STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1054-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES DARNELL CARTER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE CHARLES F. KAHN (JUDGMENT) AND THE HONORABLE FREDERICK C. ROSA (ORDER), PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF-IN-CHIEF

BRAD D. SCHIMEL
Wisconsin Attorney General

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State doesn't request oral argument or publication of this Court's opinion. The briefs-in-chief fully address the issues on appeal, and fully develop the theories and legal authorities on each side. Well-established rules of law govern each issue and the corresponding argument.

INTRODUCTION

In Milwaukee, the classified advertisement website *Craigslist* opened new vistas for criminals with Internet access and a little nerve.

Enter James C. Carter. He saw opportunities and took them.

The State charged Carter with 20 crimes: six counts of forgery-uttering, four counts of theft by fraud, one count of armed robbery, one count of attempted theft by fraud, one count of burglary, and seven counts of possessing a firearm as a convicted felon. (19.)

The probable cause portion of the criminal complaint described the nature of the charges:

- The six forgery-uttering charges and the four theft by fraud charges arose out of Carter's scheme to pose as a prospective buyer of computer equipment. He arranged purchases from Craigslist sellers, met them, paid for the goods with counterfeit money, and fled. (For brevity, the State refers to these as *scam purchases*).

- The single armed robbery charge arose when a scam purchase went bad. The seller's husband quickly discovered the counterfeit money. Carter fled. The seller chased him, then backed off when Carter displayed a handgun and threatened to shoot her.

- The single attempted theft by fraud charge arose when police arrested Carter before he could complete another scam purchase.

- The single burglary charge arose when police, discovered a stolen automated teller machine (ATM) in Carter's garage during execution of a search warrant.

- The seven felon-in-possession charges arose when police discovered and seized firearms found in Carter's residence during execution of the same search warrant.

(2:2-6.)

The search of Carter's garage and residence revealed evidence linking him to each charged crime. The evidence included stolen computer equipment and packaging, counterfeit money and counterfeiting supplies, Carter's fingerprints on bags concealing the ATM, and the firearms involved in the weapons offenses. (*Id.*)

Carter's victims testified during a single, four-day trial. (81; 82; 83; 84; 85.) The jury convicted him of the forgery-utterings, the thefts by fraud, the armed robbery, the attempted theft by fraud, the burglary, and three of the seven counts of felon-in-possession. It acquitted him on the other four weapons counts. (23.)

Carter raises multiple claims on appeal:

- He claims the circuit court committed prejudicial error by failing to grant his pretrial motion to sever Count Three—the burglary charge—from the remaining nineteen charges under Wis. Stat. § 971.12(3).

- He claims his trial counsel performed ineffectively by failing to move for severance of Count Three from the remaining nineteen charges under Wis. Stat. § 971.12(1).

- He claims the joinder of Count Five—the felon-in-possession charge involving an assault type rifle—with the other charges prejudiced him.

- He claims his trial counsel performed ineffectively by failing to move for severance of Count Five.

- He claims the State failed to prove the allegations in Count Five beyond a reasonable doubt.

The ineffective assistance claims require this Court to consider Carter's related allegations of prejudice within the context of *Strickland v. Washington,* 466 U.S. 668 (1984). *See State v. Erickson,* 227 Wis. 2d 758, 765-68, 596 N.W.2d 749 (1999).

For all the reasons discussed below, this Court should affirm Carter's convictions. The State will present and discuss relevant historical facts where necessary.

ARGUMENT

I. General principles of law governing Carter's claims.

A. Joinder and severance.

Initial joinder. Wisconsin Stat. § 971.12(1) permits initial joinder of two or more crimes in the same complaint or information if they 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. Courts broadly construe this statute in favor of initial joinder. *State v. Salinas,* 2016 WI 44, ¶ 31, 369 Wis. 2d 9, 879 N.W.2d 609.

The State believes Carter's case involves two or more crimes based on two or more transactions "connected together." In *Salinas*, the supreme court considered multiple, non-exclusive factors in deciding whether crimes were connected together for purposes of initial joinder:

- Are the charges closely related?
- Are there common factors of substantial importance?
- Did one charge arise out of the investigation of the other?
- Are the crimes close in time or close in location?
- Do the crimes involve the same victims?
- Are the crimes similar in manner, scheme or plan?

- Was one crime committed to prevent punishment for another?

- Would joinder serve the goals and purposes of § 971.12?

