STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

No. 2016AP002211-CR
Milwaukee Co. Circuit Court Case No. 2014CF1273

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ORLANDO LLOYD COTTON,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

Appeal from a Judgment and Order
Entered in Milwaukee County Circuit Court,
Honorable Clare L. Fiorenza, Presiding

Randall E. Paulson
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ISSUES

1. Is Cotton entitled to dismissal because the evidence was insufficient on all three counts?

The trial court found the evidence was sufficient.

2. Alternatively, is Cotton entitled to a new trial in the interest of justice?

The trial court denied the postconviction motion's request for a new trial in the interest of justice.

3. Alternatively, is Cotton entitled to an evidentiary hearing on his postconviction claim that he received ineffective assistance of trial counsel?

The trial court denied the postconviction motion, and rejected its request for an evidentiary hearing.

ORAL ARGUMENT AND PUBLICATION

Neither is requested. The briefs can present and develop the issues, making oral argument insufficiently helpful to warrant expenditure of resources. *See*, Wis. Stat. § 809.22(2)(b). The appeal can be decided by applying settled legal principles, making publication unnecessary. *See*, Wis. Stat. § 809.23.

STATEMENT OF THE CASE

Procedural History

The complaint and information alleged that, on March 17, 2014, at 2571 North 34th Street in Milwaukee, Mr. Cotton possessed cocaine and marijuana with intent to deliver. (2, 6).

When plea negotiations failed, the State added a third charge ("count five" because two other charges pertained to co-defendant Elijah Gilmore),[1] keeping a drug house. (14) (amended information). A jury trial was conducted from March 9-13, 2015, the Honorable Clare L. Fiorenza, presiding.

Count one (possessing cocaine with intent to deliver) was alleged by the State from the outset as having been committed as a party to a crime. (2, 6, 14). Count five (maintaining a drug house) was charged only as a direct-commission-offense throughout the proceedings. (14, 17).

Count two, possessing marijuana with intent to deliver, was charged only as directly-committed offense in the complaint, information and amended information. (2, 6, 14). However, after the evidentiary portion of trial was over, the State filed a second amended information. (17). In it, the State added the allegation that Cotton committed the offense charged in count two as a party to a crime. Consistent with this charging history, the jury was instructed on the elements of all three offenses and the definition of the party-to-a-crime allegations regarding counts one and two. (66:7-19).

In Milwaukee County Case 2014 CF 1274, arising from the same incident, Elijah Gilmore was also charged with possessing cocaine and marijuana with intent to deliver (counts three and four). (2). A copy of Gilmore's sentencing transcript is appended to Cotton's postconviction motion. (33:21-34, PC-App. 101-114).[2]

On March 9, 2015, the trial date in both cases, Mr. Gilmore pleaded to possessing marijuana with intent to

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[1] Cotton was charged in 2014CF1273; Gilmore was charged in 2014CF1274. It appears the State filed duplicate original charging documents in the two cases, each listing charges against both defendants.

[2] Search warrant materials are also appended to this postconviction motion. (33). The motion and its attachments are not paginated as a single document. The Gilmore transcript pages are labeled App. 101-114. The search warrant affidavit pages are labeled App. 115-119. Citations to motion-attachments will be to: "33:PC-App. __."

deliver, and the cocaine charge was dismissed and read in. (33:PC-App. 101). On May 1, 2015, Judge Fiorenza imposed but stayed a prison sentence, placed Gilmore on probation with 60 days in jail as one condition of it, and provided that, upon successfully completing probation, Gilmore could get his record expunged. (33:PC-App. 111-114).

Mr. Cotton was convicted of all three counts on March 13, 2015. (20). On May 22, 2015, Judge Fiorenza imposed concurrent sentences totaling four years of initial confinement and three years on extended supervision. (68:65-70). Cotton timely filed a notice of intent to pursue post-conviction relief, followed by a postconviction motion. (25, 33). The parties filed briefs. (35, 40). Rejecting Cotton's request for a hearing, the circuit court denied post-conviction relief by order dated September 9, 2016. (43, App. 101-109). Mr. Cotton appeals the underlying amended judgment (28, App. 110-112) as well as the order. (50).

Facts

Police applied for a warrant to search the duplex at 2571 North 34th Street. Their supporting affidavit claimed that, within the preceding 72 hours, a confidential informant purchased cocaine from Orlando Cotton. The affidavit did not explain how the confidential informant knew it was Orlando Cotton who made the sale. The affidavit did not state how much money the informant spent, how much cocaine the informant received, or other details. (33: PC-App. 115-120).

Police executed the warrant, recovering 1.08 grams of cocaine, with an estimated street value of $108.00, and 564.15 grams of marijuana with an estimated street value of $5,641.00. (2:4). The cocaine was in a very small bottle on a cluttered table, along with cash and drug paraphernalia. (62:107) (testimony of Officer Martinez).

