armed robbery, seven counts of possession of a firearm by a felon, one count of burglary, six counts of forgery-uttering, four counts of theft by false representation, and one count of attempt theft by false representation. (R. 2). Defense counsel moved to sever the burglary count from the remaining count for trial on the ground that joinder was unfairly prejudicial to Mr. Carter. (R. 9). The circuit court, the Honorable Charles F. Kahn, Jr., denied the motion. (R. 77). The court found joinder to be proper because the evidence relating to all of the counts was found at the same address during the execution of the search warrant. The court noted that "the problem for Mr. Carter on this issue . . . is that the evidence from the various larcenous offenses all ended up in the same place." (R. 77: 97; App. 116).

All twenty counts were tried together. Mr. Carter was convicted of all but four counts of possession of a firearm by a felon. (R. 23).

Mr. Carter filed a notice of intent to pursue postconviction relief. (R. 106). Undersigned counsel was appointed to represent Mr. Carter. Undersigned counsel moved to withdraw the no-merit report previously filed by prior counsel. This Court ordered the no-merit appeal voluntarily dismissed and granted counsel extensions of time to file a notice of appeal or postconviction motion. Counsel filed a notice of appeal, but then concluded that a postconviction motion would be necessary in this case as a prerequisite to an appeal. Counsel requested that the Court remand the case to the circuit court to allow counsel to file a postconviction motion.

This Court granted that motion, and counsel filed a postconviction motion, arguing that the burglary count was improperly joined with the remaining counts under Wis. Stat. §971.12(1), that count five, involving possession of an assault rifle, should have been severed from the remaining counts for trial under Wis. Stat. §971.12(1) because joinder caused unfair prejudice, that there was insufficient evidence supporting the conviction on count five, and that counsel provided ineffective assistance. (R. 106). The circuit court, the Honorable Frederick C. Rosa, denied the motion without a hearing. (R. 112: App 101). The court ruled that if the joinder of the burglary count was improper, the error was harmless. (R. 112: 4-5; App. 104-05). The court ruled that joinder of the assault rifle charge did not result in unfair prejudice and that trial counsel did not provide ineffective assistance when she failed to move to sever. (R. 112: 6; App. 106). The court further ruled that there was sufficient evidence to support the conviction on count five. (*Id.*).

This appeal follows.

The Trial Testimony

As relevant to this appeal, the following evidence was presented at trial:

Armed Robbery

D.C. and her husband, J.V. testified that on October 10, 2011, they advertised an ACER tablet on Craig's List. (R. 81: 47, 84) . They got a call from a man from (414) 484-6617. The caller offered to purchase the tablet. (R. 81: 48). They agreed to meet in Milwaukee for the sale. They met the man and exchanged the tablet for cash. (R. 81: 49, 85-86). J.V. immediately noticed that the currency was fake. (R. 81: 49, 86). D.C. called out to the man and followed him. (R. 81: 49,

86). D.C. testified that the man looked back at her and threatened to shoot her if she continued to follow. (R. 81: 50). He reached back for something, and she saw the butt of a gun. (R. 81: 50-51). It was black. (R. 81: 66). At trial D.C. testified that she saw nothing else related to the gun, but at the preliminary hearing, she had testified that she saw a holster. (R. 81: 51). D.C. then fell back and followed from a distance. (R. 81: 50-51). When she saw him enter a residence, D.C. called police. (*Id*.).

D.C. and J.V. identified Mr. Carter from a lineup and in court as the perpetrator. (R. 81: 53-54, 86-87). Officer Jason McGaw testified that when interviewed a couple of days after the incident, D.C. told him that she saw the perpetrator had a "black semiautomatic pistol." She did not mention a holster. (R. 84: 65).

Thefts by Fraud

R.K. testified that he advertised a Play Station 3 for sale on Craig's List on October 28, 2011. (R. 82: 20). He received a call from the same number used to contact J.V. and D.C. (R. 82: 20). They agreed to meet near Marquette University to complete the sale. (R. 82: 20). They met, and R.K. exchanged the game console for cash, which turned out to be counterfeit. (R. 82: 21-22). He called police and was able to provide the serial number for the game console. (R. 82: 22). His description of the perpetrator was consistent with the descriptions provided by other victims and was consistent with Mr. Carter. He did not identify Mr. Carter in court. (R. 82: 23).