Id. ¶ 43. Initial joinder decisions present questions of law, reviewed de novo. *Id.* ¶ 30. Similarities between federal law and § 971.12 also make federal authority useful when resolving joinder issues. *State v. McGuire,* 204 Wis. 2d 372, 380 n.5, 556 N.W.2d 111 (Ct. App. 1996) (citation omitted).

Relief from prejudicial joinder. Even after initial joinder, § 971.12(3) allows a circuit court to order separate trials "[i]f it appears that a defendant or the state is prejudiced by a joinder of crimes[.]

> When a defendant moves to sever, the trial court must determine what, if any, prejudice would result from a trial on the joined offenses, and weigh that potential prejudice against the interests of the public in conducting a trial on the multiple counts. In order to establish that the trial court erroneously exercised its discretion, the defendant must establish that he or she suffered substantial prejudice. Yet, if the offenses meet the criteria for joinder, it is presumed that the defendant will suffer no prejudice from a joint trial. That is, however, a rebuttable presumption.

State v. Linton, 2010 WI App 129, ¶ 15, 329 Wis. 2d 687, 791 N.W.2d 222 (citations, quotation marks, and internal editing omitted).

A circuit court's decision on a motion to sever under § 971.12(3) is discretionary. *Salinas,* 369 Wis. 2d 9, ¶ 30. This Court will affirm the decision if the circuit court

examined the relevant facts, applied a proper legal standard, and used a rational process to reach a conclusion that a reasonable court could reach. *See Loy v. Bunderson,* 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

Harmless error analysis applies to erroneous joinder. *State v. Leach*, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). Under harmless error analysis, an "error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Harvey*, 2002 WI 93, ¶¶ 49, 51, 254 Wis. 2d 442, 647 N.W.2d 189, quoting *Neder v. United States*, 527 U.S. 1, 18 (1999). The harmless error test is essentially consistent with the test for prejudice under *Strickland*. *State v. Eison,* 2011 WI App 52, ¶ 11, 332 Wis. 2d 331, 797 N.W.2d 890.

"The potential problem as a result of a trial on joint charges is that a defendant may suffer prejudice since a jury may be incapable of separating the evidence relevant to each offense or because the jury may perceive a defendant accused of several crimes is predisposed to committing criminal acts." *Leach*, 124 Wis. 2d at 672. "As to the first concern, there is no prejudice from misjoinder when the several counts are logically, factually and legally distinct, so that the jury does not become confused about which evidence relates to which crime and considers each of the separately." *Id.* "As to the second concern, misjoinder may also be harmless when evidence of the defendant's guilt of each offense is overwhelming." *Id.* at 673.

B. Ineffective assistance.

Carter must prove trial counsel rendered deficient performance that resulted in actual prejudice. *Strickland,* 466 U.S. at 687-88 (1984); *Erickson,* 227 Wis. 2d at 773. This

Court presumes competent representation. *Harrington v. Richter,* 562 U.S. 86, 103-104 (2011).

To prove deficient performance, Carter must identify specific acts or omissions by trial counsel that fall "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690. Pertinent here, trial counsel isn't ineffective for failing to make a meritless motion. *State v. Simpson,* 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

To prove actual prejudice, Carter must show trial counsel's deficient performance deprived him of a fair trial with a reliable outcome. *Strickland,* 466 U.S.at 687. He must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The two *Strickland* prongs present mixed questions of law and fact. *State v. Pitsch,* 124 Wis. 2d 628, 633-34, 369 N.W.2d 628 (1985).

C. Sufficiency of the evidence.

Jury verdicts receive deferential appellate review:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not

> overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

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

Carter can't simply posit different or competing inferences from the evidence. This Court must follow the inferences that support the verdict. *Id.* at 506-07. A jury can select from competing inferences drawn from the evidence and may, within the bounds of reason, reject an inference consistent with innocence. *Id.* at 506.

Juries determine witness credibility and decide whether to accept or reject certain evidence. *Id.* at 506. "This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence [that] conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990) (citation omitted).

A conviction may rest entirely on circumstantial evidence. The test for evidentiary sufficiency remains the same. *Poellinger,* 153 Wis. 2d at 501-02.

II. Trial counsel's failure to move the circuit court to sever the burglary charge under § 971.13(1) doesn't constitute ineffective assistance.

Carter moved the circuit court pretrial under § 971.12(3) to sever the burglary charge from the other charges on grounds of unfair prejudice. (9.) The prosecutor argued in response that, because the law enforcement search of Carter's residence and garage yielded evidence of all the

charged crimes, proof of those discoveries would be cross-admissible at multiple trials to demonstrate that Carter committed each offense. (77:90-93.)

