STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 17AP002480CR
Milwaukee County Cir. Court Case No. 2014CF3661

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MARTEZ C. FENNELL,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION, SENTENCE, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED BY BRANCH 30, MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN PRESIDING

CORRECTED BRIEF OF DEFENDANT-APPELLANT

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The trial court did not address this issue.
The postconviction court answered: no.

II. FENNELL'S CONVICTIONS ARE MULTIPLICITOUS CONTARY TO DUE PROCESS

The trial court did not address this issue.
The postconviction court answered: no.

III. FENNELL'S CONVICTIONS ARE BASED ON JURY INSTRUCTIONS – WIS. JI-CRIMINAL 140 -- THAT IMPERMISSIBLY REDUCE THE STATE'S BURDEN OF PROOF, CONFUSE THE JURY, AND OTHERWISE VIOLATE DUE PROCESS

The trial court did not address this issue.
The postconviction court answered: no.

IV. THE SENTENCING COURT ERRONEOUSLY EXERCISED SENTENCING DISCRETION

The trial court did not address this issue.
The postconviction court answered: no.

V. NEW TRIAL IS WARRANTED IN THE INTEREST OF JUSTICE BECAUSE THE TRUE CONTROVERSY WAS NOT FULLY TRIED

The trial court did not address this issue.
The postconviction court answered: no.

STATEMENT ON ORAL ARGUMENT

Mr. Fennell does not request oral argument.

STATEMENT ON PUBLICATION

Publication would be warranted pursuant to Wis. Stat. § 809.23, because this case presents an opportunity to correct an error in Wisconsin's criminal jury instructions defining the State's burden of proof that violates defendants' fundamental due process.

STATEMENT OF THE CASE

The Criminal Complaint charged Martez C. Fennell ("Fennell") with one count of armed robbery, PTAC, by threatening to use a dangerous weapon; and one count of operating a motor vehicle without owner's consent, PTAC. (1). Both counts concerned a car-jacking that occurred in June 2014. Id.

Fennell was tried before a jury. The car-jacking victim testified and in-court identified Fennell as the armed robber. The officer who took the victim's statement immediately after the car-jacking did not testify, although the victim in her statement denied seeing the armed robber's face. Fennell testified. (67, 68, 69, passim.)

After the standard Wis. JI—Criminal 140 instruction (hereafter "JI-140") was given with both parties' agreement,

Fennell was found guilty on both counts. (25.) He was sentenced to a total of 12 years (9 + 3, for the respective counts) of initial confinement and 9 years (6 + 3) extended supervision. Id.

He timely filed a Notice of Intent to Pursue Postconviction Relief and motions for postconviction relief (with exhibits) raising, inter alia, ineffectiveness of counsel and constitutional errors in JI-140.[1] (28, 40-43, 54).

The postconviction court denied relief without a hearing, and denied reconsideration. (53, App. 2-7; 55, App.1.).

This appeal challenges the validity of the conviction, inter alia because trial counsel provided ineffective assistance; and challenges the denial of postconviction relief without a *Machner* hearing, as well as of the remaining claims for relief.

STATEMENT OF FACTS

Both charges stem from a nighttime incident, on June 21, 2014, on Milwaukee's North Side, in which a young car owner/driver, A. R., while sitting curbside in her car, was robbed of that car at gunpoint. (1.) A.R. quickly left the scene and, once safe, she called the police and reported to Officer Paloma Winkelmann as follows: two robbers approached her car and one threatened her with a gun; she was scared, stared at the gun, did not see his face, so could not describe it; she generally described his height and skin color. Id. Officer

[1] Fennell filed a Motion for Postconviction Relief, a Reply to the State's Response to such Motion, and -- after the initial denial of postconviction relief -- also a Motion to Reconsider the Denial of Postconviction Motion. (39, 50, 54.)

Winkelmann in a report memorialized A.R.'s post-robbery statements. (40.) ("Report")

A.R. later twice talked to the police. The first time she did not identify Fennell in a photo line-up, but the second time she identified him. (67:113 et seq. (A.R.'s trial testimony).)