C.L. testified he also advertised a Play Station 3 and accessories for sale on Craig's List on October 28, 2011. (R. 82: 26). He received a call from a man interested in purchasing the items from the same number used to contact

the other victims. (R. 82: 27). C.L. met the man and exchanged the items for cash that again turned out to be counterfeit. (R. 82: 28-29). He provided the serial number for the Play Station console to police. (R. 82: 30). His description of the perpetrator was consistent with the descriptions provided by other victims and was consistent with Mr. Carter. C.L. did not identify Mr. Carter in court. (R. 82: 31).

U.B. testified that he advertised two HP touchpads for sale on Craig's List. He received a call from the same number that had been used to contact the other victims. (R. 82: 34, 41). U.L. met with the caller and exchanged the touchpads for currency that turned out to be counterfeit. (R. 82: 35). U.L. gave the serial numbers to police. He identified Exhibit 73 as the box he had given the man in exchange for the counterfeit money. (R. 82: 36). .

M.W. got a call in response to his advertisement on Craig's List to sell an Asus Transformer tablet. (R. 83: 5). He met with the caller, who gave him currency in a bank envelope that turned out to be counterfeit in exchange for the tablet. He then pulled out a cell phone, said "start the car," and ran. (R. 83: 7). M.W. described the person as "a black male, approximately 30 to 34 years old, 6'4" to 6'5", 250 pounds." The meeting occurred during the evening, and it was dark outside. (R. 83:9). There was no evidence of a firearm or holster. (R. 83: 11).

S.C. testified that he advertised an ACER computer for sale on Craig's List in early November, 2011. (R. 81: 93). A man called offering to purchase it. (R. 81: 94). He agreed to meet the man at a Walgreen's. (R. 81: 95). He never met with the man. He got a call from police and met with them. (R. 81: 65).

The arrest of Mr. Carter

Detective Bodo Gajevic testified that he conducted surveillance at 4117 North Sherman Boulevard on November 4, 2011. He saw Mr. Carter coming and going from the residence. (R. 82: 69-70).

At 6:15 or 6:30 P.M. Detective Gajevic saw Mr. Carter leave the residence and received information from Officer Fuhrman that Mr. Carter would be going to the area of 53rd and Capitol where a buy was being set up between Mr. Carter and a person who was selling something. (R. 82: 71, 77). Detective Gajevic went to that location and saw Mr. Carter standing outside the Walgreens. (R. 82: 71). Uniformed officers arrived, and Mr. Carter was arrested. (R. 82: 72). Counterfeit currency in a bank envelope was found in a search of Mr. Carter. (*Id*.).

Officer Fuhrman dialed the number that had been used to contact the victims, (414) 484-6617, and one of the cell phones that were recovered from Mr. Carter at the time of his arrest rang. (R. 82: 76; R. 83: 13). Detective Gajevic patted down Mr. Carter at the time of his arrest, and no gun was found. (R. 82: 79).

Officer Fuhrman identified the T-shirt that Mr. Carter was wearing at the time of his arrest, which he said matched the T-shirt worn by the perpetrator in the surveillance video that captured part of the armed robbery involving D.C. (R. 82: 97).

The Execution of the Search Warrant

Officer Fuhrman testified that a search warrant was executed at the Sherman Boulevard residence. Present were

Clara Carter, Takira Colllins, Lorell Howard, Tanesha Carter, and Caswon Barksdale. (R. 82: 98- 99).

Officer Fuhrman testified that during the execution of the search warrant a piece of mail addressed to Mr. Carter at the Sherman Boulevard address was found in the basement along with "a few" other "identifiers." (R. 82: 10). Also found in the basement was the Play Station 3 gaming system belonging to R.K. inside a box belonging to C.L. In the rafters of the basement, police located a box for an HP tablet belonging to U.B. (R. 82: 100; R. 83: 20). Also found in the basement was a black semiautomatic pistol in a black holster between the couch cushions. (R. 82: 101-102; R. 83: 20). Officer Fuhrman also discovered a paper box containing counterfeit currency. (R. 82: 102). Male clothing consistent with Mr. Carter's build was found in the basement. (R. 83: 44).

