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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

The State insists that the burglary charge and all of the other charges were "connected together" under Wis. Stat. §971.12(1). The State directs the Court's attention to the factors outlined in ***State v. Salinas***, 2016 WI 44, 369 Wis. 2d 9, 879 N.W.2d 609, and posits that the burglary charge here was "closely related" to the other charges. The crimes deemed "closely related" in ***Salinas*** were "a series of events within one household involving one defendant and two victims." ***Id.***, at ¶ 44, 369 Wis. 2d at 36, 879 N.W.2d at 622. The State argues that the charges were closely related here because, other than the felon in possession charges, they "were all crimes against a property owner's right of self-possession." (State's Brief at 10). The State offers no support for its expansive reading of the language of ***Salinas*** that would mean that *all* property crimes are "closely related."

The State gives a similarly unwarranted and expansive interpretation to the fourth ***Salinas*** factor — that the crimes were committed closely in time and location. According to the State, that factor is satisfied here because the crimes all took place in Milwaukee County and "spanned a five-month period." (State's Brief at 11). All crimes committed in Milwaukee County within five months are not committed closely in time and location. Milwaukee County is a big place. And it is important to note that while it is technically accurate to say that the crimes "*spanned* a five-month period," it is more accurate to say that the burglary charge

was *separated from* the other offenses by a period of four months.[1]

One of the ***Salinas*** factors does support the joinder in this case. The burglary charge resulted from the investigation of the other charges. Of course, saying this is enough is simply another way of saying what the trial court said in allowing joinder — that joinder is proper because the evidence was found in the same place. (R. 77: 97). The State claims to have found "ample" support for this proposition. (State's Brief at 12).

The State has reached far afield to find the support it describes as "ample." Even so, the State has pointed to only one case that gives any support to its position. In ***United States v. Park***, 531 F.2d 754 (5th Cir. 1976), a firearm charge was joined with drug charges. The court, with very little analysis and no real support, said that because a gun and the drug evidence were found during the same search, the charges were "based on the same act or transaction" as contemplated by Federal Rule of Criminal Procedure 8(a).[2] ***Id***., at 761. The court appeared to reason that the *search* could be the "transaction" that would satisfy the federal statute. The flaws in this reasoning are stated well by the federal district court

[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.

[2] Rule 8(a), like Wis. Stat. §971.12(1) allows joinder of counts that are "of the same or similar character, or are based on the same act or transaction." The remaining language is subtly different. The federal rule allows joinder of charges that "are connected with or constitute parts of a common scheme or plan." The Wisconsin statute allows joinder of charges based on "2 or more acts or transactions connected together or constituting a common scheme or plan." The difference is not relevant here.

for the Eastern District of Virginia, which rejected this approach, saying the following:

> Citing ***Park***, the government claims that the crimes are part of the same transaction for purposes of Rule 8(a) because they were discovered in the course of one search. This search, the government argues, is "the same act or transaction" that Rule 8(a) requires for joinder. This argument is unpersuasive. It is flatly contradicted by the terms of the Rule itself, which make clear that it is a defendant's "offenses," not any governmental act, that must be part of the "same act or transaction" to permit joinder. And, the soundness of the Rule in this respect is plain; the justification for joinder—efficiency balanced by fairness—has nothing to do with governmental acts, but everything to do with the similar nature of, and relationship among, a defendant's offenses. To the extent ***Park*** suggests otherwise, it is unpersuasive.

United States v. Gray, 78 F. Supp. 2d 524, 532 (E.D. Va. 1999) (citations omitted).

There is nothing approaching ample support for the State's argument. Only ***Park***, a poorly reasoned decision from the Fifth Circuit, gives the State any support. That decision stands alone and is not worthy of ratification by this Court.

The circuit court's decision to allow joinder was wrong as a matter of law.

The error prejudiced Mr. Carter.

> [I]f the offenses do not meet the criteria for joinder, it is presumed that the defendant will be prejudiced by a joint trial. The state may rebut the presumption on appeal by demonstrating the defendant has not been prejudiced by a joint trial. We do not adopt a per se rule that

> misjoinder is prejudicial error and can never be harmless.

State v. Leach, 124 Wis. 2d 648, 669, 370 N.W.2d 240, 251 (1985). Prejudice is presumed. The State has not proved that the improper joinder of the burglary charge, upon which the evidence was not overwhelming, with 19 other charges did not result in a conviction where there otherwise would have been an acquittal.