As a tactical squad used a flash-bang to execute a no-knock warrant, the four men inside fled to the upper level of the duplex, which was gutted and apparently undergoing renovation. (61:70). The four men were Cotton, Gilmore, Sean Overton, and a man who gave his name as Jamal Nash (various spellings are found in the record). Police discovered that Nash was Cotton's son, and both are named Orlando Cotton. (61:75; 62:99-100).

According to the prosecutor, Gilmore admitted at his plea hearing that he was responsible for the marijuana in the bedroom. (33:PC-App. 102). Gilmore, personally and through counsel, admitted purchasing the marijuana, bringing it to the house, sharing it with the other people there, and selling it. (33:PC=App. 104). Gilmore told the court he knew where he could go to buy a pound of marijuana. (33: PC-App. 107).

According to Cotton's postconviction motion, docket entries in Gilmore's case indicated that the court reporter filed a transcript of Gilmore's plea hearing, but Cotton's postconviction counsel (undersigned counsel) did not find it in the court file. (33:3).

The prosecutor at Gilmore's sentencing confirmed that Gilmore made these admissions "…to the Court on the day that he pled out…" (33:PC-App. 102). The prosecutor noted that "[t]here was a total of 496 grams of marijuana on the bed, out—I'm assuming, ready to be packaged." *Id*. At Cotton's sentencing, the parties agreed that Gilmore admitted responsibility for the marijuana. Cotton's defense attorney claimed Gilmore not only admitted responsibility for the marijuana on the bed, but further admitted "none of it belonged to [Cotton]." The prosecutor claimed Mr. Gilmore "didn't say that." (68:35). In any event, the jury had not been informed of any admissions by Gilmore.

The jury was never told that Gilmore admitted buying the marijuana and bringing it to the house. The jury was given no information suggesting Gilmore was sophisticated enough to be independently dealing drugs, or that he might

have been a leader or lone actor. Instead, here was the first substantive remark in the prosecutor's opening statement: "What you're gonna hear is that on March 17, 2014, last year, almost to the day, a search warrant was executed at a house at 2571 North 34th Street. You're gonna hear that the target of the search warrant was this defendant, Orlando Cotton." (61:70).

Lead officer Paul Martinez, testified that Cotton was "the target of the warrant." (62:29-30). "I knew who my target was. I knew it was this defendant, Mr. Cotton, Sr., if you will, with the date of birth of 01/22/1975; and also for the residence of 2571 North 34th Street." *Id*. at 101. Defense counsel did not object to the "target" characterizations.

The jury was not told Cotton was targeted on the basis of one alleged purchase of cocaine from Cotton by an informant. Hence, neither was the jury informed of the informant's identity, why he was believable, or how the informer knew the purchase was made from Cotton.

Despite Gilmore's admissions, and despite the undisputed evidence that Gilmore was solely responsible for hidden firearms recovered during the search, the prosecutor emphasized a theory that Cotton was the ringleader. In closing arguments, the prosecutor noted Cotton was older than the others, and argued he "control[led]" them. (65:51).

Just before their no-knock execution of the search warrant, police knocked down a camera on the porch. Inside, they found a television that provided feed from the outside camera. Windows were boarded up. Next to the rear door, police noticed a small hole said to function as a service window through which drugs could be passed. (62:33-41).

In the front room, there was a table with paraphernalia, and other items scattered around it, including a small jar containing suspected rocks of crack cocaine and currency. Next to the table, on a sofa, police found a large jacket; inside it they found a smart phone, keys, and a Wisconsin Quest card

(a card used to obtain benefits through a state program, "Foodshare").[3] *Id*. at 43-54.

In the northwest bedroom, police found numerous documents connecting the bedroom to Gilmore. They also found about a kilo of marijuana and a scale with suspected cocaine residue. *Id*. at 66-69. Officer Martinez claimed that the coat with the phone, keys and Quest card was too large to fit anyone in the house besides Mr. Cotton. Police photographed the coat and its contents but did not inventory them. *Id*. at 105-106.

Police tested numerous items for fingerprints. They did not find Cotton's prints on anything, but they did recover prints of Gilmore, Overton, an Isaiah Tomlin, and someone named Arbuckle. (65:81-82).

Defense counsel sought to introduce the Quest card the police found in the jacket. The State objected that counsel had not given the prosecutor the card until the trial was underway, depriving her of the ability to check it. *Id*. at 49. The court prohibited the defense from entering the card into evidence. *Id*. at 49-50.

Cotton testified that he had no Quest card[4] and denied that the coat with the Quest card belonged to him. *Id*. at 131-132. He was also allowed to testify that he had seen his son near the couch where the coat was found. *Id*. The defense had produced Mr. Nash/Cotton to testify, but the court excluded that testimony after determining that Cotton and his son Nash/Cotton had discussed the latter's testimony in violation of the sequestration order. Cotton testified he had

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[3] The purpose of a Quest card was alleged and discussed in the postconviction motion and not disputed. Copies of two Quest cards are appended to the postconviction motion. (33:PC-App. 120).