The circuit court denied the motion, concluding that "the problem for Mr. Carter on this issue is what [the prosecutor] just explained, that the evidence, that is the items taken from the various larcenous events . . . all ended up in the same place." (77:97.)

Carter repeats his argument here. He believes trial counsel should have proceeded under § 971.12(1). He claims the burglary count was improperly joined with the remaining counts "in the first instance." Carter's Br. 13. He points to dissimilarities between the burglary charge and the remaining charges, and asserts a lack of legal support for the proposition "that joinder is appropriate merely because evidence of multiple dissimilar offenses was discovered during the same search." *Id.* at 14.

Carter also believes that, no matter which statute applies, he suffered prejudice based on the possibility the jury "cumulate[ed]" the evidence and convicted him, especially since other people had access to the property where police found the ATM. *Id.* at 15. And he asserts that, had there been a separate trial on the burglary charge, he would have testified. *Id.* at 16.

Trial counsel didn't err in failing to raise a claim of improper joinder under § 971.12(1). The burglary charge was properly joined with the other charges. And Carter suffered no actual prejudice from that joinder.

A. Because the burglary charge was "connected together" with the other charges, a severance motion under § 971.12(1) would have failed.

Initial joinder is proper "when two or more crimes are based on two or more acts or transactions that are 'connected together.'" *Salinas,* 369 Wis. 2d 9, ¶ 31.

That's what we have here. Because the burglary charge was connected together with the other charges, a severance motion under § 971.12(1) would have failed.

Many of the *Salinas* factors used to determine whether separate crimes are connected together support the initial joinder.

The first three factors—a close relationship between the charges, the presence of common factors of substantial importance, and one charge arising out of the investigation of others—support the initial joinder.

The charges were closely related. With the exception of the felon-in-possession charges, all were crimes against a property owner's right of possession.

And a single police search of Carter's residence and garage during the investigation of Carter's scam purchases revealed evidence of not only the burglary, but also each and every other charge brought in the complaint and the information, including the felon-in-possession charges. (2:2-6.) The circuit court found in postconviction proceedings that "[t]he victims [from whom Carter conducted his sham purchases] had provided police with the serial numbers of the items that had been taken, and these items were found in the same location with the ATM." (112:5.)

For purposes of initial joinder, the discovery of all the evidence in a single location during an investigative search forged a close relationship between the burglary and each of the other charged crimes. The discovery was a common factor of substantial—possibly overarching—importance. And all the charges arose out of the initial investigation of Carter's scam purchases on Craigslist.

The fourth *Salinas* factor—crimes committed closely in time and location—also favors initial joinder. The charged crimes spanned a five-month period, and all of them occurred in Milwaukee County. (112:1.) That temporal and physical proximity fully justifies the postconviction court's characterization of Carter's conduct as a single "crime spree," and not as a series of crimes too far apart in time and location to have any logical connection with each other beyond the sole perpetrator.

The seventh *Salinas* factor—whether joinder serves the goals and purposes of § 971.12—also favors initial joinder.

"We interpret initial joinder decisions broadly because of the goals and purposes of the joinder statute: (1) trial economy and convenience; (2) to promote efficiency in judicial administration; and (3) to eliminate multiple trials against the same defendant, which promotes fiscal responsibility." *Salinas,* 369 Wis. 2d 9, ¶ 36 (citations omitted). Combining the burglary charge with the other charges for a single trial saved valuable court time, allowed for a single jury selection and gathering of witnesses, and saved the additional financial expenses multiple trials would

have incurred.[1] *See id.* ¶ 43. It also gave Carter a single resolution of all the charges against him.

The burglary charge was properly joined with the other charges for a single trial. Carter doesn't establish otherwise.

He says he found "no support for the proposition that joinder is appropriate merely because evidence of multiple dissimilar offenses was discovered during the same search." Carter's Br. 14.

In addition to *Salinas*, the State found ample support for that proposition.

If offenses committed at different times and places against different victims share a common element of substantial importance, they're properly joined for a single trial. *People v. Lucky,* 753 P. 2d 1052, 1062 (Ca. 1988) (en banc). Ample support exists for the proposition that charges are connected together—that they're closely related and share a common element of substantial importance—when law enforcement discovers evidence of the charges in a single location.

