STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP840-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNNIE LEE TUCKER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE ELLEN R. BROSTROM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. At Defendant-Appellant Johnnie Lee Tucker's trial for first-degree intentional homicide, a police detective identified a subject in a surveillance video as "the shooter." Did the circuit court properly admit this testimony as a lay opinion under Wis. Stat. § 907.01?

The circuit court answered, "Yes."

This Court should answer, "Yes."

2. If the circuit court erred in admitting the police detective's testimony, was that error harmless?

The circuit court did not address this issue.

This Court should answer, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs should adequately set forth the facts and applicable precedent. Resolution of this appeal requires only the application of well-established precedent to the facts of this case.

INTRODUCTION

A jury convicted Tucker of first-degree intentional homicide and being a felon in possession of a firearm. The homicide occurred at night outside a bar. At trial, the State played surveillance videos from the interior and exterior of the bar; a police detective identified a subject in one of the videos as "the shooter." Defense counsel objected to the testimony, arguing that it usurped the role of the jury. The circuit court admitted the testimony as a lay opinion under Wis. Stat. § 907.01. On appeal, Tucker claims that the court erred in admitting Detective Butz's opinion testimony.

Tucker is wrong. The circuit court properly admitted the detective's lay opinion under Wis. Stat. § 907.01 for three reasons: (1) it was rationally based on the detective's own perceptions of the surveillance videos; (2) it was helpful because the detective was in a better position than the jury to correctly pinpoint the shooter; and (3) it was not based on scientific, technical, or other specialized knowledge. Tucker's contrary position assumes a fact that is not in evidence—that Detective Butz identified *him* as the shooter—and otherwise disregards the standard for admissibility under Wis. Stat. § 907.01.

However, even if the circuit court erred in admitting the detective's testimony, the error was harmless.

This Court should therefore affirm the judgment of conviction.

STATEMENT OF THE CASE

On November 13, 2015, Officer Kamps arrived outside Waz's Pub in Milwaukee to investigate a shooting. (R. 62:35–36.) He found the victim, CA, lying dead in the street. (R. 62:36–37.) He also saw a second victim, TA, leaning against a light pole with a gunshot wound to his leg. (R. 62:36.) Ultimately, the State charged Tucker with (1) first-degree intentional homicide; (2) aggravated battery, use of a dangerous weapon; and (3) being a felon in possession of firearm. (R. 1:1.)

Following a four-day trial, a jury convicted Tucker of first-degree intentional homicide and being a felon in possession of a firearm. (R. 66:7.)[1]

[1] The State initially tried the case in April 2016. (R. 58.) The jury found Tucker not guilty of the aggravated battery charge. (R. 58:13.) However, it could not reach a verdict on the

The trial evidence

The brothers' testimony. On the night that CA died, he was with his two brothers, TA and DA, at Waz's Pub. (R. 64:6.) At one point, CA went to the back patio. (R. 64:6.) He came back a short time later and told his brothers that they needed to leave. (R. 64:6–7.) According to DA, some type of altercation had occurred in the back of the bar. (R. 63:34.)

CA left the bar shortly before TA and DA. (R. 64:7.) Other people also left the bar around that time. (R. 63:34.)

As TA walked outside the bar, he saw CA "scuffling" with another man: the man was trying to point a silver revolver at CA, and CA was trying to force the man's hand away. (R. 64:7.) TA tried to get the gun from the man; however, someone punched him in the back of the head, and another man starting hitting him too. (R. 64:9.) TA wound up in the middle of the street, south of CA, trying to fight off his attackers. (R. 64:9, 27.) Ultimately, he was knocked unconscious. (R. 64:9.)