In the event that this Court concludes that trial counsel's motion to sever did not adequately preserve Mr. Carter's argument because trial counsel did not rely on Wis. Stat. §971.12(1), then the Court must decide the issue within the context of ineffective assistance of counsel. In that event, the question shifts to one of prejudice under ***Strickland v. Washington***, 466 U.S. 668, 690, 104 S.Ct. 2052 (1984).

The State says that Mr. Carter has not shown prejudice since he has done no more than point to a risk or possibility of it. (State's Brief at 14). Mr. Carter asserts that it is never possible to conclusively prove that an improper joinder resulted in a conviction. The prejudice resulting from an improper joinder is the *risk* that it will result in a conviction where otherwise there would have been an acquittal.

> [T]here is a risk that the defendant will be convicted not because the facts demonstrate guilt beyond a reasonable doubt but because the jury may conclude that the accused is predisposed to committing crimes and that "some" evidence is "enough" evidence to return a conviction. In a trial on joint charges, there is also the possibility that the jury will cumulate the evidence of the crimes charged and find guilt when it otherwise would not if the crimes were separately tried.

State v. Bettinger, 100 Wis. 2d 691, 696–97, 303 N.W.2d 585, 588, amended, 100 Wis. 2d 691, 305 N.W.2d 57 (1981). The question of prejudice in this context always involves the assessment of the strength of the risk.

Furthermore, whether the question is one of harmless error or one of prejudice under ***Strickland***, Mr. Carter has asserted that one aspect of the prejudice resulting from the improper joinder is that he would have testified in a separate trial on the burglary charge. The improper joinder prevented him from doing so. The State cites ***State v. Hamm***, 146 Wis. 2d 130, 140, 430 N.W.2d 584 (Ct. App. 1988); the State argues that because Mr. Carter's intent to testify would not have been sufficient to prevent an otherwise *proper* joinder it cannot be the basis for a new trial based on an *improper* joinder. (State's Brief at 15). This logic simply does not follow. The charges were improperly joined. As a result, Mr. Carter was forced to choose between the exercise of his constitutional right to testify as to the burglary charge and his constitutional right to remain silent as to the other charges. Mr. Carter asserts that this Hobson's choice that resulted from the court's error (or from counsel's ineffective assistance if the matter is viewed through that lens) precludes a finding of harmless error (or requires a finding of prejudice if the question is deemed to be one of ineffective assistance).

The State insists that Mr. Carter has not explained what he would have said that was important. (State's Brief at 16). The State argues that Mr. Carter's proposed testimony about people who had access to the garage was immaterial because such testimony was presented at trial. (State's Brief at 16-17). But Mr. Carter would have said more than that. 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." (R. 106: 13).

Furthermore, Mr. Carter would have testified that he *did not commit the burglary* and did not know that the ATM was stored in the garage. The State does not explain how this testimony would not be important. The State may elect to disbelieve Mr. Carter, sight unseen, but the Court should not.

The State dismisses the offer of proof in Mr. Carter's postconviction motion regarding his proposed testimony as a mere "unsworn assertion – really a postconviction declaration made by his counsel." (State's Brief at 16). The State treats Mr. Carter's assertions this way because no affidavits accompanied the postconviction motion. (***Id.***). But no affidavit was necessary. In his postconviction motion, Mr. Carter set forth the testimony he proposed to present at a hearing on the motion. His allegations were sufficiently specific to entitle him to a hearing. ***State v. Balliette***, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 369, 805 N.W.2d 334, 339). Although he requested a hearing at which he proposed to present sworn testimony, he was denied that opportunity.

Both statutes and case law make clear that no affidavit was necessary. Wis. Stat. §802.05(1)11 states: "Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." Further, in filing the postconviction motion, counsel certified that "[t]he allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Wis. Stat. § 802.05(2)(c).

This Court and the Wisconsin Supreme Court have held that there is no requirement of an affidavit in support of a postconviction motion. *See* ***State v. Hudson,*** 2013 WI App 120, ¶ 23, 351 Wis. 2d 73, 98, 839 N.W.2d 147, 159; ***State v. Howell***, 2006 WI App 182, n. 14, 296 Wis. 2d 380, 722 N.W.2d 567; ***State v. Brown***, 2006 WI 100, ¶ 62, 293 Wis. 2d 594, 716 N.W.2d 906.