During trial, A.R. identified Fennell in court and denied having told the police that she never saw the gun-wielding robber's face because, fear-gripped, she looked at the gun during the car-jacking; she testified that she had seen the robber's face. (67:95-131.) [2]

Defense counsel planned to impeach A.R.'s credibility and her identifications of Fennell (as the gun-wielding robber) with her initial denial of seeing the robber's face, by presenting testimony of Officer Winkelmann who had taken the initial post-car-jacking statement from A.R. and wrote the Report. But after being not being properly served with a subpoena, Officer Winkelmann did not appear to testify, so counsel could not impeach A.R.'s identifications with Winkelmann's testimony or Report. (69: 3-4, 25-27.) Counsel attempted impeachment by referring to Winkelmann's Report when cross-examining A.R., but A.R. denied that she had made the denials memorialized in the Report. (67:103-105.) The Report (40.) was not introduced into evidence.

Fennell testified. He proclaimed his innocence of the car-jacking. He innocently explained certain prosecution evidence, including the presence of his I.D. alongside A.R.'s

[2] A.R.'s testimony differed from her earlier statements to the police in several other ways, e.g. regarding the color of the robbers' car, the color of a robber's T-shirt, and how a robber got hold of her phone. (39:12.)

cars keys in the home that belonged to Fennell's grandmother (who reported finding foreign items in her home). Fennell testified that he was watching grandma's home in her absence, but other family accessed the house too, and they engaged in criminal activities; Fennell knew of such activity, but did not participate knowingly. (69:5-24.)

The jury rendered "guilty" verdicts. Although this was Fennell's first criminal case, he was sentenced to a total of 12 years of initial confinement and 9 years of extended supervision. (25.)

Postconviction, Fennell raised the same issues as in this appeal. (39, 40, 41, 42, 54.) After court-ordered briefing, (47, 50.), the circuit court denied relief without a hearing (53, App. 2-7.); then did so again, after Fennell sought reconsideration. (55, App. 1.)

This appeal follows.

ARGUMENT

I. THE POSTCONVICTION COURT ERRONEOUSLY DENIED FENNEL'S INEFFECTIVENESS CLAIM WITHOUT HOLDING A *MACHNER* HEARING

A. Standard of review.

This court reviews *de novo* the legal question of whether the motion alleges sufficient facts to entitle the movant to a hearing; and reviews the discretionary decisions of the circuit court under the deferential erroneous exercise of discretion standard. See *State v. Allen*, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433.

B. Fennell made sufficient allegations in postconviction court to create factual questions regarding the "reasonableness" of counsel's *various* actions/inactions.

The postconviction court is required to hold an evidentiary hearing on ineffectiveness claims when the movant alleges sufficient facts in the motion to raise a question of fact for the court. *State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (citation omitted).

Upon properly exercising discretion, the circuit court may deny a motion without a hearing when the motion contains insufficient allegations, is conclusory, or the record conclusively demonstrates that the movant is not entitled to relief. *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

The question for this court's *de novo* review is: did Fennell's allegations in post-conviction court raise a question of fact warranting a *Machner* hearing. *Toliver*, 187 Wis.2d at 360. Fennell asserts that they did.

Post-conviction, Fennell argued counsel's ineffectiveness, inter alia, in not securing (via properly served subpoena) and not presenting the credibility-impeaching testimony of Officer Winkelmann, who took A.R.'s statement minutes after the car-jacking, in which A.R. denied having seen the face of the armed robber who took her car, and memorialized that statement in her Report. (39, passim; 40).

Fennell specifically alleged in postconviction court that his acquittal had hinged on the issue of the credibility/reliability of A.R.'s late identifications of Fennell

as the armed robber (in a photo array and again in court), which identifications were contradictory to A.R.'s prior statements to the police. (39: 1-2, 11-14.)