[1] This Court shouldn't underestimate the administrative value of a single trial. Had the burglary been charged separately, many of the officers involved in the search of Carter's residence and garage would have testified at the burglary trial because the State would have been entitled to present evidence explaining how the police came to discover and recover the ATM in order to complete the story. *State v. Bettinger,* 100 Wis. 2d 691, 697, 303 N.W.2d 585, amended, 100 Wis. 2d 691, 305 N.W.2d 57 (1981).

United States v. Park involved joinder of drugs and weapons charges against one defendant. 531 F.2d 754 (5th Cir. 1976). Police discovered the weapon in a search of his home during the drug investigation. The Fifth Circuit held that finding the drugs and the gun during the search of his home provided a sufficient nexus to say the charges arose from the same transaction. *Id.* at 760-61. *Accord United States v. Fortenberry,* 919 F.2d 923, 926 (5th Cir. 1990). *See also United States v. Pietras*, which involved a joint trial of a weapons charge with other charges when police discovered the firearm in the defendant's escape van. There, "[p]ossession of the unregistered firearm derive[d] from the firearm's presence in the van which Pietras employed as a means of escape," making joinder proper. 501 F.2d 182, 185 (8th Cir.), cert. denied, 419 U.S. 1071 (1974).

Gooch v. United States involved a defendant facing a single trial on charges of robbery and unauthorized use of a motor vehicle. 609 A.2d 259 (D.C. App. 1992). Police discovered evidence of the robberies in the trunk of the car. *Id.* at 261. For purposes of joinder, *Gooch* held that the offenses were connected together because "[t]he proceeds of the robbery were found in the truck of the vehicle which appellant had stolen several days earlier." *Id.* at 264.

Given the broad construction afforded § 971.12(1) in favor of initial joinder, this Court should conclude that the burglary charge was properly joined with the other charges for a single trial.

The Sixth Amendment didn't require trial counsel to make a meritless motion. *Simpson,* 185 Wis. 2d at 784. Carter's ineffective assistance challenge fails for this reason alone.

B. Carter suffered no actual prejudice from joinder of the burglary charge with the remaining charges.

Carter's claims of prejudice break cleanly into two assertions:

- He faced the risk of prejudice from the jury accumulating the evidence of the remaining 19 charges and using it to find him guilty on the burglary charge, especially since he didn't have exclusive access to the property where police found the ATM. Carter's Br. 15.

- He would've testified at a separate trial on the burglary charge, denying responsibility and raising the possibility that others with access to the residence and garage committed the burglary. *Id.* 16.

His assertions fail to persuade.

First, a *risk* of prejudice isn't enough to establish either ineffective assistance or reversible error. Ineffective assistance requires proof of *actual* prejudice. *Erickson,* 227 Wis. 2d at 773. Relief from prejudicial joinder requires proof of *substantial* prejudice. *See Linton*, 329 Wis. 2d 687, ¶ 15.

Pointing to a risk or possibility of prejudice doesn't satisfy either standard. It's the equivalent of pointing to the fact of conviction and claiming, *ipse dixit*, that prejudice must have occurred. That's not enough to warrant relief.

Second, Carter's postconviction claim that he suffered prejudice because he would've testified at a separate burglary trial doesn't help him.

He concedes that severance isn't mandatory when a defendant seeks to testify on some, but not all, of properly joined charges. Carter's Br. 16 n.3. *See also State v. Hamm,* 146 Wis. 2d 130, 140, 430 N.W.2d 584 (Ct. App. 1988); *State v. Nelson,* 146 Wis. 2d 442, 457-58, 432 N.W.2d 115 (Ct. App. 1988). To hold otherwise would let defendants, not circuit courts, control joinder or severance. *Hamm,* 146 Wis. 2d at 140 (citation omitted).

The State has already shown the burglary charge was properly joined with the other charges. If reviewing courts won't allow a defendant to use his asserted desire to testify to thwart a trial on properly joined charges, there's no reason to allow Carter to suggest it as a basis for a new trial.

And even if this Court adds Carter's asserted desire to testify to the prejudice equation, the assertion doesn't contain the required level of specificity to give it any weight.

In his postconviction motion, Carter's counsel stated that, if Carter received a hearing on the motion:

- He would testify at the postconviction hearing that he would've testified at a separate trial on the burglary charge.

- He would've described how family and friends came and went freely in the garage.

- He would've denied any participation in the burglary, and denied knowing the ATM was hidden in the garage.

- He would've testified that he handled items in the garage, and anyone could've taken and used those items.