[4] According to the postconviction motion, this was true in the sense that Cotton did not have a Quest account, either when the warrant was executed, or at trial. The postconviction motion also alleged that the program's website confirms that account holders keep the same account number if they reapply for benefits after previously losing them. (33:6).

not sold cocaine, as alleged in the search warrant application, and that he told that to Officer Martinez when he was questioned. *Id*. at 125.

Other facts will be discussed as necessary to develop the argument.

ARGUMENT

I. Because the Evidence was Insufficient, the Convictions Must be Vacated, and Double Jeopardy Bars Retrial.

A. Legal Standards.

If the State failed to adduce sufficient evidence, retrial is barred under the constitutions of the United States and Wisconsin. ***State v. Banks***, 2010 WI App 107, ¶43, 328 Wis. 2d 766, 790 N.W.2d 626. On the other hand, if the evidence presented was sufficient, error(s) requiring reversal will not preclude a retrial. ***State v. Perkins***, 2001 WI 46, ¶47, 243 Wis. 2d 141, 626 N.W.2d 762.

Because the sufficiency-based and error-based remedies differ, this court should first determine whether insufficient evidence, requiring dismissal with prejudice, effectively moots the claims of error. If this court rejects the claims of insufficient evidence, it should then address the claims of error. *See*, ***State v. Ivy***, 119 Wis. 2d 591, 609-10, 350 N.W.2d 622 (1984). This court may, of course, find insufficiency as to some charges and error as to others. *See, id*.

Evidence will be found insufficient only when no jury, acting reasonably, could have found guilt beyond a reasonable doubt. Examining the evidence and reasonable inferences therefrom, but excluding speculation and innuendo, there is no possibility that a jury, acting reasonably, could have convicted Cotton. *See*, ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990), and ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762.

B. The State Presented Strong Evidence of Drug-Related Activity but Insufficient Evidence that Cotton was Involved.

The evidence showed Cotton was present in a house over which he had some measure of control, because his mother owned the duplex and hired him to work on it. Beyond that, what did Cotton do? Did he purchase the cocaine and help hold it for resale? No fingerprint or other evidence showed he even touched it; there wasn't much cocaine; and it was found on a table cluttered with numerous drug- and non-drug related items.

Did Cotton purchase the marijuana and help hold it for resale? The marijuana was much more plentiful than the cocaine, but the bulk of it (as well as a scale with cocaine residue) was found in the bedroom most likely occupied by Gilmore, who admitted that he bought it and brought it to the house—information the jury did not hear.

Did Cotton install the camera on the porch, or hook it up to the television/monitor inside the house? Only speculation supports that notion. So what did he do beyond being there, having failing to destroy the drugs or take action against the others, and running upstairs in response to the flash-bang, no-knock entry?

Despite having apparently investigated Cotton before seeking the search warrant, the State presented no evidence to show that Cotton had sold drugs from the home, much less that he acted in concert with Gilmore, with Overton, with his son, or with anyone else as part of a drug dealing business. For example, the State provided no evidence about how often and in what durations Cotton was at the house, aside from Cotton's own admission to having been there recently as a party guest.

The State endeavored to turn these lemons into lemonade with Catch-22 evidence: establishing Cotton's residence at the house would have implied greater knowledge of the activity taking place there but, lacking that evidence, the State

produced as an "expert" its own police witness, Detective Jame Henner. The detective opined that the very absence of evidence that Mr. Cotton lived at the house created evidence that he was using it as a stash house, because sophisticated operators know to limit their connections to "stash houses." (64:86). Thus, the lack of affirmative evidence of specific drug-related activity was transformed into "evidence" of criminality. It is one thing to assume that sophisticated criminals do a better job of covering their tracks than unsophisticated criminals. It is quite another thing to suggest that the absence of tracks, the absence of evidence, is itself evidence. This logic leads to trial by supposition, quite possibly shifting the burden of proof. As discussed in the next section, police witnesses introduced other speculation of this kind—that Cotton must not have been a good landlord or agent, and was likely a drug dealer himself, because he did not intervene to stop the drug activity.

In terms of sufficiency, the evidence of Cotton's non-residence at the house is a net zero: Cotton's failure to live there could demonstrate his lack of connection with the younger men who did live there, and with their activities. While, in theory, Cotton's failure to live at the house could conversely suggest his sophisticated decision to limit his ties, this is conjectural. It is conjectural because the State gave the jury no evidence that Cotton was a sophisticated operator of drug houses.

