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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP2211-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ORLANDO LLOYD COTTON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE CLARE L. FIORENZA, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Was there sufficient evidence to convict defendant-appellant Orlando Cotton of possession with intent to deliver cocaine as a party to a crime, possession with intent to deliver THC as a party to a crime, and keeping a drug house?

The circuit court held that there was sufficient evidence to support the convictions.

2. Is Cotton entitled to a new trial in the interest of justice based on evidence that his trial counsel failed to object to or failed to introduce at trial?

The circuit court held that Cotton was not entitled to a new trial in the interest of justice.

3. Is Cotton entitled to an evidentiary hearing on his claim of ineffective assistance of counsel?

The circuit court denied Cotton's postconviction motion without an evidentiary hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

INTRODUCTION

Cotton was convicted following a jury trial of possession with intent to deliver between one and five grams of cocaine as a party to a crime, possession with intent to deliver between 200 and 1000 grams of THC as a party to a crime, and maintaining a drug house. On appeal, Cotton challenges the sufficiency of the evidence on all three counts,

asks this Court to grant him a new trial in the interest of justice, and argues that his trial counsel was ineffective on multiple grounds.

This Court should affirm the judgment of conviction and the order denying postconviction relief. There was sufficient evidence adduced at trial to support the jury's finding that Cotton committed each of the charged offenses. The Court should deny his request for a new trial in the interest of justice because he bases that request solely on his trial counsel's alleged ineffectiveness and has not shown that this is an exceptional case that would allow this Court to exercise its power of discretionary reversal. The Court should reject Cotton's claims of ineffective assistance of counsel because he has not carried his burden of proving that his trial lawyer performed deficiently and that he was prejudiced by counsel's allegedly deficient performance.

STATEMENT OF THE CASE

Facts. Shortly after 10:30 a.m. on March 17, 2014, police executed a search warrant at a residence located at 2571 North 34th Street in Milwaukee. (R. 61:83, 113.) As the police entered, the four men in the house ran upstairs. (R. 61:97–98; R. 63:48.) The officers ordered the men to come downstairs, which they did. (R. 61:99.) Cotton was one of those men. (*Id*.) The other men present were Cotton's son, who also is named Orlando Cotton but who identified himself as Jamall Nash, Sean Overton, and Elijah Gilmore (R. 62:17, 100, 112 ; R. 63:79.)

Milwaukee Police Officer Paul Martinez was the officer in charge of the investigation into drug activity at 2571 North 34th Street. (R. 62:30.) He testified that he obtained the search warrant and that defendant Orlando Cotton was the target of the warrant. (R. 62:30–31.)

Martinez testified that Jamall Nash/Orlando Cotton was not the target of the investigation and that he was not familiar with Nash/Cotton until that day. (R. 62:102.)

One of the officers who conducted the search testified that "just about every room" on the first floor "held various items to include marijuana, crack, [and] different drug paraphernalia . . . ." (R. 62:5.) In the bathroom, there was marijuana on the floor and tub and in the toilet, which was still swirling when the officers entered. (R. 61:118–19.) Officers recovered 33 grams of marijuana from the toilet. (R. 61:119.) The police found many gallon-sized bags with marijuana residue in different rooms of the house, which, according to Officer Martinez, suggested that "they're dealing in pound increment levels." (R. 62:48.)

In the living room, there was a table on which officers found marijuana on multiple scales ready to be packaged, clear sandwich bags, a glass bowl with four corner-cuts of marijuana, and a jar with four $25 packets of cocaine and $25 in cash. (R. 62:42–47.) Those packets contained a total of 1.08 grams of cocaine. (R.62:91.) There was more than $1000 in cash on the living room table and chair. (R. 62:95.)

On a sofa near that table, officers found a coat with multiple sets of keys, a cell phone, and a QUEST card in the name of Orlando Cotton in the pocket.[1] (R. 62:43, 55; R. 63:77). Officer Martinez acknowledged on cross-examination that he did not know whether the card belonged to the defendant Orlando Cotton or to his son. (R. 63:18–19.) Defense counsel intended to have Nash/Cotton testify that

[1] A QUEST card is a debit card used by participants in the Wisconsin FoodShare program to buy groceries. *See* https://www.dhs.wisconsin.gov/foodshare/ebt.htm (last visited May 22, 2017).

the QUEST card belonged to him, but the court prohibited Nash/Cotton from testifying after Cotton violated the sequestration order by speaking to him about the case shortly before Nash/Cotton was to testify. (R. 64:11–12, 16–17; R. 65:39–42.)

There was other evidence that the coat belonged to Cotton. One set of keys found in the coat pocket fit Cotton's car, which was parked outside. (R. 63:81–82.) The coat was a size 2X or 3X. (R. 63:14.) Martinez testified that Cotton's son was about six feet tall and slim, while Cotton was "by far the larger" of the men who were in the house, including Cotton's son. (R. 63:85.) Martinez gave the coat (but not the items found in it) to Cotton to wear after Cotton was arrested and taken outside. (R. 63:14; R. 64:26–27.) Cotton did not tell Martinez that it was not his coat. (R. 63:84.)

In the kitchen, police found a glass jar on the stove containing a large amount of cocaine residue. (R. 62:58–59.) There was a knife in the jar and scratch marks in the residue that appeared to have resulted from scraping crack cocaine chunks from the jar after the crack had cooled and hardened. (R. 62:58–60.) There were eight 100-count boxes of clear plastic sandwich bags on the kitchen table. (R. 62:60.)

In one of the first-floor bedrooms, officers found a bag with 28 grams of marijuana, a Pyrex measuring cup and beater spoons with suspected crack residue, a digital scale, and documents for a Jonathan Thomas. (R. 61:121–22; R. 62:12, 15.) Thomas was not at the house while police were there. (R. 62:21–22.)

In the other first-floor bedroom, there was a bag containing 490 grams (a little over a pound) of marijuana, a gallon-sized Ziploc bag with marijuana residue in the corners, and a digital scale with marijuana residue on it. (R. 62:61–63, 69.) On a shelf in that bedroom, there was a bag

containing small zip-closure bags used for packaging narcotics for sale, a jar with marijuana residue inside, and a box of nine millimeter cartridges. (R. 62:64–66.) There was a backpack in that bedroom that had documents with Elijah Gilmore's name. (R. 62:67–68.)