In the northwest bedroom on the first floor, Officer Fuhrman found a pill bottle from 2008 with Mr. Carter's name on it. He also found a money gram with Mr. Carter's name on it as the sender. (R. 82: 103; R. 83: 31, 32; R. 83: 34). The pill bottle was found inside a luggage bag. (R. 83: 24). He also found a counterfeit $50 bill and a Guaranty Bank envelope as well as an oversized watch that looked like the one worn by the perpetrator in the surveillance video that captured part of the armed robbery of D.C. (R. 82: 104; R. 83: 24). However, Officer Fuhrman also identified Exhibit 130 as an oversized watch that also matched the watch in the surveillance video that was on Mr. Carter's wrist at the time of his arrest. (R. 83: 27-28).

In that bedroom, Officer Fuhrman also found a Mak-90 assault-type rifle or a "7.62 assault style firearm." (R. 82: 104; R. 83: 32). There was no ammunition found for this gun. (R. 83: 42). The officer said his recollection was that male clothing was found in this bedroom. (R. 83: 43). The male clothing that was consistent with Mr. Carter's build was underwear. (R. 83: 44).

When he initially testified, Officer Fuhrman said that he found a county or state identification card with Mr. Carter's name on it in the northwest bedroom as well. (R. 82: 103). However, later when going through the photographic exhibits, Officer Fuhrman identified Exhibits 117 and 123 as a Wisconsin ID and a county ID both bearing Mr. Carter's name and picture. He indicated twice that these items were located in the northeast bedroom. (R. 83: 24, 26, 31, 33). He then testified that a debit card bearing Mr. Carter's name was located in the northwest bedroom. (R. 83: 33; R. 83: 38).

In the northeast bedroom, Officer Fuhrman testified that he found mail addressed to Mr. Carter as well as his driver's license. (R. 82: 104). In a closet, Officer Fuhrman found three rifles and an antique-type handgun. (R. 82: 105). These firearms were the basis for the felon in possession charges in counts 6, 7, 8, and 9, on which Mr. Carter was acquitted. The officer's recollection was that both male and female clothing were found in this bedroom. (R. 83: 43). The male clothing that was consistent with Mr. Carter's build was underwear. (R. 83: 44).

There was another bedroom containing items that appeared to belong to Mr. Carter's sister, Tenesha. There were no items of evidentiary value located in that room. (R. 83: 15).

An Acer Tablet PC with the serial number corresponding to D.C.'s property was found in the kitchen. (R. 83: 20). An Asus pad matching the description M.W.'s stolen property was found in the living room. (R. 83: 6; R. 83: 19). An HP Tablet box bearing the serial number that corresponded to U.B.'s stolen property was found in the rafters of the basement. (R. 83: 16-17). Counterfeit currency was found in a "lint box" in the wall of the garage. (R. 83: 21).

Tenesha Carter's name was on the lease to the Sherman Ave. residence, and possibly her mother's as well. Mr. Carter was not on the lease. (R. 83: 33). Tenesha Carter testified that her she lived in the house with her mother, her son, and her fiancé. (R. 83: 79). She testified that Mr. Carter did not live there. However, on rebuttal, Officer Fuhrman testified that Tenesha Carter had told him that Mr. Carter lived in the home and that "[s]he stated that he either sleeps in the basement or the northwest bedroom located on the first floor."

Ms. Carter testified that her twenty-three year old nephew had access to the house and at one point had keys. (R. 83: 80). She said her mother kept rifles in the house that had belonged to her deceased step-father. (R. 83: 80-81). Mr. Carter was acquitted of the firearm counts involving the four guns found in the northeast bedroom.

Tenesha Carter testified that her step-father was from Ohio. (R. 83: 81). Officer Fuhrman testified that the "assault style" rifle found in the northwest bedroom was known to have been stolen from Mount Vernon, Ohio. (R. 83: 48). The parties stipulated that Mr. Carter had previously been convicted of a felony. (R. 83: 54).

The Burglary

F.A. testified that he was the owner of Home Run Foods on Florist Avenue in Milwaukee. R. 81: 30). He testified that on June 9, 2011, he arrived at the store to find its ATM had been taken. The burglar had apparently broken through the wall between the store and the daycare center next door and had removed the ATM that way. (R. 81: 31).

Detective Robert Laloggia testified that the ATM taken from Home Run Foods was the same one that was recovered at 4117 North Sherman Boulevard. (R. 81: 42). The ATM was located in the garage with a plastic black garbage bag covering it. (R. 83: 17).

