STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

No. 2016AP002211-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ORLANDO LLOYD COTTON,

Defendant-Appellant.

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

REPLY BRIEF

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ARGUMENT

I. The Evidence was Insufficient: the State, at Trial and On Appeal, has not Moved Beyond a Showing of Knowledge to Proving Intent or Providing Evidence from which a Factfinder Could Reasonably Have Inferred Intent.

A. The State has not Shown Any Specific Action(s) the jury could reasonably have attributed to Cotton, from which to infer that he aided and abetted or directly committed the crimes.

The State's appellate brief, like its trial presentation, focuses on the drugs and drug-related items in the house, and the duration of Cotton's presence there prior to execution of the search warrant. These circumstances are consistent with Cotton knowing that drug-related activities occurred in the house. However, as noted at page 12 of Cotton's brief, the evidence did not establish a specific role Mr. Cotton played to aid/abet or commit any of the offenses.

Even the sentencing court did not know what Cotton did: "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 State notes that one element of keeping a drug house is knowledge that the premises was being used for drug activity. Further, the State notes that, as the owner's son, hired to work there, Cotton had control over the house. (Resp. Br. at 15). However, the State does not point to evidence showing that Cotton exercised management or control over the premises "for the purpose of warehousing or storage for ultimate manufacture or delivery. ..." (Resp. Br. at 18, quoting 66:18-19 (trial court's jury instruction on elements of keeping drug house).

While keeping a drug house has a knowledge element, it also has an element requiring the actor to have a "purpose." Were it otherwise, every landlord or agent knowing their house was used for drug-dealing would be criminally liable for keeping a drug house. It would be for the legislature to create such broad criminal liability, after balancing the desire to combat drugs with the implications of requiring landlords, in essence, to function as law enforcement officers.

"'Know' requires only that the actor believes the specified fact exists." Wis. Stat. §939.23(2). "'Intentionally' means that the actor either has a **purpose** to do the thing or cause the result specified, or is aware that his **conduct** is practically certain to cause that result. ..." Wis. Stat. §939.23(3) (emphases added). As noted above, "purpose" is an element of keeping a drug house. Also, intent is part of aiding and abetting as well as being a principal to possession drugs with *intent* to deliver.

With respect to each of the charges, the State proved Cotton's presence. The duration of the presence and other factors arguably supported an inference that Cotton had knowledge. But, as Wis. Stat. §939.23(2) suggests, knowledge is "only" part of the required showing. The State proved no conduct, no purpose and no intent on Cotton's part.

B. This court's unpublished decision in ***State v. Omot*** is not "diminished" by ***State v. Dukes***.

The State notes that Cotton's brief does not cite ***State v. Dukes***, 2007 WI App 38, 250 Wis. 2d 689, 641 N.W.2d 490, and neither did this court in ***State of Wisconsin v. Cham Okery Omot***, No. 2010AP899-CR (Wis. App. December 23, 2010) (unpublished, authored opinion). A-Ap. 113-126. The State claims that ***Omot*** is "diminished somewhat by its reliance on cases that did not involve drug possession and its failure to mention ***Dukes***..." (Resp. Br. at 17).

One non-drug case relied on by ***Omot*** is ***State v. Rundle,*** 176 Wis. 2d 985, 1009, 500 N.W.2d 916 (1993). ***Omot,*** ¶¶11, 18. ***Rundle*** is discussed at page 14 of Cotton's brief. The State does not discuss ***Rundle*** or confront its rationale at all, much less explain why its status as a non-drug-related case "diminishes" the force of the principles enunciated by the Wisconsin Supreme Court.

But ***Rundle's*** knowledge-versus-intent/purpose rationale lies at the heart of the sufficiency issue in this case. And, when we get to ***Dukes,*** it becomes clear that Dukes evinced not mere knowledge, but knowledge coupled with conduct that proved intent.