DA was the last brother to exit the bar. (R. 63:34–35.) He turned the corner and saw TA and CA fighting with different people. (R. 63:35.) He ran between some cars and starting shooting his semiautomatic in TA's direction. (R. 63:35–36.) He then saw CA running across the street, toward him, where CA collapsed. (R. 63:37.) DA ran to a nearby alley and got rid of his gun. (R. 63:38.) When he returned to the scene of the crime, he lied to police about not having a gun that night; police therefore arrested him. (R. 63:38.) DA lied because he knew that he could not possess a firearm as a felon. (R. 63:38.)

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other charges. (R. 58:15.) The circuit court granted the State's motion for a mistrial. (R. 58:15.) The State tried the second case in July 2016. (R. 61:1.)

Neither TA nor DA could identify the shooter. (R. 63:41–42; 64:25–26.) However, DA saw someone shooting toward CA's back while CA was trying to cross the street. (R. 63:41.)

The autopsy. The medical examiner ruled CA's death a homicide—CA died from gunshot wounds. (R. 62:74–75.) He suffered four entrance gunshot wounds: three on his back, and one on his left leg. (R. 62:70.) He also suffered one exit gunshot wound on the right side of his chest. (R. 62:71.)

The ballistics. Police recovered three fired .38/.357 caliber bullets from CA's body. (R. 62:77; 64:36.) Police found a fourth .38/.357 caliber bullet at the scene of the crime. (R. 62:60–61; 64:36.) The firearm expert testified to a reasonable degree of scientific certainty that the bullets all came from one gun, specifically, a revolver. (R. 64:36–37.)

Police also recovered two fired .380 cartridge casings from the scene of the crime. (R. 64:33.) The firearm expert testified to a reasonable degree of scientific certainty that the casings were fired from the same gun. (R. 64:35.) Though he could not say for certain, the firearm expert believed that the casings were discharged from a semiautomatic weapon. (R. 64:35.)

The surveillance videos. Much of what transpired that night was captured on camera. (R. Exs. 24, 30, 31.)[2] The footage shows CA, TA, and DA arriving inside Waz's Pub. (R. 63:45–46; Ex. 24, Ch. 3, 22:47:53–22:48:16.) Roughly one

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[2] Exhibits 24, 30, and 31 are contained on separate DVDs without document numbers as non-electronic portions of the record. Each DVD contains multiple channels representing different camera views. At trial, the State played the videos as various witnesses testified. This brief will refer to the transcript, the exhibit, the video channel, and the video time stamp where appropriate in summarizing the evidence.

hour later, Tucker enters the bar. (R. 64:55; Ex. 24, Ch. 3, 23:38:29–23:39:19.) After looking around, Tucker heads to the back of the bar. (R. 64:55–56; Ex. 24, Ch. 3, 23:39:19–38.)

One minute later, Tucker leaves the back of the bar, immediately ahead of CA. (R. 64:60–61; Ex. 24, Ch. 6, 23:40:00–21.) Tucker stops at the side of the bar and hugs the bartender. (R. 63:81; Ex. 24, Ch. 6, 23:40:00–23.) Meanwhile, CA proceeds to the front of the bar and talks to TA and DA. (R. 63:45–46; 64:56; Ex. 24, Ch. 3, 23:39:38–23:40:21.)

For roughly the next minute, CA, TA, and DA stand at the front of the bar near the exit. (R. 63:45–46; Ex. 24, Ch. 3, 23:40:21–23:41:19.) During that time, Tucker talks to the bartender, repeatedly looks to the front of the bar, and finally turns to face the front, appearing as though he is going to leave. (R. 63:81–82; 64:62; Ex. 24, Ch. 6, 23:40:21–23:41:09.)

Ten seconds later, CA exits the front door of the bar just behind another man. (R. 64:58–59; Ex. 24, Ch. 5, 23:41:09–19.) Two more men then exit the bar. (R. 64:58–59; Ex. 24, Ch. 5, 23:41:19–26.) At this time, Tucker walks quickly to the front of the bar. (R. 63:82; 64:62; Ex. 24, Ch. 6, 23:41:09–26.) As Tucker exits the front door, he is the third person to leave behind CA, and the fifth person to leave the bar in a ten-second window. (R. 64:56–57; Ex. 24, Ch. 3, 23:41:19–29.)