Even by the time of sentencing, the court had been given little information about what, if anything, Cotton did. The court stated, "Mr. Cotton, I have a—I don't believe you knew nothing that was going on in that house, sir, that that house was not a drug house, a stash house. I have—I couldn't swallow that, sir. I don't know why." (68:49).

The court's statement is telling. Convictions were not permissible based solely on Cotton "knowing" what "was going on in that house." The State bore the burden of proving that Cotton directly committed the crime or "intentionally aid[ed] or abet[ed] the person who directly committed it." Wis. JI Criminal 400 (2005). Merely "knowing" marijuana is present is insufficient to establish criminal liability. The court's

subsequent sentencing remarks underscore the fact that the State, despite its pre-search warrant activity, adduced no evidence of specific acts or statements through which Cotton could be said to have committed or aided or abetted the crimes.

The postconviction court noted that Cotton testified he arrived at the house between 9:00 and 9:30 a.m. and that the search warrant was executed at 10:37 a.m. (App. 105, 102). Therefore, Cotton could have been present for as much as one hour, 37 minutes, in a dwelling that contained numerous items of drugs and drug-related items. Juries and reviewing courts are entitled to infer that Cotton acquired knowledge during that period, but knowledge is not enough.

In ***State v. Rundle***, 176 Wis. 2d 985, 1009, 500 N.W.2d 916 (1993), the defendant had ample knowledge his wife was physically abusing their daughter. Moreover, he took no action to stop his wife's criminal conduct. Nevertheless, his knowledge and omissions to act did not constitute either direct commission or aiding and abetting the wife's crimes. "One of the elements of aiding and abetting is that the defendant engage in some conduct (either verbal or overt), that as a matter of objective fact aids another person in the execution of a crime." *Id*. at 985. Moreover, the State must prove that the defendant "had a conscious desire or intent that the conduct would in fact yield such assistance." *Id*. at 989.

As to direct commission, the State seemingly conceded, when it initially charged Cotton as a party to crime as to the cocaine, and, after presenting all its evidence, when it added the party-to-a-crime allegation on the marijuana charge, that it lacked proof that Cotton directly committed all acts meeting the elements of those two charges. Plainly, the lack of fingerprints on the drugs or other items, combined with the ample number of prints and identifiers implicating the others, the most the State arguably showed was that Cotton aided and abetted the others.

But aiding and abetting requires mutuality of purpose between the aider/abettor and the recipient of that assistance.

As the court correctly instructed the jury, party-to-a-crime liability requires proof beyond a reasonable doubt that "the person who [directly] the crime [must] know[] of the [aider/abettor's] willingness to assist." (66:8).

In this case, the jury was deprived of the chance to weigh Gilmore's claim that he acted independently and separately from Cotton. The evidence the State did present included no specific indication of what Cotton did or offered to do, much less whether and how he communicated that willingness to co-actors.

Appended to this brief, as permitted by Wis. Stat. §809.23(3)(b) and (c), is a copy of this court's opinion in ***State of Wisconsin v. Cham Okery Omot***, No. 2010AP899-CR (Wis. App. December 23, 2010) (unpublished, authored opinion). App. 113-126.

Like Cotton, Omot was proximate to a lot of drugs. Indeed, unlike Cotton, Omot lived on the premises where a roommate apparently kept and sold them. Yet nearness to and knowledge of drugs was insufficient proof that Omot was "concerned in the commission" (*i.e.*, a party to the crime) of possessing them with intent to deliver, or maintaining a house for that purpose.

The State was not entitled to convictions merely because it persuaded a jury that Cotton should have known about activity at the house—either during the approximately 1.5 hours just before the search, or at other times. The State was required to prove that Cotton "intentionally aid[ed] or abet[ed] the person who directly committed" each crime. (66:8). The record contains no such proof.

Omot also provides convincing analysis of the need for mutuality of purpose among aiders-abettors and principals. In this case, the State adduced insufficient evidence that Cotton and the others were working in concert.

II. Alternatively, this Court Should Order a New Trial in the Interest of Justice.

If this court rejects Cotton's sufficiency arguments, it should nevertheless grant him relief—a new trial—without need for an evidentiary hearing. Many of the instances of ineffective assistance of trial counsel asserted in the next section are sufficiently clear to justify remedying them with a new trial in the interest of justice.

Cotton's postconviction motion sought a new trial in the interest of justice pursuant to Wis. Stat. §§805.15(1) and 806.07.(1)(g), as permitted by ***State v. Henley***, 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350. (33). He seeks the relief here based on the discretionary authority conferred on this court by Wis. Stat. §752.35.

New trials in the interest of justice are granted sparingly. Even so, the relief can be appropriate, in this court's discretion, "(1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may fairly be said that the real controversy was not fully tried." The determination is made after examining the totality of the circumstances. ***State v. Hicks***, 202 Wis. 2d 150, 160 549 N.W.2d 435 (1996).