Fennell specifically alleged that trial counsel planned to challenge the identifications as unreliable, and to impeach A.R.'s credibility, by introducing evidence of A.R.'s initial denial of seeing the robber's face. (39:11-13; 40:5.) [3]

Fennell specifically alleged that in his opening remarks trial counsel prepared the jury for this strategy and the supporting testimony from Officer Winkelmann:

> … the question . . . is whether or not . . . *the person's identification of my client beyond a reasonable doubt that he was the one who did it*.…
>
> …The evidence will be that . . . [A.R.] *called the police, they came just about right away, and she gave an interview to the police including a description of the two people that robbed her car*. . . . . I'll ask you at the end of the trial to look at . . . *the quality and the ability to make an identification to describe a person at the scene and then to see how that relates back to a photo identification*…
>
> …
>
> At the conclusion of the trial, it's going to be our position that there is insufficient evidence to prove beyond a reasonable doubt that the identification removes all reasonable doubt that has Mr. Fennell here as the person that stole that vehicle…

(39:11 (quoting 67:87-90 (emphasis added)).)

By specifically pointing to this opening Fennell alleged, postconviction, defense counsel's reasonable

[3] The State's opening did not mention A.R.'s initial post-carjacking statement, where she admitted never having seen the gunman's face.

strategy/theory of defense: showing that A.R.'s identifications did not eliminate reasonable doubt, by impeaching them with A.R.'s initial denial – to Officer Winkelmann -- of having seen the robber's face.

Fennell specifically alleged, postconviction, that implementation of this strategy was derailed by counsel's failure to subpoena Winkelmann properly, making her unavailable to testify and preventing admission of her Report into evidence. (39:12-14.)

Fennell specifically alleged that counsel admitted failure in his "obligation" to secure/present Winkelmann's testimony and the trial court found counsel's actions unreasonable and not legally proper. ((39:12-13) (citing 69:3-4).) [4]

Fennell, post-conviction, detailed that the defense rested without objecting; and subsequently, in closing, the prosecutor made inaccurate arguments and statements about A.R.'s reliability and credibility that would have been refuted by the admission of Officer Winkelmann's testimony and her Report. (39:12-13.)

Based on the above-summarized specific allegations, Fennell argued post-conviction that counsel's failures were unreasonable and deficient; and prejudiced Fennell by preventing him from impeaching A.R.'s identifications and her credibility/reliability generally, consistent with the defense's pre-selected reasonable and promising strategy. Id.

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[4] Counsel admitted he had been "hoping that the State had subpoenaed him [sic.]" "yesterday." Counsel referred to officer Paloma Winkelmann as though she were a male, using the pronoun "he," for reasons unclear from the record. The court continued this erroneous form of address. Id.

Fennell submits that the above-summarized specific allegations, made post-conviction, created sufficient factual questions regarding the "reasonableness" of counsel's *various* actions/inactions to warrant a *Machner* hearing.

C. The postconviction court erroneously exercised discretion in denying relief without holding a *Machner* hearing.

Proper exercise of discretion is "a process of reasoning based on the facts of record and reasonable inferences from those facts, and a conclusion supported by a logical rationale founded upon proper legal standards." *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971). Proper exercise of discretion requires that the court rely on facts of record, the applicable law, and, using a demonstrable rational process, reach a reasonable decision. *Martindale v. Ripp*, 2001 WI 113, P28; 629 N.W. 2d 698.

Fennell submits that the postconviction court erroneously exercised discretion in denying an evidentiary hearing and postconviction relief upon erroneously finding:

(1) that counsel's deficiencies did not prejudice Fennell because the jury "heard" about A.R.'s initial statement to the police (denying having seen the robber's face) *through trial counsel's questions*; and

(2) that "the outcome of the trial would have been no different had Officer Winkelmann testified as to what the victim told her at the time of the incident."

(53: 3-4, App. 4-5.)