CA then appears outside Waz's Pub, immediately behind another man, roughly five seconds after he left inside. (R. 64:63; Ex. 30, Ch. 14, 23:41:20–24.) Within seconds, two more men walk outside the bar. (R. 64:63–64; Ex. 30, Ch. 14, 23:41:24–28.) About six seconds later, Tucker

walks outside the bar and turns the corner in CA's direction. (R. 64:64; Ex. 30, Ch. 14, 23:41:28–34.)[3]

Tucker then grabs CA. (R. 64:69–70; Ex. 31, Ch. 18, 23:41:44.) TA then appears and tries to intervene; however, another man hits TA from behind and into the street, where TA backpedals southward. (R. 64:22–23; Ex. 31, Ch. 18, 23:41:44–54.) DA then appears in the middle of the street, north of TA, and shoots in TA's direction. (R. 63:57–58; Ex. 31, Ch. 18, 23:41:59–23:42:01.) DA then turns and runs northward with his arm outstretched. (R. 63:57–58; Ex. 31, Ch. 18, 23:42:01–09.)

Around this time, across the street from DA, CA and Tucker struggle down the sidewalk. (R. 64:66–68; Ex. 31, Ch. 17, 23:41:56–59.) CA breaks free from Tucker and begins to run into the street. (R. 64:67–68; Ex. 31, Ch. 17, 23:42:00.) Tucker follows, pointing a shiny object toward CA's back. (R. 64:67–68; Ex. 31, Ch. 17, 23:42:00–01.) CA then collapses in the street. (R. 62:85–86; Ex. 30, Ch. 13, 23:42:01–10.) At the time that CA collapses, Tucker walks away. (R. 64:67–68; Ex. 31, Ch. 17, 23:42:10.)

The motive. Venita Pugh—the mother of Tucker's child, Johnnie Tucker, Jr.—testified at trial. (R. 64:41.) She knew CA because she had been in a relationship with him for about nine and one half years. (R. 64:41, 45.) For most of that time, she lived with CA and Johnnie Jr. (R. 64:47.)

Pugh said that about 18 months before the murder, Johnnie Jr. told her that CA touched him inappropriately. (R. 64:47–51.) She took Johnnie Jr. to the hospital, where

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[3] Outside the bar, Tucker's clothes appear darker than they do inside the bar. Detective Butz explained that the night vision on the interior cameras washed out a lot of the color in people's clothing that night. (R. 63:13–14.)

police also followed. (R. 64:49–50.) The hospital told her that Johnnie Jr. "hadn't been tampered with." (R. 64:51.) She neither pursued criminal charges nor told Tucker, as Tucker was not involved in Johnnie Jr.'s life at that time. (R. 64:50.)

According to Pugh, a few weeks before the murder, she got a call from Tucker, who was with Johnnie Jr. (R. 64:51.) Tucker asked about the incident between CA and Johnnie Jr., and Pugh explained what had happened. (R. 64:51.) About one week or so before the murder, Tucker called her again, this time from the police station. (R. 64:76.) Tucker told her that he was trying to get a restraining order to keep CA away from Johnnie Jr. (R. 64:76.)

Tucker's defense. Tucker called two witnesses at trial. The first witness was Detective Thomas, who conducted a lineup to determine whether DA could identify the shooter. (R. 64:86.) Although Tucker was in the lineup, DA could not identify the shooter. (R. 64:86–87.) According to Detective Thomas' police report, DA stated that "the person who shot [my] brother was not in the lineup." (R. 64:91.)[4]

The second witness that Tucker called was Detective Porter, who interviewed DA the day after the shooting. (R. 65:10.) He said that DA admitted to lying about not having a gun that night. (R. 65:10–11.) According to Detective Porter, DA said that he gave his gun to his ex-wife after he returned to the scene of the crime. (R. 65:11.)[5]

In addition to the above witnesses, Tucker entered Exhibit 42 into evidence. (R. 65:12.) Exhibit 42 is a copy of the petition for a restraining order that Tucker filed against

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[4] At trial, DA denied making that statement to police. (R. 63:70–71.)