The jury was deprived of the following important evidence:

1. The jury was not told that Gilmore admitted bringing the marijuana into the house, and that he acted independently of Cotton and the others. A jury, not a reviewing court, should assess whether this is

> completely true or whether is some reason—not discernible in the extant record—why Gilmore would wish to spare Cotton from responsibility. The need to have the jury weigh this claim is acute because the absence of Gilmore's admissions gave the State an unfair advantage as it pressed its theory that Cotton controlled Gilmore and the others. It deprived Cotton of corroboration that Gilmore was not under his control and not even part of a common enterprise.

In its response to the postconviction motion, the State admitted that trial counsel could not have had a valid strategic reason for failing to bring Gilmore's admission to the jury's attention. The State admitted: "Trial counsel intended to call Mr. Gilmore to testify." (35:8). Hence, it is unnecessary to hold an evidentiary hearing to determine what is obvious: counsel performed deficiently by failing to introduce Gilmore's admission into evidence.

Nor is a hearing needed to determine whether admission of the evidence was possible. In ***State v. Anderson***, 141 Wis. 2d 653, 656, 416 N.W.2d 653 (1987), the court noted that an out-of-court statement by a third party, made against that party's penal interest, *i.e.,* a statement covered by Wis. Stat. §908.045(4), could be admitted if sufficiently corroborated. A statement should be admitted upon "corroboration sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the statements could be true." ***Anderson***, *Id*.

Gilmore's statements-against-interest were made in a guilty plea and at his sentencing. As outlined above in the facts, his statements—that he acted alone with respect to the marijuana—were amply corroborated by the marijuana having been recovered in the bedroom containing identifiers suggesting that the bedroom was his. A scale with cocaine residue was found in the same bedroom.

Finally, there is no question that omitting Gilmore's admission clouded the jury's consideration of a "crucial"

issue, as required by ***Hicks***. There was no question whether drug-related activity was and had been taking place. The question for the jury was whether Cotton directly committed the offense of keeping a drug house and whether he was concerned—as a principal or as an aider/abettor—in possessing marijuana and cocaine with intent to deliver. Since the crucial issue was whether Cotton was involved, the jury should have had all reliable evidence bearing on the comparative involvement of Gilmore and others.

In ***State v. Guerard***, 2004 WI 85, 273 Wis. 2d 250, 682 N.W.2d 12, a unanimous supreme court reversed a conviction under circumstances similar to those presented here. Guerard's brother had given police an out-of-court confession, but invoked his Fifth Amendment privilege and refused to testify at the jury trial. Trial counsel failed to subpoena the brother's out of court statement and present it as evidence. *Id.*, ¶¶ 3, 14-15.

As in this case, the confession by another person might not necessarily have resulted in exoneration of the defendant: "The jury would have had to determine the weight and credibility to assign to Daniel's [the defendant's brother's] confessions, and might have convicted Guerard anyway. But the failure to introduce Daniel's admissible confessions exculpating Guerard undermines our confidence in this verdict." *Id.*, ¶ 49.

It is particularly within the province of the jury to determine matters of credibility. *Id*. In this case, had trial counsel performed adequately, the jury could have determined whether Gilmore and others, but not Cotton, shared possession of the drugs and/or operated a drug house, or whether Cotton shared liability for one or more of the charged crimes. It surely must undermine confidence in the reliability of the verdicts though, when the jury was given no opportunity to weigh Mr. Gilmore's admission that he was responsible for the large amount of marijuana.

The State's response to the postconviction motion rationalizes the omission of the Gilmore admissions on the ground that other evidence supported conviction. However, even if other evidence may have diminished the value of the admission, neither the other evidence nor any other circumstances justified "foregoing [its] use altogether." *Id.*, ¶ 46.

2. As detailed at pp. 19-20 of the postconviction motion (33:19-20), the jury should have heard Overton's admission that he saw Gilmore bring a scale into the house at about 5:00 a.m. the morning of the search, hours before Cotton was present. Overton and Gilmore were cousins, increasing the chance that Overton and Gilmore, as opposed to either of them with Cotton, were involved in drug-related activity.

Instead of evidence that could have helped the jury assess the relative involvement of all the men in the house, the jury received information that was at once irrelevant to the proper inquiry and inflammatory—virtually guaranteed to distract the jury from its mission. These instances are discussed more fully in the next section, but Cotton requests this court to consider them in the context of the interest of justice. In summary form, the improper considerations clouding the issues were:

- A claim unsupported by evidence and not subjected to testing that Cotton was "the target" of the search warrant. (67:70) (prosecutor's opening statement). 62:29-30, 101 (police testimony). (63:54) (police testimony, with "target" elicited by defense counsel).
- An unforced, spontaneous accusation by defense counsel, lacking any support in the record, that Cotton had admitted to police, "I have even been a pimp." (66:42).
- A claim by a police witness that, if Cotton was not guilty of wrong doing, he would have acted like a responsible landlord and contacted law enforcement officers to stop drug dealing activity by others. (63:64).