Detective Douglas Williams testified that he recovered two garbage bags from the room in the daycare center where the hole had been made in the wall. (R. 81: 98). He took the serial number of the missing ATM from the owner. (R. 81: 106).

Lee Vedbraaten, a forensic investigator for the Milwaukee Police Department, testified that he lifted three fingerprints from one of the plastic bags that were brought to him by Detective Williams from the burglary scene. (R. 82: 10). Douglas Kneuppel, a latent print examiner for the Milwaukee Police Department, testified that Mr. Carter was the source of three fingerprints that were found on the bag. (R. 82: 17).

Chet St. Clair, a forensic investigator for the Milwaukee Police Department, testified that he lifted two fingerprints from the large plastic bag or tarp, presumably the one that had been found covering the ATM in the garage. (R. 81: 115). He admitted that he had no way of knowing how long the fingerprints had been on the tarp. (R. 81: 116).

Andrew Smith, a latent print examiner for the Milwaukee Police Department, testified that he analyzed the two prints lifted from the plastic bag by Chet St. Clair. (R. 82: 45). He identified one of them as matching Mr. Carter. (R. 82: 45).

ARGUMENT

I. The Burglary Count was Improperly Joined with the Other Counts and Should Have Been Tried Separately.

A. Legal principles regarding joinder and severance.

The court may order that multiple counts be tried together if the crimes "could have been joined in a single complaint." Wis. Stat. § 971.12(4). Under Wis. Stat. § 971.12(1) two or more crimes may be charged in a single complaint only if:

> the crimes charged ... 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.

To be of the "same or similar character" under Wis. Stat. § 971.12(1), crimes must be "the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap***." State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584, 588, (Ct. App. 1988), citing ***State v. Hoffman***, 106 Wis.2d 185, 208, 316 N.W.2d 143, 156 (Ct.App.1982). It is not sufficient that the offenses involve merely the same type of criminal charge. *Id*.

The initial decision on joinder is a question of law that the appellate courts review de novo. ***State v. Salinas***, 2016 WI 44, ¶ 30, 369 Wis. 2d 9, 26, 879 N.W.2d 609, 618 (citing *See* ***State v. Locke***, 177 Wis.2d 590, 596–97, 502 N.W.2d 891 (Ct.App.1993); ***Hoffman***, 106 Wis.2d at 208–09).

Even if charges would satisfy joinder requirements, a court may order separate trials "[i]f it appears that a defendant or the state is prejudiced by a joinder of crimes." Wis. Stat. § 971.12(3). A motion for severance is addressed to the trial court's discretion. Appellate courts review the circuit court's decision for an erroneous exercise of discretion. ***Salinas***, 2016 WI 44, at ¶ 30, 369 Wis. 2d at 27, 879 N.W.2d at 618.

B. The burglary count involving the ATM was improperly joined.

In this case, the burglary count was improperly joined with the remaining counts in the first instance. The burglary count was not "of the same or similar character" to any of the other charges. First, the burglary was not "the same type of crime" as any of the other charges. This seems self-evident. This Court has specifically held that a burglary is not the same type of crime as an armed robbery. ***State v. Davis,*** 2006 WI App 23, ¶ 18, 289 Wis. 2d 398, 411, 710 N.W.2d 514, 520. The burglary involving the ATM shares no particular similarity with thefts by fraud, forgery/uttering, or possession of a firearm by a felon. Further, while the thefts by fraud, the associated forgery/uttering offenses, and the armed robbery all occurred over a "relatively short period of time," the burglary occurred four months before the other crimes.[1]

[1] The verdict forms listed the date corresponding to each offense. The burglary was alleged to have occurred on or about June 9, 2011. The closest charges in time were those alleged to have occurred on October 10, 2011.

The circuit court, the Honorable Charles Kahn, in allowing joinder and denying the defense motion to sever, took a backward approach to the analysis. The court skipped the questions of similarity and timing and decided that the charges were properly joined simply because the evidence was found at the same location. (R. 77: 98-100; App. 117-119). The court concluded that this fact alone justified joinder.

Undersigned counsel can find no support for the proposition that joinder is appropriate merely because evidence of multiple dissimilar offenses was discovered during the same search. The circuit court skipped entirely the question whether the crimes were "the same type of crime occurring over a relatively short period of time." ***Hamm***, 146 Wis. 2d at 138, 430 N.W.2d at 588. They were not.