[5] At trial, DA denied making that statement to police. (R. 63:69.)

CA on November 9, 2015—four days before the murder. (R. 65:12.)

The trial objection

The objection at issue in this case concerns the State's use of the surveillance videos with Detective Butz, who reviewed the videos "many times." (R. 62:83; 63:5.) The prosecutor played a portion of a video and asked Detective Butz to explain what it revealed. (R. 63:5.) Detective Butz stated, "At this point the subject pictured on the left-hand side of the screen that just entered the tavern would be the shooter outside." (R. 63:5.)[6] Defense counsel objected, arguing that the jury was to identify the shooter on camera. (R. 63:5–6, 51–52.)

The circuit court, the Honorable Ellen R. Brostrom, presiding, overruled the objection. (R. 63:6, 50–52.) Relying on *State v. Small*, 2013 WI App 117, 351 Wis. 2d 46, 839 N.W.2d 160, the court admitted Detective Butz's testimony as a lay opinion under Wis. Stat. § 907.01. (R. 63:50–51.) The court reasoned that Detective Butz's testimony was helpful to the jury because he watched the videos many times and the videos were not easy to follow. (R. 63:50–51.) The court also instructed the jury that "ultimately, it's going to be your determination of what you see in this video and who you think is the shooter and of course ultimately whether the defendant is that person." (R. 63:6.)

Tucker appeals.

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[6] Two different witnesses later identified the "subject" as Tucker. The first witness was Rheatra Jones, the bartender at Waz's that night. (R. 63:75–78.) The second witness was Venita Pugh. (R. 64:55.)

ARGUMENT

I. The circuit court properly admitted Detective Butz's testimony identifying a certain subject on video as the shooter.

A. Standard of review

This Court reviews the circuit court's decision to admit lay witness opinion testimony for an erroneous exercise of discretion. *Simpson v. State*, 62 Wis. 2d 605, 609, 215 N.W.2d 435 (1974). "The test is not whether the reviewing court would admit the evidence, but whether the circuit court 'exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record, [and] whether appropriate discretion was in fact exercised.'" *State v. Ford*, 2007 WI 138, ¶ 30, 306 Wis. 2d 1, 742 N.W.2d 61 (alteration in original) (citation omitted). "This court will not find that the circuit court erroneously exercised its discretion if there is a rational basis for its decision." *Id.*

B. Relevant law

Wisconsin Stat. § 907.01 sets forth three requirements for the admission of lay witness opinion testimony. The opinion testimony must be: (1) rationally based on the perception of the witness; (2) helpful to an understanding of the witness's testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge within the scope of an expert witness. Wis. Stat. § 907.01(1)–(3).

Lay opinion testimony interpreting a surveillance video may be admissible without invading the province of the jury. *See generally* Brent G. Filbert, Annotation, *Admissibility of Lay Witness Interpretation of Surveillance Photograph or Videotape*, 74 A.L.R. 5th 643 (1999). Courts tend to focus the analysis on whether the lay opinion is helpful—is the witness in a better position than the jury to

interpret the video? *Id.*; *see also United States v. White*, 639 F.3d 331, 335–36 (7th Cir. 2011) (people familiar with White permitted to identify White in surveillance video due to poor quality of video and White's concealing attire); *United States v. Jackman*, 48 F.3d 1, 5 (1st Cir. 1995) (same). Where the answer to that question is "yes," courts have admitted lay opinion testimony—even from police officers. *See, e.g.*, *United States v. Stormer*, 938 F.2d 759, 761–62 (7th Cir. 1991) (officers who knew Stormer allowed to identify him in surveillance photos due to poor quality of photos and Stormer's concealing attire); *United States v. Allen*, 787 F.2d 933, 935–36 (4th Cir. 1986), *cert. granted*, *judgment vacated on other grounds*, 479 U.S. 1077 (1987) (same). The admission of such testimony does not usurp the jury's role because the jury is free to believe or disregard the testimony in deciding what the video shows. *See White*, 639 F.3d at 335–36.