The upper unit of the house, which was accessible from the first-floor kitchen, was unoccupied and under renovation. (R. 62:39, 72.) The grill had been removed from a fresh air return vent in one of the upstairs bedrooms. (62:72.) Police recovered three loaded semi-automatic pistols from the fresh air return duct. (R. 62:72–73.) Cotton later told the police that the guns belonged to Gilmore. (R. 63:61.)

The house had a video surveillance camera on the front porch. (R. 62:34–35.) In the living room, there was a large flat screen television that displayed a live feed from the porch camera. (R. 62:35–36.) The front door had metal brackets to hold a two-by-four for barricading the door from the inside. (R. 62:38–39.) The house's rear door, which was in the kitchen, was barricaded with a board. (R.62:39–40.) All of the windows on the first floor were boarded up with plywood from the inside. (R. 62:41–42.)

A hole about the size of a birdhouse opening had been drilled in the kitchen wall next to the rear door. (R. 62:40). The hole was covered on the outside by a piece of vinyl siding that slid to allow access to the hole. (*Id*.)

A Milwaukee Police Department detective who was experienced in drug investigation explained that drug dealers often keep drugs, drug supplies, and weapons in a "stash house" where they do not reside and that they often sell drugs from that location. (R. 64:77–79, 87–88.) The detective testified that, in his opinion, based on the presence of the video surveillance system with a live feed, the front-door barricade, the service hole next to the back door, the

boarded-up windows, the amount of cash, the baggies, and the scale, the house was being used as a place to maintain, manufacture, and distribute marijuana and cocaine. (R. 64:89–101.)

A Milwaukee Police Department forensic examiner recovered 17 prints from the more than 30 items seized from the house. (R. 64:71–72.) Cotton's fingerprints were not on any of the items. (R. 63:78–79.)

After Cotton was arrested, Officer Martinez and a Special Agent from the Bureau of Alcohol, Tobacco, and Firearms interviewed him. (R. 62:95.) Cotton told them that he was the property manager for his mother, who owned the house. (R. 62:96.) Cotton said that he was supposed to be renovating the upper unit of the house. (R. 62:97.) He said that he allowed a man named Johnny Tate to live in the lower unit rent free because he owed Tate money and that his mother was unaware of the situation. (R. 62:97–98; R. 63:97–98.)

Cotton said that he was at the house at the time of the search to retrieve his car, which he had left there following a party a few nights earlier. (R. 62:100.) He told the officers that he didn't know anything about drug activity at the house other than some small personal use and didn't know what was going on at the house that day. (R. 62:99; R. 63:64.)

Officer Martinez testified that Cotton's denials "struck me as odd seeing how everything, all the action of the houseful of people was all contained to the living room . . . ." (R. 63:64.) Martinez testified that Cotton's denials also seemed odd because Cotton said that he was the property manager and, as a former landlord himself, Martinez would have called the police if he had seen those things in one his

rental properties. (R. 63:64–65.) Defense counsel objected that the latter testimony was unresponsive to his question. (R. 63:65.) The trial court had counsel restate the question and directed him to answer the restated question. (*Id*.)

Defense counsel asked Martinez whether, when Cotton denied knowledge of the drugs, "did he do it in a stern fashion, or did he do it in, like, a plain face?" (R. 63:72.) Martinez said that Cotton "did it in a manner as though he's been here before," that Cotton "was very comfortable with the situation," and that he said words to the effect of "what's it going to take; not verbatim, but, what is it going to take for me to get out of the situation?" (*Id*.) Martinez testified that he normally works with informants who admit their wrongdoing because that makes them a more credible informant and that Cotton "simply denied having any knowledge of anything that was going on in plain view." (R. 63:73.)

Cotton testified in his defense. (R. 65:84–151.) He testified that he was not employed, that his mother owned 16 rental properties, and that he "assist[ed] her in running her properties." (R. 65:85–86.) Cotton said that his mother rented the lower unit at 2571 North 34th Street to a man named Jonathan Thomas and that the upper unit was vacant; he denied that he was letting Thomas stay there because he owned Thomas money. (R. 65:88–89, 139.)

Cotton testified that he had been at a party in the lower unit two days before the search and that his car would not start when he left the party. (R. 65:89.) He returned to the house to retrieve the car around 9:00 to 9:30 on the morning of the search. (R. 65:89, 94.) Cotton testified that he did not have keys to the property and that Elijah let him in to the house. (R. 65:94.) He said that he did not know how Elijah, his son, or the other man got access to the residence. (R. 65:131.)

Cotton said that he did not install the security camera and did not know who had. (R. 65:95–96.) He testified that he did not see any cocaine or marijuana. (R. 65:100, 103–04.) He also testified that he had his car keys on his person, that he did not have a "large amount of keys," and that the officer took the keys to his car from the pocket of the coat he was wearing. (R. 65:108–09, 142–43.) He said that he did not place a jacket on the couch and that he did not have a QUEST card that day. (R. 65:109, 132.)

Cotton testified that he remained standing outside the living room from the time he came to the house until the police arrived. (R. 65:101–03, 133, 144.) He ran upstairs when the police broke down the door because he did not know what was going on and everyone else was running. (R. 65:105–06.) He testified that the drugs found in the house were not his. (R. 65:128.)

Cotton testified that he did not know about the brackets on the front door. (R. 65:90.) He said that the windows had been partially boarded up to prevent break-ins and that the house previously had been broken into. (R. 65:90–92.) He also testified that he did not see any plywood covering the living room windows. (R. 65:93.)

Litigation history. Cotton was charged with possession with intent to deliver cocaine, possession with intent to deliver THC as a party to a crime, and keeping a drug house. (R. 14:1–2.) Codefendant Elijah Gilmore was charged with possession with intent to deliver THC as a party to a crime and possession with intent to deliver cocaine as a party to a crime (R. 14:2.)

Cotton and Gilmore were to be tried together. (R. 58:2–9). Shortly before the trial was to begin, Gilmore pleaded guilty to the THC charge (R. 60:9–11.) The circuit court subsequently granted the State's request to amend Cotton's

cocaine possession charge to add a party-to-a-crime allegation. (R. 63:6–7.) Cotton's case was tried to a jury, which found him guilty on all counts. (R. 67:8–10.)