The jury are presumed to follow the jury instructions. *State v. LaCount*, 2008 WI 59, ¶23, 750 N.W.2d 780 (jurors are presumed to follow instructions given by courts). The jury

were instructed to follow the jury instructions as given, and to base their verdict *only on "evidence,"* with "evidence" defined as *excluding counsels' statements, remarks,* etc. (69:28-29; 69:38:15-23).

No *evidence* was presented of A.R.'s initial statements to Officer Winkelmann, which would impeach A.R.'s later identifications of Fennell and A.R.'s credibility in general. No impeachment *evidence* (of prior inconsistent statements) was presented. Therefore, the jury is presumed *not* to have considered A.R.'s alleged statements to Winkelmann *as relayed by trial counsel*: because that was not *evidence*. *LaCount,* 2008 WI at ¶23.

A.R.'s identifications *were* in evidence, unimpeached. And A.R.'s *denials* of her (self-impeaching) statements to Winkelmann *were in evidence*. Therefore -- based on the instructions received -- the jury presumptively, as instructed, considered the identifications and the denials as *evidence*, and made verdicts accordingly. *LaCount,* 2008 WI at ¶23. A.R.'s identifications and denials were found credible because they stood *unimpeached* with *evidence* of A.R.'s prior inconsistent statements to Winkelmann.

Proper exercise of discretion -- including reliance on "applicable law, . . . a demonstrable rational process, … [and producing] a reasonable decision," *Martindale,* 2001 WI at P28 -- compels conclusions contrary to those of the postconviction court.

The postconviction court's findings and conclusions, (53:3-4, App. 4-5.), demonstrate misused discretion because they are clearly contrary to the controlling law of *LaCount, Martindale* and *McCleary*, in that they rely on these *unreasonable inferences and determinations*:

- The jury *would not* consider A.R.'s fresh post-robbery statements to Winkelmann (denying that A.R. ever saw the face), if introduced as rebuttal evidence through Winkelmann and her Report, to be more credible/reliable than A.R.'s later identifications and testimony.

- Contrary to the jury instructions, the jury *did* consider A.R.'s statements to Winkelmann -- relayed in trial counsels *questions*, but then denied by A.R. -- as proper evidence.

- Because the jury heard about A.R.'s impeaching statements to Winkelmann *through counsel* (thus not via "evidence") and still found Fennell guilty, then Fennell could/would not benefit from actual admission into evidence of such statements and would still have been convicted if the jury *had* heard and seen (as evidence) Winkelmann's testimony about A.R.'s denials of having "seen the face" and the Report memorializing them.

See McCleary, 49 Wis.2d at 277 (properly exercised discretion includes drawing "reasonable inferences" from the facts of record and a "conclusion supported by a logical rationale founded upon proper legal standards").

When the jury were instructed that A.R.'s statements to Winkelmann were *not* evidence when relayed by counsel and that *only evidence could be considered in deciding guilt/innocence*, it is irrational and contrary to law to claim that the jury *did* treat such statements as evidence, as the postconviction court does.

The findings and conclusions of the postconviction court may not stand because they rest on *un*reasonable

inferences from "appropriate facts," are not based on "the correct law," and are not conclusions "which a court reasonably could have reached." *State v. McConnohie*, 113 Wis.2d 362, 370, 334 N.W.2d 903 (1983).

Fennell asks this Court to remand to circuit court with directions to set this matter for a *Machner* hearing.

II. FENNELL'S CONVICTIONS ARE MULTIPLICITOUS, CONTRARY TO DUE PROCESS.

A. Standard of review.

The question of whether there is a multiplicity problem is one of law which this court reviews *de novo*. See *State v. Woods*, 117 Wis.2d 701, 715, 345 N.W.2d 457, 465 (1984) (constitutional questions reviewed independently).