The State points to a couple of parallels between Dukes' and Cotton's arguments, and argues Cotton's appeal must fail for the same reasons Dukes was unsuccessful. Like Dukes, Cotton points to the lack of fingerprints/DNA evidence. (Resp. Br. at 16). However, the State must concede that Dukes, in post-arrest telephone calls, provided evidence that has no parallels to this case. "...Dukes had someone watching the house and feeding him information about who entered the premises [and that] 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." ***Dukes,*** 303 Wis. 2d at ¶24.

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

If the court finds the evidence sufficient on one or more counts, it will determine whether to affirm, remand for an evidentiary hearing on the ineffectiveness-related issues, or remand for a new trial in the interest of justice.

The State argues that, "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." (Resp. Br. at 33).

This argument illustrates how obviously the record is infected with prejudice. There is no basis for suggesting that the evidentiary record could properly have included an admission to having been a pimp, when no allegations at issue were remotely connected with such activity. Likewise, there was no basis or need for testimony from police about Cotton being a target. "Target" references provided smears, not facts. Police testimony suggesting that Cotton was guilty because he did not do what the police officer thought a responsible landlord would do, likewise, clouded the issues with character attacks substituted for facts.

Dukes supports Cotton's arguments that he should not have been labeled the "target" without specific linkage to activity used to support the search warrant application. The trial court restricted evidence of a prior drug buy as insufficiently tied to Dukes. ***Dukes***, 303 Wis. 2d, ¶8. "Target" references in this case should have been disallowed for the same lack of evidentiary support as in ***Dukes***.

Just as it ignored ***Rundle***, the State ignores ***State v. Guerard***, 2004 WI 85, 273 Wis. 2d 250, 682 N.W.2d 12, discussed at pp. 18-19 of Cotton's brief. The Wisconsin Supreme Court in that case unanimously found that omission of a co-defendant's testimony undermined confidence in the verdict—even though that co-defendant was Guerard's brother.

III. Alternatively, the Postconviction Motion Sufficiently Alleged Facts Requiring an Evidentiary Hearing on Whether Cotton Received Ineffective Assistance of Counsel.

The State argues: "Cotton's [sic, Gilmore's] guilty plea [sic] possessing with intent to deliver THC *as a party to a crime* suggests..." Cotton is wrong to argue that failing to adduce Gilmore's admissions deprived the jury of the chance to

weigh Gilmore's claim that he acted separately and independently of Cotton. (Resp. Br. at 28-29) (emphasis in original).

The State's arguments seem to overlook the relief Cotton seeks in the context of ineffective assistance of counsel. Cotton appeals the circuit court's denial of an evidentiary hearing. The State's conjecture about the significance of Gilmore's having pled as a party to the crime underscores the need for an evidentiary record.

There is no real significance to pleading as a party to a crime if that was the charge issued by the State. For instance, no reasonable defense attorney would request that a party to a crime allegation be replaced in favor of charging her or his client as a principal.

An evidentiary hearing would establish the nature and scope of admissions by Gilmore that were available to trial counsel. Once that is established, Cotton will be properly situated to detail the legal grounds upon which trial counsel should have adduced those admissions. The postconviction motion, prepared without benefit of an evidentiary hearing, need not accompany every factual assertion with a theory of admissibility. *See,* ***State v. Love,*** 2005 WI 116, ¶36, 284 Wis. 2d 111, 700 N.W.2d 62.

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, June 20, 2017.

Respectfully submitted,

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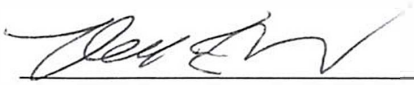

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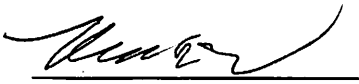
FORM & LENGTH CERTIFICATION

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 1847 words.



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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(12)(f).

RANDALL E. PAULSON

CERTIFICATE OF MAILING

Pursuant to WIS. STAT. (RULE) 809.80(4), I hereby certify that on the 20th of June, 2017, I caused 10 copies of this reply brief 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 this brief, also by U.S. Mail, on Assistant Attorney General Jeffrey J. Kassel, Wisconsin Department of Justice.

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