- A claim by the police witness that Cotton spoke "in a manner as though he's been there before. He was very comfortable … and he basically kind of said … what is it going to take for me to get out of this situation? I know how this works, things to that effect. He was willing to talk about other crimes and other things going on." *Id*. at 72-73.

The crucial issue was not whether drug-related activity occurred or even whether the jury could have disbelieved Cotton's claim that he was unaware of it. Evidence undercutting Cotton's general character, and transforming the inquiry into whether he should have *stopped* the activity were permitted to distract the jury from the question whether Cotton was *involved* in the crimes.

III. Alternatively, this Court Should Reverse the Order Denying the Postconviction Motion and Remand for an Evidentiary Hearing on Whether Defense Counsel at Trial Rendered Ineffective Assistance.

A. Introduction

Effective assistance of counsel is guaranteed by U.S. Const. amends. VI and XIV, as well as Wis. Const. art. I, sec. 7. To establish ineffective assistance, Cotton is not required to prove he would have been acquitted but for his attorney's errors or omissions. He is required to establish deficient performance—that his counsel's errors or omissions were so serious that counsel was not functioning as the "counsel" guaranteed by U.S. Const. Amend. VI—and prejudice: a *reasonable probability* that, but for counsel's deficient performance, the result of the proceeding would have been different. *See*, ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

Whether counsel rendered ineffective assistance is a mixed question of law and fact. Factual determinations are upheld unless clearly erroneous, but the ultimate

determination is a question of law. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Prejudice can result from the cumulative impact of multiple deficiencies, even if none of them, standing alone, would be prejudicial. *Id*. at ¶59, citing the prejudice requirement of ***Strickland v. Washington***, 466 U.S. 668 (1984).

When Cotton's trial attorney, James E. Toran, took over representation from a public defender-appointed attorney, he told the court, about two months before trial, that he did not anticipate calling any witnesses, except, possibly, Cotton. (58:3).

On the morning of trial, the court advised the parties that Gilmore was going to resolve his case, and asked whether Cotton still intended to go to trial. Mr. Toran requested an adjournment because "…some of the witnesses I want, I found out that they had given different names and I couldn't subpoena them. And in addition, with the codefendant pleading to the charge, I might want to call him as a witness, Your Honor, because he's pleading to, I believe, to the marijuana, which my client is also charged with." (59:2-3).

The court wanted a record of who Mr. Toran had as witnesses and the issues with producing them. Mr. Toran stated that police "interviewed someone by the name of Jamal Nash. I don't believe that that individual's name is Jamal Nash." *Id*. at 3. The prosecutor noted that Mr. Nash was Mr. Cotton's son; Mr. Toran admitted this was true, but indicated he had not been able to subpoena him because he gave a different name. *Id*. at 3-4. The lack of preparation and knowledge demonstrated by Mr. Toran in this exchange set the stage for subsequent problems.

B. Instead of objecting to the "target" characterizations, defense counsel endorsed them.

As noted, the prosecutor, early in her opening statement, emphasized that Cotton was the "target" of the search warrant. The jury was not given a legal definition of "target," but the term plainly carries the implication that Cotton was involved with drug trafficking and that, since he had this involvement, the jury could infer guilt of the charges at hand. The "target" characterizations should be viewed in combination with Mr. Toran's gratuitous indication that Mr. Cotton had also been a pimp, and with the unnecessary opinions that Mr. Cotton seemed well at home in the setting of a police interrogation. These facts are discussed below. Without being told of specific acts, Mr. Toran allowed the jury to be told that Mr. Cotton routinely did other criminal acts. In the absence of any attempt by Mr. Toran, having stood by while this evidence came in, to obtain a limiting instruction, the "target" characterizations, "pimp" remark, and opinion testimony invited the jury to convict Mr. Cotton on the grounds that, in addition to being present, he was a bad person capable of committing the crimes.

Mr. Toran failed to function as counsel when he allowed this to happen. As to the "target" characterizations, Mr. Toran not only failed to object, he asked Officer Martinez, "In this case, the target was Orlando Cotton, correct?" (63:54). By reinforcing that his client was a target, Mr. Toran rendered deficient representation, assisting the State in its insinuation that facts never put in evidence nevertheless evidenced involvement in the crimes. This action, especially when combined with counsel's other errors, was prejudicial because the jury was invited to substitute innuendo—actions making Cotton a target—for actual proof of anything Cotton actually said or did to commit or aid or abet the commission of the crimes.

C. Trial counsel failed to present evidence that Elijah Gilmore admitted responsibility for the marijuana found in his bedroom.