Cotton filed a motion for postconviction relief under Wis. Stat. § (Rule) 809.30. (R. 33:1–20.) He alleged that the evidence was insufficient to support his convictions, that the court should grant him a new trial in the interest of justice, and that the court should modify his sentence. (R. 33:7–9, 18–20.) He also alleged that he received ineffective assistance from his trial counsel because counsel: 1) failed to object to remarks and testimony characterizing Cotton as the target of the investigation (R. 33:11–12); 2) failed to present evidence that Gilmore admitted responsibility for the marijuana found in one of the bedrooms (R. 33:12–15); 3) failed to present evidence that the QUEST card belonged to his son (R. 33:15–16); 4) failed to move to strike Officer Martinez's testimony that, based on Martinez's experience as a landlord, Martinez would have called the police rather than staying in the house (R. 33:16–17); 5) failed to object to Martinez's description of his demeanor during questioning (R. 33:17); and, 6) in closing argument, asserted prejudicial facts not in evidence that Cotton told the police that he had been a pimp (R. 33:17–18).

The circuit court denied the motion in its entirety. (R. 43:1–9, A-App. 101–09.) The court summarized the trial testimony in some detail and concluded that the evidence was sufficient to convict Cotton on each charge. (R. 43:2–5, A-App. 102–05.) With respect to Cotton's ineffective assistance claim, the court held that it might have sustained an objection to Martinez's testimony about what Martinez would have done as a landlord (R. 43:8, A-App. 108) and that counsel could be deemed to have performed deficiently when he said in closing argument that Cotton told police that he had been a pimp (R. 43:8–9, A-App. 108–09), but otherwise

concluded that counsel had not performed deficiently (R. 43:6–9, A-App. 106–09). The court further held that Cotton was not prejudiced by any of the instances of alleged ineffective assistance. (R. 43:6–9, A-App. 106–09.)

STANDARD OF REVIEW

Whether the evidence is sufficient to sustain a guilty verdict is a question of law subject to this Court's de novo review. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410.

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The circuit court's findings of fact will be upheld unless they are clearly erroneous. *Id.* Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an appellate court reviews without deference to the circuit court's conclusions. *Id.* at 128.

Whether a defendant's postconviction motion alleges sufficient facts to entitle him to an evidentiary hearing is a question of law that an appellate court reviews de novo. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

ARGUMENT

I. There was sufficient evidence to support each of Cotton's convictions.

A. Applicable legal standards.

"[A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501,

451 N.W.2d 752 (1990). In 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." *Id.* at 507.

"If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id.* "This high standard translates into a substantial burden for a defendant seeking to have a jury's verdict set aside on grounds of insufficient evidence." *State v. Hanson*, 2012 WI 4, ¶ 31, 338 Wis. 2d 243, 808 N.W.2d 390.

B. There was sufficient evidence to support Cotton's convictions.

1. Possession of cocaine and marijuana with intent to deliver.

The trial court instructed the jury that the crimes of possession with intent to deliver cocaine and marijuana as a party to a crime had four elements:

> [One], the defendant or another possessed a substance. "Possess" means that the defendant or another knowingly had actual physical control of the substance. An item is also in a person's possession if it is in an area of which the person has control and the person intends to exercise control over the item.
>
> It is not required that the person own an item in order to possess it. What is required is that the person exercises control over the item. Possession may be shared with another person. If a person exercises control over an item, then that item is in

> his possession even though another person may also have simi1ar control.
>
> Two, the substance was [cocaine] [marijuana]. [Cocaine] [marijuana] is a controlled substance whose possession is prohibited by law. 3, the defendant or another knew or believed that the substance was [cocaine] [marijuana]; and 4, the defendant or another intended to deliver [cocaine] [marijuana].

(R. 66:10, 16–17 (some punctuation altered).)

The court gave the jury the following instruction on aiding and abetting:

> A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either assists the person who commits the crime, or is ready and willing to assist, and the person who commits the crime knows of the willingness to assist. To intentionally aid and abet possession with intent to deliver [cocaine] [marijuana], a controlled substance, the defendant must know that another person is committing or intends to commit the crime of possession with intent to deliver [cocaine] [marijuana], a controlled substance, and had the purpose to assist the commission of that crime.

(R. 66:8–9, 14–15 (some punctuation altered).) The court further instructed the jury that "a person does not aid and abet if he's only a bystander or spectator and does nothing to assist the commission of that crime." (R. 66:15.)

The State presented sufficient evidence to prove each of the elements of both possession-with-intent charges. With respect to the first three elements, there was sufficient evidence to prove that "the defendant or another" possessed substances that were cocaine and marijuana and that "the defendant or another" knew or believed that the substances

were cocaine and marijuana. One officer testified that "just about every room" on the first floor "held various items to include marijuana, crack, [and] different drug paraphernalia . . . ." (R. 62:5.) There was a bit over a gram of crack cocaine in the living room. (R. 62:45, 91.) There was 490 grams of marijuana in one of the bedrooms, 28 grams of marijuana in the other bedroom, and 33 grams of marijuana recovered from the still-flushing toilet. (R. 61:118–19, 121–22; R. 62:61.)

With respect to the fourth element, there was sufficient evidence that "the defendant or another" intended to deliver the marijuana and cocaine. The cocaine was packaged in $25 increments of crack cocaine in a jar with money that held $25 in cash. (R. 62:42, 45.) There was a glass jar on the stove containing a large amount of cocaine residue. (R. 62:58–59.) There was a knife in the jar and scratch marks in the residue that appeared to have been produced by scraping crack cocaine chunks from the jar after the crack had cooled and hardened. (R. 62:58–60.) There were eight 100-count boxes of clear plastic sandwich bags on the kitchen table. (R. 62:60.) In one of the bedrooms, there was Pyrex measuring cup and three beater spoons with suspected crack residue, and a digital scale. (R. 61:121–22; R. 62:15.) That was sufficient evidence to establish an intent to deliver cocaine.

The evidence with respect to intent to deliver marijuana was equally strong. The police found many gallon-sized bags with marijuana residue in different rooms of the house, which, Officer Martinez testified, suggested that "they're dealing in pound increment levels." (R. 62:48.) In one of the bedrooms, officers found 28 grams of marijuana and a digital scale. (R. 61:121–22; R. 62:12, 15.) In the other bedroom, there was a pound of marijuana, a gallon-sized Ziploc bag with marijuana residue in the corners, and a digital scale with marijuana residue on it. (R. 62:61–63, 69.)