(106:13.)

No affidavits—sworn or unsworn, from Carter or anyone else—accompanied the motion.

A defendant hoping to make a case for severance—or, by extension, hoping to make a showing of actual or substantial prejudice—must do far more than assert, through his attorney, "I wanted to testify."

> [N]o need for a severance exists until the defendant makes a convincing showing that he [or she] has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information ... to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of "economy and expedition in judicial administration" against the defendant's interest in having a free choice with respect to testifying. [Footnotes omitted.]

Nelson, 146 Wis. 2d at 458, quoting *Baker v. United States,* 401 F.2d 958, 977 (D.C. Cir. 1968), cert denied, 400 U.S. 965 (1970), and citing *Holmes v. State,* 63 Wis. 2d 389, 398 n.12, 217 N.W.2d 657 (1974).

Carter's unsworn assertion—really, a postconviction declaration made by his counsel—doesn't demonstrate he had important testimony. Police witnesses freely testified that multiple people were at the residence when they executed the search warrant that yielded the evidence (82:92, 98; 84:32.) Carter's sister, who also lived at the

residence, testified that others had access to the residence and to keys (84:80.) The point he says he wanted to make—someone else could've committed the burglary—was made. His unsworn assertion also fails to show that he had a "strong need" to refrain from testifying as to any of the other charges. This Court shouldn't fill the void with speculation. *Nelson,* 146 Wis. 2d at 458.

Third, the State's proof of each charge—including the burglary—was powerful, and compartmentalized so the jury could easily separate each charge and consider Carter's guilt or innocence. The prosecutor road-mapped the charges and the corresponding evidence in his opening statement. (81:9-22.) Over a period of four days, the State presented its fact witnesses in sequence, linking the testimony to each event that formed the basis for a separate criminal charge. (81:31-119; 82:6-107; 83:3-46; 84:19-48; 85:4-21.)

The prosecutor proved the burglary charge the same way. The ATM was taken during the burglary of a Milwaukee convenience store. (81:29-35.) The machine was recovered from 4117 N. Sherman Boulevard. (*Id.* 42.) Bags used to conceal the ATM bore Carter's fingerprints. (81:96-116; 82:6-18.) And Carter lived at the location where police seized the ATM. (82:67-75, 103-04; 83:17-33; 84:38; 85:4-16.)

The jury could easily identify and consider the evidence that applied solely to the burglary, and separate it from the evidence pertaining to the remaining counts. The State presented simple, direct trial evidence. Much of it involved easily distinguishable fact patterns—the scam purchases arranged through Craigslist, the use of counterfeit currency, the discovery of weapons during execution of the search warrant, and the discovery of evidence fully establishing Carter's direct connection to the residence and garage where police discovered the treasure

trove of evidence. There's no indication from the record that the jury confused the evidence regarding the burglary with any evidence pertaining solely to the other charges—or confused any of the evidence at all.

Fourth, the jury received instructions as to each individual count, and was told the State bore the burden of proving each element of each offense beyond a reasonable doubt. (85:23-40.) The circuit court told the jury that it must consider each count separately, and "must make a finding as to each count of the Information. Each one charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count." (85:88, 89.)

Courts "presume that the jury follows the instructions given to it." *State v. Truax,* 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). These instructions presumptively cured any prejudice Carter may have suffered from joinder. *State v. Hoffman*, 106 Wis. 2d 185, 213, 316 N.W.2d 143 (Ct. App. 1982).

Fifth, the jury's acquittal on four charges of felon-in-possession (23) indicates that it separately considered the evidence as to each charge. In combination with the cautionary jury instructions, the acquittals indicate that Carter "was not swept into conviction by a finding of mass guilt[.]" *United States v. Vida,* 370 F.2d 759, 765-66 (6th Cir. 1966). *See also People v. Lucas*, 333 P.3d 587, 643 (Ca. 2014) ("The fact that the jury acquitted defendant of Garcia's murder and could not reach a verdict as to the murders of Strang and Fisher strongly suggests that the jury was capable of weighing the evidence and differentiating among defendant's various charges").