Nor was the burglary a part of the same transaction or common scheme or plan with or connected to the other offenses. The charges related to the fraud scheme, the armed robbery, and the possession of the handgun charged in counts 2 and 4 satisfied the statutory requirements for joinder under Wis. Stat. § 971.12(1) because they were all parts of the same transaction or a common scheme or plan. The same cannot be said of the burglary charge. There was no transactional relationship or common scheme or plan between the fraud scheme, or the armed robbery and the burglary four months earlier.

Again, undersigned counsel can find no support for the notion implicit in the circuit court's remarks, that offenses are transactionally related whenever evidence of them is found at the same address. The circuit court's analysis begs the question: if the officers had stumbled across a dead body

during the execution of the warrant, could the State have joined a homicide with the other charges? The circuit court's decision regarding the initial joinder was wrong as a matter of law.

In denying Mr. Carter's postconviction motion, Judge Frederick C. Rosa[2] said without explanation that he "tend[ed] to concur with Judge Kahn's findings and probably would not have severed count three either." (R. 112: 4; App. 104). However, the postconviction court denied the motion based on its conclusion that any error was harmless. (Id.).

The error was not harmless. Trying charges together creates the risk "that the jury will cumulate the evidence of the crimes charged and find guilt when it otherwise would not if the crimes were tried separately." ***State v. Bettinger***, 100 Wis. 2d 691, 697-98, 303 N.W.2d 585 (1981). That risk was particularly present here.

Although the ATM machine was found in his sister's garage, the testimony established that multiple people had access to the property including Mr. Carter's adult nephew, who at times had keys to the property. (R. 83: 80). The misjoinder created the danger that the jury would find Mr. Carter guilty of the burglary where it otherwise would not because of the evidence of the fraud scheme and firearms possession.

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[2] Judge Charles F. Kahn, Jr. denied the defense motioin to sever and allowed the counts to be tried together. Judge Frederick C. Rosa rendered the decision denying Mr. Carter's postconviction motion. (R. 112).

Further, in finding any error to be harmless, the circuit court ignored the fact that Mr. Carter's postconviction motion requested a hearing at which he proposed to testify that if the burglary had been tried separately, he would have exercised his right to testify. (R. 106: 13). He would have described how his nephew and numerous friends came and went freely including in the garage. Nothing tied Mr. Carter in particular to the burglary except the fingerprints found on the plastic bag and tarp (R. 82: 17, 45). Mr. Carter would have testified at a separate trial that he had nothing to do with the burglary and did not know the ATM was hidden in the garage. He would have explained that equipment and tools belonging to him (and handled by him), including plastic bags and tarp, were stored in his sister's garage and readily available for the use of anyone passing through. The misjoinder of the charges forced Mr. Carter to elect between exercising his right to remain silent regarding the other charges and his right to testify regarding the burglary[3]

C. Counsel provided ineffective assistance.

To prevail on a claim of ineffective assistance of counsel, Mr. Carter must show that counsel's performance was deficient, meaning that it fell "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690, 104 S.Ct. 2052 (1984). Further, he must show that he was prejudiced by these

[3] This court has held that when charges are *properly* joined under Wis. Stat. § 971.12(1), the defendant's wish to assert his Fifth Amendment privilege as to one while testifying regarding another is not a sufficient basis for finding unfair prejudice and severing the charges under § 971.12(3). ***State v. Hamm***, 146 Wis. 2d 130, 140, 430 N.W.2d 584, 589 (Ct. App. 1988). However, here, the charges were *not* properly joined at the outset, and Mr. Carter asserts that the Hobson's choice resulting from the improper joinder precludes a finding of harmless error.

failings, meaning that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id***. at 694, 104 S.Ct. 2052.

Trial counsel did move to sever the burglary charge from the remaining charges for trial. (R. 9). However, trial counsel's motion was limited to the argument that the joinder of the charges was unfairly prejudicial and that severance should be granted under Wis. Stat. § 971.12(3). Because trial counsel never asserted that the charges were improperly joined in the first instance under Wis. Stat. §971.12(1), it is arguable that this claim was waived. Therefore, in his postconviction motion Mr. Carter asserted alternatively that trial counsel provided ineffective assistance and requested a Machner hearing. (R. 106: 1, 20).