Cotton does not argue that the evidence was insufficient to prove any of the elements of possession with intent. Rather, he contends that "the State presented strong evidence of drug-related activity but insufficient evidence that Cotton was involved." (Cotton's Br. at 12 (some uppercasing omitted).) He argues that the evidence was not sufficient to prove his liability as an aider or abettor. (*Id.* at 13–16.)

The elements of aiding and abetting are satisfied if a person "(1) undertakes conduct (either verbal or overt action) which as a matter of objective fact aids another person in the execution of a crime, and further (2) he consciously desires or intends that his conduct will yield such assistance." *State v. Hecht,* 116 Wis. 2d 605, 620, 342 N.W.2d 721 (1984). A person who knows that another is committing a criminal act is a party to the crime if he or she acted in furtherance of the other person's conduct and acquiesced or participated in the act. *Id.* The jury may rely on circumstantial evidence to infer intent from the defendant's conduct. *Id.* at 623.

The evidence in this case allowed the jury to find that by providing the house in which that activity took place, Cotton intentionally assisted in the commission of the crimes of possession of cocaine and marijuana with intent to deliver. There was evidence from which a jury could find that Cotton knew about the drug activity in the house. Cotton testified that he came to the house around 9:00 to 9:30 a.m. on the morning of the search. (R. 65:94, 101–03, 133, 144.) The police executed the warrant at 10:37 a.m. (R. 61:113.) Because Cotton was, by his own admission, in the house for more than an hour before the search, the jury reasonably could have found that he was aware of the drug activity that morning.

Cotton also testified that he had been at a party at the house two nights earlier. (R. 65:89.) Because there was evidence of drugs and drug manufacturing throughout the first floor of the house, the jury reasonably could have inferred that those items had been present when Cotton was there two nights earlier and that he had seen that evidence. The jury also could have found that Cotton knew that the house had the indicia of a drug house—a video surveillance system with a live feed to a television in the living room, barricaded doors, windows boarded up from the inside, and a delivery hole drilled through an exterior kitchen wall. (R. 62:34–42.)

There also was evidence that Cotton exercised control over the house. He told police that he managed the house for his mother and that he was responsible for rehabbing the upstairs unit. (R. 62:96–97.) He also told police that he allowed a man to live in the lower unit because he owed that man money and that his mother was unaware of the situation. (R. 62:97–98; 63:97–98.)

There was evidence, therefore, that Cotton knew about the large-scale drug activity in the house and that he exercised control over the house. Based on that evidence, the jury reasonably could have found that, at the very least, Cotton intentionally aided the persons engaged in the drug activity by providing a place in which they could conduct that activity.

Cotton argues that one of the reasons that the evidence was insufficient is because "[n]o fingerprint or other evidence showed he even touched" the cocaine or marijuana. (Cotton's Br. 12.) This Court rejected a similar argument in *State v. Dukes*, 2007 WI App 175, 303 Wis. 2d 208, 736 N.W.2d 515. A jury found Dukes guilty of being a party to the crimes of possession of cocaine with intent to deliver and keeping a drug house. *Id.* ¶ 1. Dukes was one of

several individuals in an apartment when the police executed a search warrant and found crack cocaine, cocaine powder, a digital scale, and a handgun. *Id.* ¶¶ 2–3. After his arrest, Dukes made phone calls in which he discussed guns, whether police had found anything in the basement, and whether the police saw anyone making "transactions." *Id.* ¶¶ 4, 18. He also said that all the police found was the gun, "a whole bunch of money," and "a 'G' worth of bags." *Id.* ¶ 20.

Dukes argued on appeal that the evidence was insufficient to convict him of the possession charge because there was no physical evidence linking him to the drug house and the drugs in the drug house because, among other reasons, neither his fingerprints nor DNA were on any of the items recovered. *Id.* ¶ 22. The court of appeals was not persuaded. "This case does not turn on whether Dukes's fingerprints or DNA were not found on any of the recovered items or on whether mail at the residence was addressed to Dukes" *Id.* ¶ 23. "[E]ven if the State is unable to show that he personally possessed the cocaine with the intent to personally deliver it, to be found guilty as party to the crime the jury need only conclude that he intended to aid and abet in the commission of the crime." *Id.*

The court of appeals held that the evidence was sufficient to show aiding and abetting because "[t]he recorded conversations explicitly mentioned drugs and encouraged others to not say anything to anyone, and to act like they do not know anything, clearly indicating that Dukes was well aware of the illegal activities that were going on at 450 North 33rd Street." *Id.* ¶ 24. The court noted that the evidence supported a finding that Dukes had "a clear familiarity with the building and the contents of the basement." *Id.* The court also said "the fact that Dukes had someone watching the house and feeding him information about who entered the premises shows that he not only was

familiar with the building, but in fact had control over what took place there and had others observing it on his behalf." *Id*.

The court of appeals concluded that "[t]he evidence shows that Dukes was well aware of the criminal behavior that went on, and was not, as he claims, an overnight guest simply sleeping on the floor." *Id*. Based on that evidence, the court held, the jury could reasonably conclude that Dukes aided and abetted in the commission of the crime of possession of cocaine with intent to deliver. *Id*.

As in *Dukes*, there is no physical evidence tying Cotton to the drugs found in the house. But there was evidence from which the jury could have found that Cotton was "well aware of the criminal behavior that went on," *id*., that Cotton exercised control over the house, and that he aided the drug activity by providing the place in which it occurred.

Cotton does not cite or discuss *Dukes*. Instead, he cites an unpublished decision of this Court, *State v. Omot*, 2010 WL 5186056, no. 2010AP899–CR (Wis. Ct. App. Dec. 23, 2010), for the proposition that "nearness to and knowledge of drugs was insufficient proof that [the defendant] 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." (Cotton's Br. 15.) *Omot*'s persuasive value is diminished somewhat by its reliance on cases that did not involve drug possession and its failure to mention *Dukes* when it concluded that the State had not presented evidence of "conduct from which courts have inferred intent to aid and abet crime." *See Omot*, ¶ 22 (A-App. 120–21.) More importantly, as described above, the evidence in this case that Cotton aided and abetted the drug possession went beyond his mere "nearness to and knowledge of drugs."