This Court's decision in *Small* is instructive. There, the State charged Small with armed robbery as a party to a crime after he helped his cousin rob a furniture store. *Small*, 351 Wis. 2d 46, ¶¶ 1–4. At trial, the store's co-owner testified that when the gunman came into the store, he yelled "gun" to alert his co-owner, and Small responded, "No. No. No." *Id.* ¶ 3. The State played the surveillance video covering those moments. *Id.* ¶ 13. Because the sound was not clear, the prosecutor asked a police officer to interpret what Small said after the co-owner yelled "gun." *Id.* The officer, who watched the video between 50 to 100 times, testified as to what he thought Small said. *Id.*

This Court held that the officer's testimony was properly admitted as a lay opinion under Wis. Stat. § 907.01. *Small*, 351 Wis. 2d 46, ¶¶ 14–16. Drawing on the officer's extensive review of the low-quality footage, this Court cited to *United States v. Begay*, 42 F.3d 486, 502 (9th Cir. 1994), *cert. denied*, 516 U.S. 826 (1995), for support. *Id.* ¶ 15.

There, the Ninth Circuit held that an officer was allowed to identify the defendants in a surveillance video because the officer's testimony: (1) was based on his own perceptions of the video; and (2) was helpful to the jury—the video was hard to follow, and the officer watched the video over 100 times. *Begay*, 42 F.3d at 502.

Moreover, consistent with other jurisdictions, this Court in *Small* explained why admitting the officer's opinion testimony did not usurp the role of the jury: "The jurors here heard the audio as well as the co-owner's testimony of what Small said, and were thus able to use their own life experiences in assessing whether [the officer's] opinion was accurate." *Small*, 351 Wis. 2d 46, ¶ 15; *accord White*, 639 F.3d at 335–36; *Begay*, 42 F.3d at 503.

C. The detective's testimony satisfied all three requirements for admissibility under Wis. Stat. § 907.01.

The circuit court properly admitted Detective Butz's testimony—that a certain subject on camera was the shooter—because the testimony met all three requirements for admissibility as a lay witness opinion under Wis. Stat. § 907.01.

First, Detective Butz rationally based his opinion on his own perceptions of the surveillance videos. Because he reviewed the surveillance videos "many times" (R. 62:83), he had sufficient personal knowledge to testify as to their contents. *See Small*, 351 Wis. 2d 46, ¶¶ 13–14; *see also Begay*, 42 F.3d at 502–03.

Second, Detective Butz's opinion helped the jury determine a fact in issue. More specifically, it helped the jury decide the primary fact in issue—the identity of the shooter. As the circuit court recognized, answering this question was no small task. (R. 63:51.) Not only are there multiple camera views that must be pieced together for a full

picture of what transpired that night, the videos show many individuals—dressed alike in baggy clothing and hats[7]—moving around the dimly-lit bar. As "following the events and people from inside to outside [was] a key aspect of the identification process in this case" (R. 63:52), the detective's extensive review of the videos provides a basis for concluding that he was more likely to correctly pinpoint the shooter than the jury. *See Begay*, 42 F.3d at 503. And, as the circuit court noted, Detective Butz particularly was in a better position to interpret the videos based on his understanding of how night vision affected the coloring in people's clothing that night. (R. 63:51). Thus, Detective Butz's testimony was helpful to the jury.

Third, Detective Butz did not base his opinion on specialized knowledge within the scope of an expert witness. He simply based his opinion on his extensive review of the surveillance videos. *See Small*, 351 Wis. 2d 46, ¶ 15.