B. Fennell's conviction for Count 2 is identical in law and in fact to his conviction for Count 1.

In *State v. Davison*, 2003 WI 89, 263 Wis. 2d 145, 666 N.W.2d 1, the supreme court reviewed the "established methodology" for reviewing multiplicity claims:

> First, the court determines whether the charged offenses are identical in law and fact using the *Blockburger* test. If it is determined, using this test, that the offenses are identical in law and fact, the presumption is that the legislative body did not intend to punish the same offense under two different statutes. "Accordingly, where two statutory provisions proscribe the `same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent."

Id., ¶¶ 43-45 (citations omitted).

The *Blockburger* test inquires whether "each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Courts must "consider whether each of the offenses ... requires proof of an element or fact that the other does not." *State v. Derango*, 2000 WI 89, ¶ 30, 236 Wis. 2d 721, 613 N.W.2d 833.

If, under *Blockburger*, charges are not identical in law and fact, there is no potential double jeopardy violation. See *Davison*, 263 Wis. 2d 145, ¶¶ 33, 46. The remaining multiplicity question is then: whether there is a due process violation. A due process violation is present if "the legislature did not intend to authorize multiple convictions and cumulative punishments." Id., ¶46. *Davison*, at P.50, provides guidance for this legislative intent inquiry:

> As we seek legislative intent in a multiplicity claim, the court does not stop at the language of the subsection. Instead, we analyze four factors to determine legislative intent: (1) all applicable statutory language; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct.

Multiplicity arises when a single criminal act encompasses the elements of more than one distinct statutory crime. *State v. Lechner*, 217 Wis. 2d 392, 401-02, 576 N.W.2d 912 (1998).

When two charges are “identical in law and in fact”, then charging both is unconstitutional, *State v. Grayson*, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992), as well as contrary

to Section 939.66, *State v. McKinnie*, 2002 WI App 82, P.6, 52 Wis.2d 172, 642 N.W.2d 617. [5]

Fennel's convictions of both Count 1 and 2 present a multiplicity violation. The underlying charged criminal conduct -- intentionally taking and driving away A.R.'s vehicle from her, without her consent (while threatening armed force) -- encompasses elements of *two distinct statutory crimes*:

- in Count 1 under Section 943.32(2), the core elements of "armed robbery" of person of her vehicle, commonly known as carjacking; and

- in Count 2 under Section 943.23(2), the elements of "taking and driving a vehicle without owner's consent."

The overlapping elements of count 1 and 2 are: (a) intentionally taking the vehicle (which is "property"); (b) intentionally carrying the vehicle away (by driving away in it); and (c) with knowledge of non-consent, because "with intent to steal" in count 1 includes knowledge of non-consent. This is the complete list of elements of Count 2, and a partial list of elements of Count 1.

The offense in Count 2 is identical in law and in fact to the offense in Count 1, and Fennell's convictions of both violate double jeopardy and Section 939.66(1). The crime in Count 2 is the same in law and fact as the crime in Count 1 because Count 2 does not require proof of any element not also required to prove the crime in Count 1. *Blockburger*, 284 U.S. at 304 (1932); WIS. STAT. § 939.66 (1).

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[5] Multiplicitous charges violate the double jeopardy provisions of the state and federal constitutions, Wis. Const. art. I, § 8; U.S. Const. amend. V; and violate Wis. Stats §939.66.

It was impossible to commit the crime in Count 1 without also committing the included crime in Count 2: the armed carjacking simply could not occur without the taking and driving of the vehicle *sans* consent. See *Randolph v. State*, 83 Wis. 2d 630, 266 N.W.2d 334 (1978) (for one crime to be included in another, it must be utterly impossible to commit the greater crime without committing the lesser). Element-wise, the crime in Count 2 is wholly included within the crime charged in Count 1.

Also factually, Count 2 is not distinct from, but is included within, Count 1: the same underlying conduct is alleged, occurring at the same location (2315 W. Hampton St., Milwaukee, WI), on one date (June 21, 2014), at the same hour (minutes before midnight). (1.)

Thus, Count 2 is not -- either in law or in fact -- a different crime than Count 1, when Count 2 (taking and driving a vehicle without the owner's consent) is wholly included within Count 1 (taking and carrying away the vehicle, by driving, without the owner's consent, with threat of weapons).