Postconviction, the circuit court relied on harmless error analysis under *Leach*, 124 Wis. 2d at 668-674, and reached the right conclusion:

> Any error in this case was indeed harmless. . . .
>
> Here, as in *Leach*, each of the charges for which the defendant was convicted was factually distinct from each other as they occurred with different victims at different locations. As in *Leach*, separate witnesses appeared for each crime, and the jury was instructed to consider each count separately. [85:88-89.] Judge Kahn told the jury, "Each [count] charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count." [*Id.* 89.]
>
> Here, as in *Leach*, the jury was presented with "strong, uncontradicted evidence to support each crime charged" and would have convicted the defendant "whether the evidence was presented in a single trial or [separate] trials." [124 Wis. 2d at 674.] The victims had provided police with the serial numbers of the items that had been taken, and these items were found in the same location with the ATM. There was simply overwhelming evidence to convict the defendant in this case. Accordingly, any error in limiting count three [the burglary] to a single trial did not significantly influence the jury. It was harmless. The court agrees with the State that even if trial counsel had based [her] motion to sever on improper joinder as opposed to severance, the ultimate result would not have been any different.

(112:4-5.)

Joinder of the burglary charge with the other charges was proper, and didn't prejudice Carter.

III. Carter suffered no actual prejudice from the joinder of Count Five with the remaining charges for a single trial.

Count Five alleged that Carter, a convicted felon, possessed a 7.62 caliber Norinco Mak-90 rifle. (2:5; 19:2.) Without fanfare or detailed explanation, two trial witnesses described this firearm as an assault or assault type rifle (82:104; 83:23, 32, 45.) Police discovered the rifle in their search of a bedroom of Carter's residence, along with other personal property connected to Carter. (82:103-04; 83:23-33; 84:37-38.)

The rifle was unloaded (84:44.) Police found it behind the bedroom door, partially inserted in a plastic bag. (85:15, 17.)[2]

On appeal, Carter concedes proper initial joinder of Count Five under § 971.12(1), but claims trial counsel performed ineffectively by failing to move for severance under § 971.12(3). Carter's Br. 18-22.

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[2] In his challenge to the sufficiency of the evidence on Count Five, Carter claims "there was no evidence presented of where in the room the rifle was found." Carter's Br. 25. That doesn't appear correct. Both the prosecutor and trial counsel asked Milwaukee Police Officer Patrick Fuhrman in rebuttal where police found the rifle in the bedroom. (85:15, 17.) Fuhrman answered: "It was as soon as you open up the door. If you would open up the door, it would be kind of behind the door. . . . If you would open up the door and the door would hit the wall, it would be located where that door – between the door and the wall. . . . It was in a plastic bag, but it was an open bag. . . . It was open. It was partially in there, so it was halfway in there." (*Id.*)

His claims of prejudice again break cleanly into various assertions:

- When considering his guilt on the felon-in-possession charge, the jury had before it evidence of the other 19 charges. He says the jurors were "inundated" with evidence, and that "bombardment . . . likely contributed substantially to the conviction . . . on [Count Five.]" Carter's Br. 19, 21.

- The term *assault rifle* "suggest[s] a large, scary, militaristic weapon." *Id.* 20. The "extremely inflammatory implications" of his possession of that particular weapon created a "very real likelihood" that the allegation in Count Five "contributed to the jury's willingness to find [him] guilty of armed robbery. *Id.* 21.

- Despite his concession of proper initial joinder, he asserts the evidence pertaining to Count Five wasn't admissible at a joint trial involving "the fraud scheme and related armed robbery with a handgun," and vise-versa. *Id.* 20.

- He again asserts he would've testified at a separate trial on Count Five, denying he stayed in the bedroom where police found the rifle, and denying possession. *Id.* 20.

Carter's challenge to trial counsel's effectiveness regarding severance of Count Five suffers from many of the same deficits as his earlier challenge to counsel's effectiveness, and the State refers this Court back to its earlier analysis. *See* State's Br. 16-20 *supra.*

Carter's speculation as to what the jury may have done or could have done with evidence of the other 19 charges when it considered Count Five doesn't establish the *actual* prejudice required by *Erickson* when challenging counsel's effectiveness, or the *substantial* prejudice required by *Linton* when challenging joinder. *Erickson*, 227 Wis. 2d at 773; *Linton*, 329 Wis. 2d 687, ¶ 15. Nothing in the record suggests misapplication of evidence.

And Carter's assertion that he would've testified at a separate trial on Count Five is no stronger and no more compelling than his similar assertion regarding the burglary charge. He doesn't show the importance of his testimony, nor a strong need to refrain from testifying as to the remaining charges. *See Nelson*, 146 Wis. 2d at 458. Again, he offers only a postconviction declaration by counsel as to his asserted desire to testify. Carter submitted no affidavits, sworn or unsworn, from himself or anyone else.