In sum, Detective Butz's opinion was admissible under Wis. Stat. § 907.01.

Tucker disagrees, arguing that the circuit court erred in admitting the evidence because Detective Butz's opinion did not satisfy Wis. Stat. § 907.01(1), the personal knowledge requirement. (Tucker's Br. 5–7.) Specifically, Tucker claims that Detective Butz's testimony was not rationally based on his own perception because he was not personally familiar with Tucker before reviewing the videos. (Tucker's Br. 5–7.)

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[7] As noted, courts are inclined to admit lay witness identification testimony if a suspect's features are difficult to discern in a surveillance video or photograph. *See United States v. White*, 639 F.3d 331, 336 (7th Cir. 2011) (bulky winter coat and hat); *United States v. Allen*, 787 F.2d 933, 936 (4th Cir. 1986) (jacket hood pulled over head); *United States v. Stormer*, 938 F.2d 759, 762 (7th Cir. 1991) (baseball cap and hosiery pulled over face).

However, Tucker's argument assumes that Detective Butz identified *him* as the shooter. (Tucker's Br. 4–7.) This simply did not happen. (R. 63:5.) Therefore, Tucker errs in relying on cases from other jurisdictions (Tucker's Br. 5–7), and his personal knowledge argument fails—all that matters is that Detective Butz reviewed the surveillance videos before testifying as to their contents. *See Small*, 351 Wis. 2d 46, ¶¶ 13–14; *see also Begay*, 42 F.3d at 502–03.[8]

Tucker's remaining argument does not relate to the requirements for admissibility under Wis. Stat. § 907.01. (Tucker's Br. 6–7.) He contends that Detective Butz's opinion should not have been admitted because it usurped the role of the jury. (Tucker's Br. 6–7.)[9] His reasoning appears to be that the jurors could watch the videos for themselves. (Tucker's Br. 6–7.) But that is not the standard for admissibility of lay witness opinion testimony. *See* Wis. Stat. § 907.01. As shown above, Detective Butz's testimony meets the standard for admissibility.

Moreover, as this Court has already explained, lay witness opinion testimony interpreting a surveillance video

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[8] Tucker's related argument that Detective Butz's opinion testimony creates the "imprimatur problem" (Tucker's Br. 5–6) fails for the same reason—it is premised on the notion that the detective identified *him* as the shooter. Moreover, the State fails to see how Detective Butz was an overview witness, as Tucker suggests. (Tucker's Br. 5–6.) Detective Butz was asked to interpret evidence that already had been introduced to the jury (R. 62:83–94; 63:4–5), unlike many of the cases that Tucker cites in his brief. (Tucker's Br. 5–6.)

[9] As far as the State can tell, Tucker is not arguing that Detective Butz's testimony—though admissible under Wis. Stat. § 907.01—should have been excluded under Wis. Stat. § 904.03. If he is, the argument is undeveloped and should not be considered by this Court. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

does not usurp the role of the jury because the jury is free to believe or disregard the witness's testimony based on all of the evidence presented at trial. *See Small*, 351 Wis. 2d 46, ¶ 15. For this reason, Tucker's related due process argument fails too. (Tucker's Br. 7.)

The bottom line is that the circuit court applied the correct law to the facts and rationally admitted Detective Butz's lay witness opinion testimony. This Court should therefore affirm.

II. Any error in admitting Detective Butz's opinion was harmless.

A. Standard of review

Whether the circuit court's erroneous admission of evidence was harmless presents a question of law that this Court reviews de novo. *State v. Hunt*, 2014 WI 102, ¶ 21, 360 Wis. 2d 576, 851 N.W.2d 434.

B. Relevant law

A circuit court's erroneous admission of evidence is subject to the harmless error rule. *Hunt*, 360 Wis. 2d 576, ¶¶ 21, 26. "Harmless error analysis requires [the court] to look to the effect of the error on the jury's verdict." *Id.* ¶ 26. "For the error to be deemed harmless, the party that benefited from the error . . . must prove 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* "Stated differently, the error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* (citations omitted).