During trial, the court permitted the State to amend count two to add an allegation that Mr. Cotton was a party to the crime of possessing marijuana. The prosecutor argued outside the jury's presence that Gilmore and Cotton were each parties to the crime, that Gilmore had pled as to his role, and that Mr. Cotton also played a role. (63:6).

Unfortunately for Cotton, his attorney failed to bring Gilmore's role to the attention of the jury to let it assess, in light of Gilmore's clear role, whether the State proved that Cotton played any role. This failure deficiently and prejudicially kept Cotton from arguing that Gilmore was exclusively responsible for the marijuana. In turn, the failure deprived Cotton of powerful evidence that, if Gilmore was exclusively responsible for the marijuana, his excusive responsibility for the marijuana lent credence to Cotton's claim that he was wholly unaware of the comparatively tiny amount of cocaine: Gilmore had a scale with cocaine residue in the bedromm he apparently used. If Cotton had nothing to do with either the marijuana or the cocaine, this would have created doubt whether—as opposed to knowing that the house had been equipped for drug-dealing—Cotton had directly committed the crime of maintaining a drug house.

In keeping with Wis. Stat. Sec. 905.13(2), the court, out of the presence of the jury, confirmed that Gilmore would invoke his Fifth Amendment privilege against self-incrimination if called to testify. (59:9-10). But that statute is constitutional only because it should have been applied without depriving Mr. Cotton of a complete defense. *See*, ***State v. Heft***, 185 Wis. 2d 288, 517 N.W.2d 494 (1994).

Trial counsel's sentencing argument shows he knew Gilmore's admissions supported Mr. Cotton's claims that he was not involved in dealing drugs at the duplex. Counsel noted, "…we went to trial because Elijah Gilmore had pled

guilty, indicating that the drugs in the bedroom, the marijuana, was his. So we knew that going in, but we couldn't tell the jury that." Tr. 5/22/15 at 42.

But the jury could have and should have been told. Mr. Gilmore was unavailable as a witness after the court ruled he validly asserted his Fifth Amendment right. *See*, Wis. Stat. Sec. 908.04(1)(a). His plea to having bought the marijuana and having brought it to the house represented a statement against interest—his interest in avoiding criminal liability. *See*, Wis. Stat. Sec. 908.045(4). While that statute conditions admissibility of the statement on corroboration (because it would be offered to exculpate Mr. Cotton), Mr. Gilmore's admissions were amply corroborated by the physical evidence: the vast bulk of the marijuana was found on the bed in the same bedroom with numerous "identifiers" of Mr. Gilmore. Despite these statutory provisions, and trial counsel's clear awareness that Mr. Gilmore's admissions were important, counsel did not attempt to introduce the admissions after Mr. Gilmore invoked his privilege against self-incrimination. Mr. Cotton engaged in no wrong-doing to warrant exclusion of Mr. Gilmore's admissions. *See*, ***State v. Frambs***, 157 Wis. 2d 700, 702, 460 N.W.2d 811 (Ct. App. 1990).

Whether the right to present a complete defense was violated is a question of constitutional fact: constituent factual findings are upheld unless clearly erroneous, but the ultimate issue is one of law, independently determined on review. ***In Interest of Michael R.B.,*** 175 Wis. 2d 713, 720, 499 N.W.2d 641 (1993). This limits the general rule giving trial courts wide discretion. *See,* ***State v. Doss***, 2008 WI 93, ¶¶19-20, 312 Wis. 2d 570, 754 N.W.2d 150. Trial counsel's failure introduce the Gilmore admissions was prejudicial because there is no question the trial court would have been required to receive the evidence.

D. Trial counsel failed to present evidence that a QUEST card recovered at the duplex belonged to Cotton's son.

Police inventoried numerous objects. They gave other objects to their apparent owners rather than keeping them. Among these were the Quest card issued to an Orlando Cotton. Even though they established that Mr. Nash was also named Orlando Cotton, the police did not verify whether the Quest card belonged to the father or to the son. (61:109).

Cotton asserted that the Quest card belonged to his son, along with the jacket in which the card was found. Mr. Toran sought to so establish, but he had failed to provide the Quest card to the State as required by discovery statutes. (65:49-50). The prosecutor noted that the card presented to her had illegible numbers. *Id*. at 49.

The postconviction motion alleged as follows. (33:15-16).

At a hearing on the motion, the defense would establish that (1) Mr. Toran did not consult with Mr. Cotton, prior to trial, about whether he and his son had (or had had previously) a Quest card; (2) Mr. Toran did not speak to Mr. Cotton's mother, Bobbi Robinson about a Quest card; and (3) That Ms. Robinson possessed, and could have given Quest cards to Mr. Toran at any point after he began representing Mr. Toran in October of 2015. (33:15).