2. Keeping a drug house.

The court instructed the jury that there were three elements to the crime of keeping a drug house:

> [One], the defendant kept or maintained a structure or place. To keep or maintain a place is to exercise management or control over the place. This element does not require that the defendant owned 2571 North 34th Street, Milwaukee, Wisconsin, but it does require that the defendant exercised management or control of the place in question.
>
> Two, the place was used for keeping tetrahydrocannabinols, marijuana, and cocaine. Tetrahydrocannabinols, marijuana, and cocaine are controlled substances whose keeping is prohibited by law. "Keeping" requires that controlled substances be kept for the purpose of warehousing or storage for ultimate manufacture or delivery. It requires more than simple possession.
>
> Three, the defendant kept or maintained the place knowingly. "Knowingly" requires that the defendant knew that the place was used for keeping of tetrahydrocannabinols, marijuana, and cocaine.

(R. 66:18–19.)

There was sufficient evidence adduced at trial on each of these elements.

With respect to the first element, there was sufficient evidence that Cotton "kept or maintained" the house because there was evidence that he exercised management or control. Cotton told the police that his mother owned the house, that he managed it for her, and that he was supposed to be renovating the upper unit. (R. 62:96–97.) Officer Martinez testified that the upstairs unit was "gutted out" and "under renovation." (R. 62:72.)

Cotton told Martinez that he allowed a man to live in the lower unit rent free because he owed that man money

and that his mother was unaware of the situation. (R. 62:97–98; R. 63:97–98.)[2] That Cotton would allow a man to live in the lower unit rent free without informing the owner because Cotton owed the man money provided further evidence of Cotton's management or control of the house.

With respect to the second element, there was evidence that the house was used to keep marijuana and cocaine for storage for manufacture or deliver. One of the officers who conducted the search testified that "just about every room" on the first floor held marijuana, crack, and drug paraphernalia. (R. 62:5.) The presence of many gallon-sized bags with marijuana residue in different rooms of the house suggested that "they're dealing in pound increment levels." (R. 62:48.)

In the living room, there was marijuana on multiple scales ready to be packaged, clear sandwich bags, a glass bowl with four corner-cuts of marijuana, and four $25 increments of crack cocaine in a jar with money that held $25 in cash. (R. 62:42, 44–45, 47.) In the kitchen, there was evidence that cocaine had been cooked into crack and eight 100-count boxes of clear plastic sandwich bags. (R. 62:58–60.) In one of the bedrooms, there was marijuana, a Pyrex measuring cup and beater spoons with suspected crack residue, and a digital scale. (R. 61:121–22; R. 62:12, 15.) In the other bedroom, there was a pound of marijuana, a digital scale with marijuana residue on it, and small zip-closure bags used for packaging narcotics for sale. (R. 62:61–66, 69.)

The house had a video surveillance camera on the porch that fed a live display to a large flat screen television in the living room. (R. 62:34–36.) The front door had metal

[2] Cotton denied that at trial (R. 65:139), but the jury was entitled to believe Martinez's testimony about what Cotton told him.

brackets to hold a two-by-four for barricading the door from the inside. (R. 62:38–39.) The house's rear door was barricaded. (R. 62:39–40.) All of the windows on the first floor were boarded up with plywood from the inside. (R. 62:41–42.) A hole large enough to pass money and drugs had been drilled in the wall next to the rear door. (R. 62:40). The hole was covered on the outside by a sliding piece of siding that allowed access to the hole. (*Id*.)

A detective experienced in drug investigation explained that drug dealers often keep drugs, drug supplies, and weapons in a "stash house" where they do not reside and that they often sell drugs from that location. (R. 64:77–79, 87–88.) He testified that based on the presence of the video surveillance system with a live feed, the front-door barricade, the service hole next to the back door, the boarded-up windows, the amount of cash, the baggies, and the scale, the house was being used as a place to maintain, manufacture, and distribute narcotic marijuana and cocaine. (R. 64:89–101.)

Regarding the third element, there was sufficient evidence that Cotton knew that the house was used for keeping marijuana and cocaine. Cotton testified that he came to the house around 9:00 to 9:30 a.m. on the morning of the search and that he stood outside the living room in the entryway until the police arrived. (R. 65:94, 101–03, 133, 144.) But the police did not execute the warrant until 10:37 a.m. (R. 61:113), which meant that Cotton would have been standing in the foyer for over an hour. The jury reasonably could have found that testimony incredible, especially when coupled with the evidence that Cotton's coat was on the living room sofa. (R. 62:43, 55; R. 63:14, 77, 82, 84–85; R. 64:26–27.)

Moreover, Cotton testified that he had been at a party at the house two nights earlier. (R. 65:89.) Because there

was so much evidence of drugs and drug manufacturing throughout the first floor of the house, the jury reasonably could have inferred that those items had been present when Cotton was there two nights earlier and that he had seen that evidence.

Cotton does not contest the first element, as he acknowledges that "[t]he evidence showed Cotton was present in a house over which he had some measure of control . . . ." (Cotton's Br. 12.) He does not argue that there was insufficient evidence that the house was used for "keeping" marijuana and cocaine. (*Id*. at 12–15.) Nor does he argue that there was insufficient evidence that he knew that the house was used for keeping marijuana and cocaine. (*Id*.)

Instead, he argues that his "[c]onvictions were not permissible based solely on Cotton 'knowing' what 'was going on in that house'" because "[t]he 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.'" (*Id*. at 13.) Aiding and abetting, he argues, "requires mutuality of purpose between the aider/abettor and the recipient of that assistance." (*Id*. at 14.)

That argument is flawed for two reasons. First, evidence that Cotton knew that the house was being used for keeping marijuana and cocaine is permissible because his knowledge is all that is required under the third element of the offense.[3] Second, because Cotton was charged with directly committing the offense of keeping a drug house

[3] The jury was instructed that the third element required that "the defendant kept or maintained the place knowingly. 'Knowingly requires that the defendant knew that the place was used for keeping of tetrahydrocannabinols, marijuana, and cocaine." (R. 66:19.)

rather than as a party to the crime (R. 18:2), the State did not need to show that there was a mutuality of purpose between Cotton and someone else.