This Court has identified "several factors to assist in a harmless error analysis, including but not limited to: the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating

or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." *Hunt*, 360 Wis. 2d 576, ¶ 27. Those factors are non-exhaustive, but assist in the determination of whether the exclusion of defense evidence was harmless. *See id*.

C. Detective Butz's opinion was only part of the identification evidence.

As Tucker concedes, the pivotal issue in this case relates to the identity of the shooter. (Tucker's Br. 6.) While Tucker accused DA, the overwhelming evidence—the gunshot wounds (R. 62:70–75), the ballistics (R. 62:77; 64:36–37), and the surveillance videos (Ex. 31, Ch. 17, 23:41:56–23:42:01; Ex. 30, Ch. 13, 23:42:01–10)—establish that the shooter was the person who pointed a gun at CA's back before CA collapsed in the street. So the question is whether Detective Butz's opinion testimony was critical to proving that Tucker was that person. It was not.

First, there is no question that Tucker was at the bar that night. Two different witnesses—Pugh and Jones—identified Tucker inside Waz's Pub. (R. 63:75–78; 64:55.) While Tucker claims that Pugh had a motive to lie (Tucker's Br. 6), he cannot escape Jones' uncontroverted testimony in this regard. (R. 63:79–82.)

Second, as the prosecutor demonstrated during closing argument, once Tucker's identity is clear, the case boils down to common sense and simple math. (R. 65:29–33.) In less than three minutes, the jury watched Tucker enter the bar (R. 64:55; Ex. 24, Ch. 3, 23:38:29–23:39:19); look for CA (R. 64:55–56; Ex. 24, Ch. 3, 23:39:19–38); locate CA (R. 64:60–61; Ex. 24, Ch. 6, 23:40:00–21); monitor CA (R. 63:81–82; 64:62; Ex. 24, Ch. 6, 23:40:21–23:41:09); and leave the bar seconds behind CA. (R. 64:56–57; Ex. 24, Ch. 3, 23:41:19–29.) Tucker was the *fifth person* to leave the bar in

a ten-second window (R. 64:56–57; Ex. 24, 23:41:19–29), and he was the *fifth person* to reappear outside in a ten-second window. (R. 64:63–64; Ex. 30, Ch. 14, 23:41:24–34.)[10] It was the *fifth person* outside the bar—Tucker—who fought with CA on the sidewalk and pointed a gun at CA's back before CA collapsed in the street. (R. 64:69–70; Ex. 31, Ch. 18, 23:41:44; R. 64:66–68; Ex. 31, Ch. 17, 23:41:56–23:42:01.) Because the jurors were able to view the surveillance videos—both during the evidence phase of the trial and during deliberations (R. 65:59–70; 66:1–6)—they were able to use their own judgment in assessing who killed CA.

Third, the State established Tucker's motive for killing CA: a couple weeks before the murder, Tucker learned that CA had allegedly assaulted his son. (R. 64:51.) Just four days before the murder, Tucker tried to get a restraining order against CA. (R. 64:76; 65:12.)

Fourth and finally, the circuit court instructed the jury to draw its own conclusions about the identity of the shooter. (R. 63:6.) Thus, the jurors understood that they were not required to accept Detective Butz's opinion in reaching their verdict.

Under these circumstances, it is clear beyond a reasonable doubt that the jury would have convicted Tucker absent any error in admitting Detective Butz's opinion testimony.

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[10] Again, Detective Butz testified that the night vision on the interior cameras washed out the coloring in people's clothing, thereby providing an explanation for why Tucker's clothing looks darker outside the bar. (R. 63:51.)

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 16th day of March, 2018.

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 4,626 words.

Dated this 16th day of March, 2018.

_____
KARA L. MELE
Assistant Attorney General

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 16th day of March, 2018.

_____
KARA L. MELE
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