Carter also wants this Court to conclude that characterizing the weapon in Count Five as a "large, scary, and militaristic" assault or assault type rifle must have inexorably led the jury to reach prejudicial conclusions about Carter—and his guilt on the other charges—that could only have been avoided by a separate trial. But he cites no legal authority in support of his assertion of prejudice. This Court should reject it outright. It shouldn't abandon its neutrality to develop his argument. *See Industrial Risk Insurers v. American Eng'g Testing, Inc.,* 2009 WI App 62, ¶ 25, 318 Wis. 2d 148, 769 N.W.2d 82; *State v. Pettit,* 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

Additionally, the condition of the rifle when found—unloaded and partially bagged (84:44; 85:15, 17)—also suggests the jury didn't reflexively conjure up prejudicial

images, or misuse the evidence to find guilt on the other charges.

The State also attaches little importance to Carter's apparent belief that evidence of the Count Five felon-in-possession charge wasn't properly admissible at a joint trial. That belief rests uneasily alongside his concession that initial joinder was appropriate. Carter's Br. 18. It also ignores the fact that the State was entitled to present evidence explaining how the police came to discover and recover the rifle in order to complete the story of how and why Carter was charged. *State v. Bettinger*, 100 Wis. 2d 691, 697, 303 N.W.2d 585, amended, 100 Wis. 2d 691, 305 N.W.2d 57 (1981).

And finally, the remainder of the State's earlier observations regarding Carter's claims of prejudice involving joinder of the burglary charge apply with persuasive force here. State's Br. 18-20. The State presented powerful evidence of each charge, compartmentalized so the jury could easily separate each charge and consider Carter's guilt or innocence. The evidence was simple and direct, following patterns. There's no indication that the jury confused or misapplied the evidence. It received appropriate jury instructions on consideration of individual charges, and it demonstrated that it applied those instructions by acquitting Carter of four charges.

Carter suffered no prejudice from trial counsel's failure to seek severance of Count Five.

IV. The trial evidence fully supports Carter's guilt on Count Five.

In the final section of his brief, Carter claims the State failed to prove beyond a reasonable doubt that he possessed the rifle identified in Count Five, the rifle found behind the

door of the "northwest bedroom of the residence. (85:15, 17.) Carter's Br. 22-26. Listing some—but not all—of the evidence linking Carter directly to that bedroom and the items found therein, Carter says the evidence fails to demonstrate that he "ever knowingly possessed the gun." *Id.* 25.

The jury found the evidence adequate. So does the State.

The crime of felon in possession of a firearm has two elements: (1) the defendant has been convicted of a felony, and (2) the defendant possessed the firearm. *State v. Black,* 2001 WI 31, ¶ 18, 242 Wis. 2d 126, 624 N.W.2d 363.

Possession includes both actual and constructive possession. *State v. Peete*, 185 Wis. 2d 4, 14-16, 517 N.W.2d 149 (1994). The jury received instruction on both theories of possession. (85:35.).

Proof that Carter had actual physical control of the rifle would constitute possession. (85:35.) Proof of Carter's joint dominion and control over the residence and the bedroom containing the rifle is also sufficient to establish his possession of the rifle. *See Ritacca v. Kenosha County Court*, 91 Wis. 2d 72, 82, 280 N.W.2d 751 (1979). "Constructive possession" consists of circumstances sufficient to support an inference that the person exercised control over, or intended to possess, the item in question. Wis. JI-Criminal 920, Comment 2 (2000). *See State v. Allbaugh*, 148 Wis. 2d 807, 813-14, 436 N.W.2d 898 (Ct. App. 1989). An item is in the person's possession if it is in an area over which he has control and he intends to exercise control over the item. Wis. JI-Criminal 920.

> Possession of an illicit drug may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his [or her] exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the drug.

Schmidt v. State, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977).

The State sees sufficient trial evidence to prove both actual and constructive possession.

The jury could reasonably conclude that Carter lived at the property where police discovered the evidence, and stayed in the bedroom where police found the rifle:

- Tanesha Carter told police Carter lived at the residence—4117 North Sherman Boulevard—with her brother, the defendant, and that he "either sleeps in the basement or the northwest bedroom located on the first floor." (85:6, 10.) Police discovered the rifle in that bedroom. (82:104.)