There was sufficient evidence to prove that Cotton directly committed the offense of keeping a drug house because there was evidence that he exercised management or control of the house, that the house was used for keeping marijuana and cocaine, and that he knew that the house was used for that purpose. Accordingly, this Court should reject Cotton's argument that there was insufficient evidence to support his conviction on this charge.

When it sentenced Cotton, the circuit court said that "[t]here is clearly sufficient evidence in this case, based upon everything, all of the evidence that the Court heard, . . . for the jury to reach of verdict with respect to guilty on these counts . . . ." (R. 68:64.) The circuit court was correct.

II. Cotton is not entitled to a new trial in the interest of justice.

Cotton asks this Court to grant him a new trial in the interest of justice. Under Wis. Stat. § 752.35, this Court may order a new trial in the interest of justice on either of two grounds: "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *State v. Cleveland*, 2000 WI App 142, ¶ 21, 237 Wis. 2d 558, 614 N.W.2d 543.

An appellate court will exercise its discretion to grant a new trial in the interest of justice "'only in exceptional cases.'" *Id.* (quoting *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983)). But Cotton does not argue that this is an exceptional case. (Cotton's Br. 16–20.) Rather, he seeks a new trial in the interest of justice based on his trial counsel's alleged failings. (*Id.* at 16.)

When a defendant argues that he is entitled to a new trial in the interest of justice because his trial counsel's deficiencies prevented the real controversy from being fully tried, the appropriate analytical framework is provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *See State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115. Accordingly, the State will discuss Cotton's arguments in the ineffective assistance of counsel context rather than under the standards governing requests for discretionary reversal in the interest of justice.[4]

III. Cotton's trial counsel was not ineffective.

A. Applicable legal standards.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687. If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside

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[4] One of the grounds for Cotton's request for a new trial in the interest of justice is that the jury did not hear evidence that one of the men present in the house when the police executed the search warrant saw Gilmore bring a scale into the house that morning. (Cotton's Br. 19.) Cotton does not present a developed argument on that issue, referring instead to his discussion of the issue in his postconviction motion. (*Id.*) As this Court has explained, however, an attempt to incorporate a circuit court brief into an appellate brief by reference "is not permissible appellate advocacy." *Bank of Am. NA v. Neis,* 2013 WI App 89, ¶ 11 n.8, 349 Wis. 2d 461, 835 N.W.2d 527. Cotton does not discuss this claim in the ineffective assistance section of his brief. (Cotton's Br. 20–28.)

the wide range of professionally competent assistance." *Id.* at 690. Counsel's performance is "constitutionally deficient if it falls below an objective standard of reasonableness." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citation omitted).

To demonstrate prejudice, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. Counsel's deficient performance is prejudicial if "there is 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." *Thiel*, 264 Wis. 2d 571, ¶ 20 (citation omitted). The prejudice component asks "whether it is 'reasonably likely' the result would have been different." *Harrington*, 562 U.S. at 111. "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing on that claim. To obtain an evidentiary hearing on an ineffective assistance of counsel claim, the defendant's motion must allege, with specificity, both that counsel provided deficient performance and that the deficiency was prejudicial. *See Bentley*, 201 Wis. 2d at 313–18. If the claim is conclusory in nature, or if the record conclusively shows that the defendant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. *See id.* at 310–11.

B. Cotton has not met his burden of showing that his trial counsel was ineffective.

Cotton argues that his trial lawyer was ineffective on five grounds. The circuit court correctly denied Cotton's motion without an evidentiary hearing because the record conclusively shows that he is not entitled to relief on any of those grounds.

"Target" characterization. In her opening statement, the prosecutor told the jury that it would hear that Cotton was the target of the search warrant that was executed at 2571 N. 34th Street. (R. 61:71.) She followed through by presenting the testimony of Officer Martinez, who was in charge of the investigation into drug activity at that residence and who had obtained the search warrant. (R. 62:30.) During Martinez's direct examination, the prosecutor showed him the warrant affidavit and the search warrant and asked him to describe those documents. (*Id*.) Martinez testified that the warrant "was for the residence of 2571 North 34th Street in Milwaukee" and that "the target of the warrant was Orlando Cotton, black male, date of birth, 1/22 of 1975." (R. 62:31.)

Cotton argues that his trial counsel was ineffective for not objecting to the "target" characterization and for "endors[ing]" it. (Cotton's Br. 22.) He contends that the description of him as the target of the search warrant was "unsupported by the evidence and not subjected to testing." (*Id*. at 19.) But there was evidence to support that description, because the lead investigator, Officer Martinez, testified that Cotton was the target. (R. 62:31.)

Cotton's complaint that his lawyer performed deficiently by not "testing" the officer's testimony fares no better because he has not shown that there was a potential basis for challenging that testimony. That might be a viable claim if trial counsel could have presented evidence that

would have undermined Martinez's testimony, but Cotton identifies no such evidence. *See State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999) ("A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding."), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477.

Moreover, the search warrant affidavit states that an informant made a controlled buy of crack cocaine from Cotton at 2571 North 34th Street within the preceding 72 hours. (R. 33:55.) Had defense counsel challenged the basis for the officers' testimony that Cotton was the target of the search warrant, that objection likely would have backfired because it would have elicited evidence that an informant had made a controlled buy from Cotton at that house. Cotton has not shown, therefore, that his lawyer was ineffective for not "testing" the officers' testimony that he was the target of the search warrant.

Cotton also criticizes his lawyer for "endors[ing]" the target characterization when he asked Officer Martinez, "[i]n this case, the target was Orlando Cotton, correct?" (Cotton's Br. 22 (quoting R. 63:54).) But Cotton ignores the context of that question. Defense counsel asked it in the course of eliciting testimony from Martinez that Cotton's fingerprints had not been found on any item collected at the scene. (R. 63:53–55.) Defense counsel was not, as Cotton argues, "reinforcing that his client was a target" (Cotton's Br. 22), but making the point that the police failed to find Cotton's fingerprints despite having been the target of the investigation. That was good advocacy, not deficient representation.

Failure to present evidence that Gilmore admitted responsibility for the marijuana found in his bedroom. Cotton's codefendant, Elijah Gilmore, was charged with possession with intent to deliver THC, as a party to a crime, and possession with intent to deliver cocaine, as a party to a crime. (R. 14:1–2.) Cotton and Gilmore were to be tried together (R. 58:2–9), but Gilmore pled guilty just before trial to the THC charge (R. 60:9–11).