It was obvious that the burglary was not of the same or similar character, based on the same act or transaction, connected together, or part of a common scheme or plan with the other charges. Trial counsel's failure to argue based on the plain language of Wis. Stat. § 971.12(1) that the charges were not properly joined was deficient performance. By skipping the analysis of whether the charges were properly joined at the outset and jumping straight to the question of unfair prejudice, trial counsel took on an unnecessary burden. Furthermore, it appears likely that trial counsel's failure to analyze whether joinder was proper in the first instance likely caused the Court's analysis to veer off track.

The deficiency was prejudicial. Again, trying charges together results in the risk "that the jury will cumulate the evidence of the crimes charged and find guilt when it otherwise would not if the crimes were tried separately." ***Bettinger***, 100 Wis. 2d at 697-98. "[A]lthough a single trial

may be desirable from the standpoint of economical or efficient criminal procedure, the right of a defendant to a fair trial must be the overriding consideration." ***State v. Brown***, 114 Wis. 2d 554, 559, 338 N.W.2d 857 (Ct. App. 1993).[4] Further, as discussed above, Mr. Carter would have testified at a trial of the burglary charge. Trial counsel's failure to correctly argue the motion to sever made it necessary for Mr. Carter to choose between his right to testify regarding the burglary and right to remain silent as to the charges related to the fraud scheme. He should never have had to make this election between two competing constitutional rights.

II. Count Five Should Have Been Severed From the Remaining Counts for Trial.

A. Joinder of the charge that Mr. Carter possessed an "assault-style" rifle with the remaining charges caused unfair prejudice.

Count 5 charged Mr. Carter with being a felon in possession of a firearm, specifically "7.62 caliber rifle." At trial, Officer Fuhrman described the weapon that was the subject of count 5 alternatively as a "Mak-90 assault-type rifle" or a "7.62 assault style firearm." (R. 82: 104; R. 83: 32). This count was properly initially joined in a complaint with the others under Wis. Stat. §971.12(1). It was a charge of possession of a firearm by a felon, like the charge in counts 2 and 4 (which were properly joined to the other charges as being part of a common scheme or plan with the armed robbery, which was part of a common scheme with the fraud-related charges). Further, the felon in possession charge in count 5 and the other counts occurred within a short period of time, and evidence of the charges overlapped (since

[4] ***Brown*** involved a question of consolidation of co-defendants' trials, but its rationale applies equally here.

presumably the officers would have had to discuss the fraud scheme in order to explain why the presence of the counterfeit currency in the same room as the firearm was significant). However, this does not end the analysis.

Even if charges would satisfy joinder requirements, a court may order separate trials "[i]f it appears that a defendant or the state is prejudiced by a joinder of crimes." Wis. Stat. § 971.12. If the evidence of the counts severed would be admissible in separate trials, "the risk of prejudice arising because of joinder is generally not significant.". ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). The "test for failure to sever thus turns to an analysis of other crimes evidence under ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967)." Id. This asks: (1) Does the evidence fit within an exception set forth in Wis. Stat. § 904.04(2)?; (2) Is the evidence relevant under Wis. Stat. §904.01?; and (3) Is the evidence's probative value substantially outweighed by the danger of unfair prejudice under Wis. Stat. § 904.03? ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

The joinder of count 5 with the other charges was unfairly prejudicial to Mr. Carter. The jury that was weighing the evidence regarding the fraud scheme was told that Mr. Carter possessed an "assault-style rifle." Conversely, the jury that was weighing the evidence of Mr. Carter's guilt or innocence of the possession of the assault-style rifle was inundated with evidence regarding 19 other unrelated criminal counts, including an armed robbery.

In denying Mr. Carter's postconviction motion, the postconviction court also concluded that any gun evidence could be arguably prejudicial, but would not require severance. (R. 112: 6; App. 106). But an "assault rifle" is not

just any gun. The words "assault rifle" suggest a large, scary, militaristic weapon. Many ordinary citizens own handguns. Not many own assault rifles.

The postconviction court also concluded that trial counsel would not have prevailed on a motion to sever Count 5 "given that the assault rifle was found with the defendant's identifiers in the northwest bedroom of his sister's home." (R. 112: 6; App. 106). But if the assault rifle evidence was unfairly prejudicial, it is unclear why the physical *proximity* of the assault rifle to evidence of other counts should matter.