- Police discovered a pill bottle bearing Carter's name in that bedroom. (*Id.* 103)

- Police discovered a Money Gram bearing Carter's name in that bedroom. (*Id.*)

- Police discovered an identification card bearing Carter's name in that bedroom. (*Id.*)

- Police discovered a VISA card bearing Carter's name—and a movie theater ticket recently

purchased with the card—in that bedroom. (84:37-38.)

- Police discovered counterfeit money—the indispensible part of Carter's scam purchases—in that bedroom. (82:103-04.)

- Police discovered a wristwatch they associated with Carter in that bedroom. (*Id.* 104.)

- Police discovered a Guaranty Bank envelope in that bedroom. (*Id.* 104.) Carter used a Guaranty Bank envelope in some of his scam purchases. (82:28; 83:6.)

The jury also heard testimony that police found the rifle behind the door of Carter's bedroom:

> Q [BY THE PROSECUTOR:] And where was the gun in that northwest bedroom; do you recall?
>
> A [BY OFFICER FUHRMAN:] It was as soon as you open up the door. If you would open up the door, it would be kind of behind the door.
>
> . . . .
>
> Q [BY TRIAL DEFENSE COUNSEL:] The gun we are talking about is—is it—well, okay, first of all, tell me where this gun was located in the room.
>
> A [BY OFFICER FUHRMAN:] If you would open up the door and the door would hit the wall, it would be located where that door—between the door and the wall.
>
> Q And it was in a plastic bag?
>
> A It was in a plastic bag, but it was an open bag.

Q Are we talking about the antique revolver?

A No, we are talking about the assault type weapon.

Q And it was in a plastic bag you said?

A It was open. It was partially in there, so it was halfway in there.

(85:15, 17.)

The jury had the right to believe and accept all this evidence as true. From it, the jury could reasonably conclude that the northwest bedroom belonged to Carter. And it could reasonably infer that Carter possessed all the items found in it, including the rifle.

The evidence supports Carter's guilt on a theory of actual possession.

How did the rifle get into Carter's bedroom? How did it get behind his bedroom door? "Teleportation is not an option." *Young v. United States,* 124 F.3d 794, 802 (7th Cir. 1997).

Could some unknown person have done it? Snuck the rifle into Carter's bedroom and put it behind the door, uncased, with Carter unaware of its presence until police found it?

It's possible. But it certainly isn't probable.

And it's not a possibility this Court should indulge. This Court must follow the inferences that support the jury's verdict. *Poellinger,* 153 Wis. 2d at 506-07. The evidence—and common sense—reasonably permitted the jury to

conclude Carter knowingly brought the rifle into his bedroom and knowingly put it behind his bedroom door.

The State says Carter *knowingly* brought the rifle into his bedroom because the evidence supports that inference. When police discovered the rifle, it wasn't in a case, a box, or some other opaque container. It was visible. The jury could reasonably infer Carter knew exactly what he brought into his bedroom and stored behind his door.

And that's enough to fully establish his guilt on a theory of actual possession. Physical control constitutes actual possession. When he physically brought the rifle into his room and placed it behind his bedroom door—even if it only took a moment—he actually possessed it. There's no *de minimis* defense to a charge of felon-in-possession. In Wisconsin, it's a strict liability offense, with no temporal limitations. *Black,* 242 Wis. 2d at 142. The time it took Carter to bring the rifle in and put it behind his bedroom door is all it took to establish criminal culpability—to justify a guilty verdict.

Alternatively, the evidence supports guilt on a theory of constructive possession. The evidence supports the entirely reasonable inference that Carter had joint dominion and control over the residence, and full dominion and control over the bedroom and its contents. He exercised control over the rifle—how did it get there?—and intended to possess it. He saw it every time he closed the bedroom door from the inside, or looked behind it. Because he would have to have recognized it as a rifle—in his case, contraband—the evidence fully supports the inference he knew what he had done and acted intentionally in bringing the weapon into and keeping it in his bedroom.

CONCLUSION

The proliferation of Craigslist websites in American cities added a new term to the criminal law lexicon—"crime by appointment." http://fox2now.com/2012/03/26/new-internet-crime-crime-by-appointment/ (last visited October 25, 2016). Milwaukee police and a Milwaukee County jury cancelled Carter's appointments for the foreseeable future. This Court should affirm his convictions and sentences for the reasons presented in this brief.

Dated at Madison, Wisconsin, this 26th day of October, 2016.

BRAD D. SCHIMEL
Wisconsin Attorney General

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

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 6,799 words.

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GREGORY M. WEBER
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 26th day of October, 2016.

_____
GREGORY M. WEBER
Assistant Attorney General