Cotton faults his trial counsel for not presenting "evidence that Elijah Gilmore admitted responsibility for the marijuana found in his bedroom." (Cotton's Br. 23.) But he is vague about how counsel could or should have presented that evidence. He seems to suggest that even though Gilmore invoked his Fifth Amendment right not to testify at Cotton's trial (R. 59:9–11), Cotton's constitutional right to present a defense overrides that privilege (Cotton's Br. 23). If that is his argument, he is wrong. "[A] defendant's right to present a defense does not include the right to compel a witness to waive his Fifth Amendment privilege against self incrimination." *United States v. Serrano*, 406 F.3d 1208, 1215 (10th Cir. 2005); *see also State v. Williams*, No. 2010AP1266-CR, 2011 WL 292139, ¶ 10 (Wis. Ct. App. Feb. 1, 2011) (unpublished) (R-App. 102) ("courts routinely recognize that a witness's Fifth Amendment right will trump the defendant's right to present a defense").[5]

Alternatively, Cotton appears to be suggesting that the jury should have been informed that Gilmore entered a plea to "having bought the marijuana and having brought it to the house." (Cotton's Br. 24.) But Cotton does not explain how defense counsel should have done that. Even if there

[5] The State cites *Williams* for its persuasive value pursuant to Wis. Stat. § (Rule) 809.23(3)(b). A copy of the *Williams* decision is included in the appendix to this brief. (R-App. 101–03.)

was a way for counsel to have introduced the fact that Gilmore entered a plea to the charge of possession with intent to deliver THC as a party to a crime, that information would not be evidence that Gilmore admitted to having bought the marijuana and bringing it into the house.

And even if there would have been a way to bring that information to the jury, it would not, as Cotton argues, been evidence that "Gilmore was exclusively responsible for the marijuana." (Cotton's Br. 23.) As the trial court pointed out after Gilmore invoked his Fifth Amendment privilege, "whether or not Elijah Gilmore took responsibility for bringing the marijuana into the residence doesn't negate the fact that this defendant either owned, shared, was in possession, or aided and abetted in that possession, with the intent to deliver." (R. 60:10.) "His taking responsibility doesn't change the charges before this defendant." (*Id.*)

Moreover, the jury heard evidence that Gilmore's backpack was found in the bedroom in which officers found a bag with a pound of marijuana. (R. 62:61–63, 66.) So even without evidence that Gilmore pleaded guilty to the charge, the jury was aware of evidence linking him to the marijuana. And while Cotton characterizes the bedroom as Gilmore's bedroom (Cotton's Br. 23), there was no evidence at trial that it was Gilmore's room. The only evidence linking him to the bedroom was the fact that his backpack was there.

In the sufficiency of the evidence section of his brief, Cotton asserts that "the jury was deprived of the chance to weigh Gilmore's claim that he acted independently and separately from Cotton." (Cotton's Br. 15.) But Cotton does not explain why Gilmore's admission that he bought the marijuana and brought it to the house means that Gilmore claimed to have "acted independently and separately from Cotton." Cotton's guilty plea possessing with intent to

deliver THC *as a party to a crime* (R. 60:11–12) suggests the opposite.

Cotton has not demonstrated that his trial counsel performed deficiently because he has not shown how counsel could have introduced evidence that Gilmore's plea to possession of the marijuana was an admission that Gilmore bought the marijuana and brought it into the house. Cotton also has not shown that he was prejudiced, because he has not identified any evidence that Gilmore was "exclusively responsible for the marijuana" after Gilmore brought it into the house. Gilmore's plea to possessing the marijuana as a party to a crime did not negate Cotton's liability for also possessing that marijuana as a party to a crime.

Failure to present evidence that the QUEST card belonged to Cotton's son. Cotton argues that trial counsel was ineffective for failing to present evidence that the QUEST card that was in the pocket of a jacket found on the living room sofa, which bore the name "Orlando Cotton," belonged to his son, who is also named Orlando Cotton. (Cotton's Br. 25.) But counsel was prepared to present that evidence through the son's testimony. (R. 64:11–12, 16–17.) The defense was unable to do so because the court prohibited the son from testifying after Cotton violated the sequestration order by speaking to his son about the case in the hallway outside the courtroom shortly before the son was to testify. (R. 65:39–42.)

Counsel's failure to present evidence that the QUEST card belonged to the son resulted from Cotton's violation of the sequestration order. Counsel did not perform deficiently by failing to anticipate that his client would violate the sequestration order and not having an alternate source for that evidence available in the event of his client's misconduct.

Even if counsel's performance somehow could be deemed deficient, Cotton was not prejudiced. Defense counsel successfully undermined the probative value of the QUEST card by eliciting an admission from the lead investigator, Officer Martinez, that he did not know whether the card belonged to Orlando Cotton the defendant or Orlando Cotton the son. (R. 63:18–19.)

Moreover, there was evidence other than the QUEST card that the jacket belonged to Cotton rather than his son. There were keys in the coat pocket that fit Cotton's car, which was parked outside. (R. 63:82.) And, Martinez testified, the coat was a size 2X or 3X. (R. 63:14.) Cotton's son was about six feet tall and slim, while Cotton was "by far the larger" of the men who were in the house, including Cotton's son. (R. 63:85.)

Failure to adequately object to opinion evidence. In his cross-examination of Officer Martinez, defense counsel asked Martinez what Cotton said in response to Martinez's question about the cocaine that was on the living room table. (R. 63:64.) Martinez said that because Cotton said that he was the property manager, it struck Martinez as odd that Cotton claimed to have no knowledge of anything going on in the house because as "a former landlord, . . . if I were to walk into one of my rental properties that I had seen these things . . . I would simply call the police, or I would --." (R. 63:64–65.) Counsel objected that the answer was not responsive. (R. 63:65.) The court asked counsel to repeat the question, which counsel did, and Martinez answered. (*Id.*)

Cotton argues that his lawyer was ineffective because he "objected but did not move to strike the testimony." (Cotton's Br. 26.) But he does not explain why counsel's failure to move to strike that testimony was deficient performance or why that testimony was prejudicial. This Court will neither develop an appellant's argument for him,

see State v. Gulrud, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987), nor address issues on appeal that are inadequately briefed, *see State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

In any event, even if counsel performed deficiently by not moving to strike, Cotton was not prejudiced. The court instructed the jurors that when weighing the evidence, they may "take into account matters of your common knowledge and your observations and experience in the affairs of life." (R. 66:23.) As the circuit court noted in its decision denying Cotton's postconviction motion, Martinez's opinions "were commonplace observations that most jurors would have considered in determining the defendant's guilt." (R. 43:8, A-App. 108.) The jurors did not need Martinez's testimony to know that a law-abiding landlord or property manager would have called the police upon seeing drugs, drug-related items, and other signs of drug dealing throughout the house.