The risk of prejudice is generally not significant if evidence of each severed count would have been admissible at a trial of the other counts and vice-versa. ***Locke***, 177 Wis. 2d at 597. But here, it cannot reasonably be argued that under Wis. Stat. §904.02 and ***Whitty***, evidence of Mr. Carter's possible possession of an assault-style rifle would have been admissible other act evidence in a trial of the fraud scheme and the armed robbery with a handgun. Nor can it be argued that the evidence of the fraud scheme and related armed robbery with a handgun would have been admissible other act evidence at a trial of the possession of the assault-style rifle. The charges should have been severed under Wis. Stat. § 971.12(3).

B. Trial counsel provided ineffective assistance in failing to move to sever count 5 from the remaining counts.

Trial counsel never asked the circuit court to sever count 5 from the remaining counts. In denying the postconviction motion, judge Rosa found that trial counsel was not ineffective because the court wrongly concluded that a motion to sever count five would not have been granted. (R. 112: 7; App. 107). The motion should have been granted, and

trial counsel's failure to pursue severance fell "outside the wide range of professionally competent assistance" and was deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 690, 104 S.Ct. 2052 (1984).

The deficiency was prejudicial. Mr. Carter argues below that the evidence that he possessed the assault-type weapon was insufficient to support a conviction. But for the sake of the present argument, suffice it to say the evidence supporting Count 5 was extremely weak. The bombardment of the jury with evidence relating to 19 other unrelated criminal counts, including possession of a handgun and armed robbery, likely contributed substantially to the conviction of Mr. Carter on count 5.

There is also a substantial danger that the allegation that Mr. Carter possessed an assault-type weapon contributed to the jury's conviction of him on the charge of armed robbery. The evidence that Mr. Carter was armed in the incident involving D.C. was problematic for the State. D.C.'s testimony regarding the weapon was inconsistent. (R. 81: 50-51, 66). Further, although Mr. Carter was charged in connection with six very similar transactions, the interaction regarding D.C. was the only one in which it was claimed he was armed. Most significantly, when police set up a fake Craig's List sale and arrested Mr. Carter at the sale point, he was unarmed. An allegation of possession of an extremely dangerous assault-style rifle – even the use of the terms "assault" and "rifle" together carries extremely inflammatory implications. There is a very real likelihood that this allegation contributed to the jury's willingness to find Mr. Carter guilty of armed robbery.

Further, Mr. Carter asserted in his postconviction motion that would testify that if he had been tried separately on count 5, he would have exercised his right to testify and would have testified that he was not staying in the northwest bedroom, was unaware of the presence of the assault-style weapon, and had never possessed it. (R. 106: 16). Trial counsel's failure to move to sever count 5 from the remaining counts made it necessary for Mr. Carter to choose between his right to testify regarding that offense and his right to remain silent regarding the other unrelated charges – a choice he never should have been forced to make.[5]

III. There Was Insufficient Evidence Presented at Trial to Support the Conviction on Count 5.

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

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[5] Again, Mr. Carter recognizes that this Hobson's choice would not have been a sufficient to require severance. ***Hamm,*** 146 Wis. 2d at 140, 430 N.W.2d at 589. Here, Mr. Carter asserts that severance should have been granted for the reasons discussed above and that the Hobson's choice is an example of the prejudice that flowed from trial counsel's failure to move for severance.

A reviewing 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. ***State v. Henthorn***, 218 Wis.2d 526, 629-30, 581 N.W.2d 544 (Ct. App. 1998). If the reviewing court determines that the evidence is insufficient, it must reverse the conviction. ***State v. Wulff***, 207 Wis.2d 144, 145, 557 N.W.2d 813 (1997), citing ***United States v. Burks***, 437 U.S.1, 18 (1978).

In order to obtain a conviction on the charge in count five involving the "assault-style rifle" it was necessary for the State to prove that Mr. Carter possessed a firearm. In order to prove possession, the State was not required to prove that he owned the firearm. ***State v. Loukota***, 180 Wis. 2d 191, 201, 508 N.W.2d 896 (Ct. App. 1993). However, proof of possession did require that the State prove that he "knowingly had actual physical control" of the weapon. ***State v. Black***, 2001 WI 31, ¶ 19, 242 Wis. 2d 126, 142, 624 N.W.2d 363, 371. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. *See*, ***Schwartz v. State***, 192 Wis. 414, 418, 212 N.W. 664 (1927); ***Doscher v. State***, 194 Wis.67, 69, 214 N.W. 359 (1927).