When the trial court's error (or counsel's ineffective assistance) prevented him from exercising his constitutional right to testify, Mr. Carter suffered prejudice. Mr. Carter would have testified at a separate trial of the burglary charge, and that testimony would have been material. If there is any question about that, then the case should be remanded for the hearing that Mr. Carter asked for.

II. Joinder of the Charge That Mr. Carter Possessed An "Assault-Style" Rifle with the Remaining Charges Caused Unfair Prejudice.

The State argues that the assault rifle evidence was not prejudicial because it was presented "without fanfare." The State also faults Mr. Carter for failing to present "legal authority" that says the assault rifle evidence would cause prejudice. (State's Brief at 20, 22). The connotations of the words "assault rifle" are obvious. No fanfare was necessary. Legal authority is not necessary to establish that the idea of an assault rifle is very alarming to most people. In this case, the effect was magnified because the jury simultaneously heard evidence that Mr. Carter was a convicted felon.

Mr. Carter argued that there was a likelihood that the jury would "cumulate the evidence of the crimes charged and find guilt when it otherwise would not." ***Bettinger***, 100 Wis. 2d at 696–97, 303 N.W.2d at 588. The State dismisses this argument as mere "speculation as to what the jury may have

done or could have done with the evidence." (State's Brief at 22). Again, the State does not explain how a person prejudiced by joinder could *ever* conclusively prove that the jury, in fact, made improper use of the evidence. The jurors would be incompetent to testify on the matter. Wis. Stat. §906.06(2). Any determination of prejudice involves an evaluation of the risk that the jury convicted where they otherwise would have acquitted. The State may call this "speculation," but it is all we have.

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

Mr. Carter's brief overstated the lack of evidence supporting Count Five, saying that there was no "evidence presented of where in the room the rifle was found." (Carter's Brief at 25). The State correctly draws the Court's (and undersigned counsel's) attention to the rebuttal testimony of Detective Fuhrman that the rifle was found behind the bedroom door partially in a plastic bag. (State's Brief at 20, n. 2, citing (R. 85: 15, 17)). Nonetheless, the evidence was insufficient to convict Mr. Carter.

The State cites cases involving possession of controlled substances in which the possession element of those offenses was held to be satisfied by proof of constructive possession. (State's Brief at 24). Possession is "imputed when the contraband is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the [contraband]." ***Ritacca v. Kenosha Cty. Court***, 91 Wis. 2d 72, 82, 280 N.W.2d 751, 756 (1979) (citation omitted).

The Wisconsin Supreme Court has, as Mr. Carter argued, held that proof of the possession element of

possession of a firearm by a felon requires proof of "actual physical control" of the weapon by Mr. Carter. ***State v. Black***, 2001 WI 31, ¶ 19, 242 Wis. 2d 126, 142, 624 N.W.2d 363, 371. Mr. Carter has never argued that proof of this element required proof that Mr. Carter had the weapon in his hands or on his person. But it was necessary that the State prove that he physically possessed it or that he (individually or jointly) controlled the location where it was found. ***Id.***, ***Ritacca***, at 82, 280 N.W. 2d at 756.

Critical to this appeal is the fact that inherent in any 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). Here, there was insufficient evidence from which the jury could conclude beyond a reasonable doubt that Mr. Carter had control over the bedroom at issue and that he knew the weapon was there.

The miscellaneous items found in the room supported an inference that Mr. Carter had been in the room. However, the evidence did not support an inference that he was living in that room, even with the addition of his sister's vague statement that he slept in that room or in the basement. (R. 85: 6, 10). The State repeatedly refers to the room as Mr. Carter's bedroom (State's Brief at 26-28). Saying that does not make it so. The trial testimony painted a picture of a room that held nobody's complete wardrobe or personal effects — a room that nobody was living in.

The weapon was not found in a common area or in plain view. It was located behind the bedroom door such that it would be hidden when the door was open. (R. 84: 15, 17). While it was reasonable for the jury to infer that Mr. Carter had been in the room recently, there was no evidence from

which the jury could infer that he had been in the room with the door closed, such that he necessarily knew the weapon was there, let alone that he "intend[ed] to exercise control over" it. ***State v. Allbaugh***, 148 Wis. 2d 807, 814, 436 N.W.2d 898, 901 (Ct. App. 1989), citing Wis. JI-Criminal 920. The evidence certainly does not, as the State argues, support the inference that Mr. Carter put it there. (State's Brief at 27-28).

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 16th day of November, 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 2,857 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 16th day of November, 2016.

Signed:

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