Cotton also contends that his counsel was ineffective in his cross-examination of Officer Martinez. He cites the follow portion of the transcript:

> Q [H]ow many times, if you know, did my client deny knowledge of cocaine or marijuana or both?
>
> A I don't know how many times.
>
> Q Was it more than five?
>
> A I don't know. It was multiple.
>
> Q Multiple times. And when he denied knowledge, I mean, did he do it in a stern fashion, or did he do it in, like a plain face.
>
> A He did it in a manner as though he's been here before. He was very comfortable with the situation as we began talking, and he basically kind of said, what's it going to take; not verbatim, but, what is it going to take for

me to get out of the situation? I know how this works, things to that effect. He was willing to talk about other crimes or other things going on.

Q Okay. But in terms of cooperation, as an investigating officer in this case, primarily, I'm asking your opinion, would a person have to acknowledge some wrongdoing in a particular case before you would entertain the thought of listening to other things from him?

A In my opinion, yes. That's how I normally would operate, because it obviously would go towards their credibility.

Q In this particular case, would Mr. Cotton ever acknowledge any knowledge of any cocaine on the table?

A Again, Mr. Cotton simply denied having any knowledge of anything that was going on in plain view.

(R. 63:72–73.)

Cotton describes this testimony, but he does not explain why counsel was ineffective for asking those questions or why counsel should have objected to the answers. (Cotton's Br. 26–27.) This Court should reject this undeveloped argument. *See Flynn*, 190 Wis. 2d at 58.

Cotton appears to be arguing that counsel was ineffective for eliciting Officer Martinez's testimony that Cotton denied involvement with the drugs "in a manner as though he's been here before. He was very comfortable . . . and he basically kind of said . . . what is it going to take for me to get out of the situation? I know how this works, things to that effect." (Cotton's Br. 27.) If Cotton is arguing that counsel was ineffective for asking the question, "when he denied knowledge, I mean, did he do it in a stern fashion, or did he do it in, like a plain face," he does not explain why

that is so. And if he is arguing that the officer's answer was inadmissible, he likewise fails to explain why that is so.

Cotton also seems to be arguing that counsel was ineffective because he "obtained the officer's agreement, that he declined to work with Mr. Cotton because he did not believe he was credible." (Cotton's Br. 27.) But Martinez did not testify that he found Cotton's denials to be incredible. Rather, he testified that he normally only works with informants who admit their wrongdoing because that makes them a more credible informant.

Asserting facts not in evidence. Cotton claims that his trial lawyer was ineffective because while "[m]aking the point that Cotton's cooperation with police suggested innocence, [defense counsel] volunteered that Cotton told police, 'I have even been a pimp.'" (Cotton's Br. 27.) Counsel performed deficiently, he argues, because that statement was based on facts not in the record and had the effect of attacking his character. (*Id.*)

Cotton is correct that there is no evidence in the record that he told the police that he had been a pimp. And, as Cotton also observes correctly, counsel did so in an attempt to argue that the jury should believe Cotton's denial of the drug charges because was forthcoming with the police about his other activities, including smoking marijuana and using cocaine. (R. 66:42.)

Had the record included Cotton's statement to the police about having been a pimp, counsel would not have performed deficiently by referencing that statement. Because it does not, the State will not argue that counsel performed within reasonable professional norms by referring to the statement.

Cotton is not entitled to relief on this claim, however, because he has not shown that he was prejudiced under the *Strickland* standard. That is so for several reasons.

First, the court instructed the jury that "[r]emarks of the attorneys are not evidence" and that "[i]f the remarks suggested certain facts that are not in evidence, disregard the suggestion." (R. 66:22.) Juries are presumed to follow the circuit court's instructions. *See State v. Delgado*, 2002 WI App 38, ¶ 17, 250 Wis. 2d 689, 641 N.W.2d 490 (holding that isolated comments during closing argument did not prejudice the defendant because the jury was instructed that closing arguments were not evidence).

Second, the jury had other evidence that reflected poorly on Cotton's character. Cotton testified that he had been convicted of two crimes. (R. 65:84–85.) When explaining to the jury why he had offered to cooperate with the police, he testified that he was worried about the guns found in the residence because, as a felon, he couldn't be around firearms. (R. 65:129.) And, he testified, he refused to provide a DNA sample after he was arrested because he had provided a sample when he was released from prison. (R. 65:146.)

Third, counsel's statement was an isolated remark, as defense counsel made only that one statement and the prosecutor made no mention of it. (R. 66:26–57.) Cotton argues that counsel's remark was "too inflammatory to be dismissed as isolated, even if it had been isolated." (Cotton's Br. 27.) But while the remark did not reflect favorably on Cotton, it did not suggest that he was the type of person who would engage in drug dealing. And while Cotton contends that the remark was not isolated (*id.*), he does not identify any other instance in which the subject was broached.

"The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of

hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). The trial transcript shows that Cotton's attorney mounted a vigorous defense. (R. 61:74–124; R. 62:4–124; R. 63:3–105; R. 64:6–156; R.65:4–157; R. 66:2–73.) Cotton has not met his burden of proving that he received constitutionally inadequate representation from his trial lawyer.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 2nd day of June, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,244 words.

_____
JEFFREY J. KASSEL
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 2nd day of June, 2017.

_____
JEFFREY J. KASSEL
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Orlando Lloyd Cotton
Case No. 2016AP2211-CR

Description of document — Page(s)

State v. Williams, No. 2010AP1266–CR,
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SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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JEFFREY J. KASSEL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 2nd day of June, 2017.

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JEFFREY J. KASSEL
Assistant Attorney General