At trial, Officer Fuhrman described the weapon that was the subject of count 5 alternatively as a "Mak-90 assault-type rifle" or a "7.62 assault style firearm." (R. 82: 104; R. 83: 32). The officer found this weapon during the execution of the search warrant in the northwest bedroom on the first floor.

In that bedroom, the officer also found: a pill bottle from 2008 with Mr. Carter's name on it, which was inside a luggage bag. (R. 83: 24); a money gram with Mr. Carter's name on it as the sender (R. 82: 103; R. 83: 31, 32; R. 83: 34); a counterfeit $50 bill and a Guaranty Bank envelope; an oversized watch that the officer believed looked like the one worn by the perpetrator in the surveillance video that captured part of the armed robbery of D.C.; and a debit card bearing Mr. Carter's name. (R. 82: 104; R. 83: 24).

The officer said his recollection was that male clothing was found in this bedroom. (R. 84: 43). But when asked whether there was any male clothing consistent with Mr. Carter's build, he responded only underwear in a drawer. (R. 83: 44). There was no ammunition found for the gun. (R. 83: 42).

Mr. Carter was not a tenant on the lease at the property and did not exercise exclusive control over it. Mr. Carter's sister was the tenant on the lease (possibly along with Mr. Carter's mother). Living in the house at the time were Mr. Carter's sister, her fiancé, her son, and Mr. Carter's mother. (R. 83: 33, 79). According to Officer Fuhrman, Mr. Carter's sister "stated that [Mr. Carter] either sleeps in the basement or the northwest bedroom located on the first floor." (R. 85: 10).[6]

Viewing the evidence in the light most favorable to the conviction, the most that can be said is that it raised a reasonable inference that Mr. Carter had been in the

[6] It is unknown whether Ms. Carter was indicating that Mr. Carter slept in one of those two locations and she was not sure which, or whether she was indicating that he alternated between the two locations, and, if so, how frequently. Her meaning was never clarified.

northwest bedroom and that he may have slept there, although there is no way to infer when or how many times. There was no evidence presented that would suggest, let alone prove, that he slept there regularly or that he had taken the room as exclusively his bedroom. There was a luggage bag there that contained an old pill bottle. There was no evidence that there were any clothes or other personal effects in the luggage and no clothing that could have been his besides some underwear. (R. 83: 44).

The presence of Mr. Carter's debit card in the room suggested that he had probably been in the room recently. The presence of the counterfeit bill and the money gram did little to tie Mr. Carter to that particular room since, according to the officer, counterfeit currency and paperwork bearing Mr. Carter's name were found throughout the house and in the garage. The watch added nothing. Although the officer testified that it was significant because it was similar to the one in the surveillance footage of the armed robbery, he also identified Exhibit 130 as an oversized watch that matched the watch in the surveillance video and that was on Mr. Carter's wrist at the time of his arrest. (R. 83: 27-28).

Although the jury could infer that Mr. Carter had been in the northwest bedroom recently, there was no evidence presented that Mr. Carter even knew about, let alone had "actual physical control" of the gun at any time. Most strikingly, there was no evidence presented of where in the room the rifle was found. Was it out in the open? Was it well concealed? On the bed? Under the bed? In the back of the closet? In a box buried under other items? In a case? The jury was not told. There simply was not enough evidence to suggest a probability, let alone proof beyond a reasonable doubt, that Mr. Carter had ever knowingly possessed the gun.

While a case may be proved with circumstantial evidence, the evidence must be "sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 502, 451 N.W.2d 752 (1990). That standard was not met here.

CONCLUSION

Wherefore, Mr. Carter asks that the Court vacate the judgment of conviction, dismiss Count 5 and grant him new trials as to the remaining counts. Alternatively, he requests that the Court grant him a ***Machner*** hearing on his claims of ineffective assistance of counsel.

Dated this 23rd day of August, 2016.

Respectfully submitted,

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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 6,887 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 23rd day of August, 2016.

Signed:

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CERTIFICATION AS TO APPENDIX

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

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

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

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