Appended to the postconviction motion is a photocopy of both Quest cards that were in Ms. Robinson's possession. App. (33:PC-App. 120). The postconviction motion alleged that Ms. Robinson had the card with illegible/rubbed off numbers prior to execution of the search warrant. This card was associated with a Foodshare account for Cotton; the account was not active at the time Cotton testified. Ms. Robinson was given the other card—the one whose numbers are all readable—after the warrant was

executed. That card was associated with a Foodshare account for Jamal Nash/Orlando Cotton—Cotton's son.

Undersigned counsel obtained these cards from Ms. Robinson a day after requesting them from her. Ms. Robinson would testify that Mr. Toran never interviewed her or requested the card. Mr. Cotton would testify—consistently with the exchange at trial—that Mr. Toran did not seek the card from him until just before the trial began.

Instead of conducting his own investigation and recovering the Quest cards, defense counsel asked a police officer—on the stand—to investigate the issue and report back. The State objected, and the court ruled, out of the jury's presence, that the defense would not be permitted, in effect, to dictate the investigation the State would be required to investigate. (62:114-115).

The postconviction court ruled that establishing Cotton's son as the owner of the Quest card "would not have made a singular difference in the outcome of the case." (43:7, App. 107). This court should consider it as part of a list of injustices to Cotton in the presentation of his case. Under ***Thiel***, it is part of a cumulating failure.

E. Trial counsel failed to adequately object to irrelevant opinion evidence.

The State elicited police testimony in the form of opinions that were either irrelevant or whose probative value was outweighed by their unfairly prejudicial effects. Officer Martinez testified that, because he was a landlord himself, he believed Cotton, if innocent of wrongdoing, would have called the police rather than staying in the house. (63:64). Mr. Toran objected but did not move to strike the testimony.

Mr. Toran elicited Officer Martinez's testimony that, during the interrogation, Cotton repeatedly denied knowledge of the cocaine or marijuana. Mr. Toran then

elicited the officer's testimony that Mr. Cotton made his denials "in a manner as though he's been there before. He was very comfortable … and he basically kind of said … what is it going to take for me to get out of this situation? I know how this works, things to that effect. He was willing to talk about other crimes and other things going on." *Id*. at 72-73. Going further, Mr. Toran noted, and obtained the officer's agreement, that he declined to work with Mr. Cotton because he did not believe he was credible. *Id*.

F. Trial counsel, asserting facts not in evidence, needlessly prejudiced his client.

Making the point that Cotton's cooperation with police suggested innocence, Mr. Toran volunteered that Cotton told police, "I have even been a pimp." (66:42). No evidence supported this announcement. It was damning on its face. No reasonable strategy could have called for such a remark, and it did nothing but prejudice Cotton before the jury.

Attacking the character of a client, by resort to an accusation that is not even part of the record, is clearly, objectively unreasonable under prevailing professional norms. As such, it is plainly deficient. *See*, ***State v. Kimbrough***, 2001 WI App 138, ¶31, 246 Wis. 2d 648, 630 N.W.2d 752.

The remark is too inflammatory to be dismissed as isolated, even if it had been isolated. In any event, the remark was not isolated: it was surrounded by the context, in which Cotton was not shown to have done anything specific beyond being present and running upstairs, but was also smeared with suggestions that he was very experienced in dealing with the police.

The prosecutor described her reasoning and measures she took to prevent the jury from hearing irrelevant and/or unduly prejudicial information from Mr. Cotton's recorded police interrogation. (61:117-118). While protecting the record, the prosecutor noted she might be forced to develop

prejudicial subjects if Mr. Toran insisted on broaching them. *Id*. at 116.

Mr. Toran insisted on proceeding in a manner designed to show the jury that Mr. Cottton had "nothing to hide." *Id*. at 116-117. As a result, Mr. Cotton ended up having to testify about why he offered to help police make arrests in other cases. (65:123-124). Indeed, Mr. Toran *initiated* this discussion. The court and State tried to restrict it. (63:71-72).

CONCLUSION

Mr. Cotton asks this court to reverse the judgement of conviction and remand with directions to dismiss all charges with prejudice. In the alternative, he seeks reversal of the judgment and a new trial; in the alternative, he seeks reversal of the order denying postconviction relief and an evidentiary hearing on the issue of ineffective assistance of counsel.

Dated at Milwaukee, Wisconsin, March 17, 2017.

Respectfully submitted,

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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 7,461 words.

RANDALL E. PAULSON

ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(1)(f).

RANDALL E. PAULSON

CERTIFICATE OF MAILING

Pursuant to WIS. STAT. (RULE) 809.80(4), I hereby certify that on March 17, 2017, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Orlando Lloyd Cotton to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin, 53701-1688. On this date, I also served three copies of the brief, also by U.S. Mail, on the Wisconsin Department of Justice, Criminal Appeals Unit at the address on file with this court.

RANDALL E. PAULSON

CERTIFICATION OF THE APPENDIX

I hereby that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b); and (4) 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.

Signed:

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RANDALL E. PAULSON

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