The core focus of each crime – in Count 1 and Count 2 -- is the same. See *Derango*, 2000 WI 89, P 33 (relying on the "focus" of each statute to determine whether the charges are multiplicitous; finding no multiplicity when such focus was different). Each crime criminalizes and punishes the same core conduct: intentional taking and carrying away of another individual's property (such as a vehicle), without that individual's consent. Because the crime in Count 2 is included in, and not "legally distinct" from, the crime in Count 1, the legislature presumably did not intend cumulative punishment. See id. at ¶34 (stating: "The two offenses are,

therefore, legally distinct, and so we presume the legislature intended to allow cumulative punishment.").

Count 2 is not legally distinct from Count 1, is identical in law and fact with Count 1, and is included in Count 1, and therefore the convictions of both Count 1 and Count 2 are multiplicitous -- thus unconstitutional and contrary to Wisconsin statutes -- and must be vacated as such. *Grayson*, 172 Wis. 2d at 159, Section 939.66(1).

In postconviction court the State asserted that factually the two counts differed, because the robber took also A.R.'s *car-and-house keys* (which he grabbed, placed in the ignition, and used to drive the car away) and her *purse* (which lay unnoticed on the floor behind the driver's seat). (48:4.)

These alleged factual differences do not rebut Fennell's multiplicity claim when:

1. nothing in the charging papers or the evidence indicated that the robber *knowingly* took the purse (with its contents) *with intent to steal*; or knew there was a purse in the car he was taking; or knew he was taking a purse; and

2. nothing in the charging papers or the evidence indicated that the robber took the house key; or knew he was taking the house key; or knowingly took the house key without A.R.s consent with intent to steal the house key; and

3. both Armed Robbery of a Vehicle and Taking/Driving a Vehicle without the Owner's Consent necessarily *require the taking and use of the vehicle's key*, to drive the vehicle away from the owner. For the purpose of both crimes the car key is part of the vehicle's operation, thus functionally part of the vehicle. Nothing in the charging papers, evidence, or the State's arguments indicates

otherwise; and no authority known to Fennell supports the argument that the car key was a separate property of which A.R. was "armed-robbed" when she was car-jacked, or that taking the car key supports a separate charge of theft or robbery, when the key is used in Taking and Driving a Vehicle without the Owner's Consent.

Because Count 1 and Count 2 are legally and factually the same for the purposes of multiplicity analysis, Fennell does not need to prove that the legislature did *not* intend to authorize cumulative punishments (for one count of armed robbery/carjacking and for one count of taking and driving a vehicle without the owner's consent) for the robber who took A.R.'s car and drove it away, without her permission, after/by threatening her with a weapon. *Steinhardt*, 2017 WI 62, P. 24.

Fennell asks this Court to vacate his multiplicitous convictions.

III. FENNELL'S CONVICTIONS ARE BASED ON JURY INSTRUCTIONS – WIS. JI-CRIMINAL 140 -- THAT IMPERMISSIBLY REDUCE THE STATE'S BURDEN OF PROOF, CONFUSE THE JURY, AND OTHERWISE VIOLATE DUE PROCESS

A. Standard of review.

Whether a jury instruction correctly states the law, and whether a jury instruction violates due process, are both legal questions, which this Court reviews *de novo*. *State v. Krawczyk,* 2003 WI App 6, ¶10, 259 Wis. 2d 843, 657 N.W.2d 77; *State v. Tomlinson,* 2002 WI 91, ¶53, 254 Wis. 2d 502, 648 N.W.2d 367.

B. By including the Dual Directives the Instruction reduced the State's burden of proof, violating fundamental due process.

Fundamental due process requires that a defendant's guilt in a criminal prosecution be proven by the high "beyond a reasonable doubt" burden. See *In Re Winship*, 397 U.S. 358 (1970). When "reasonable doubt" lingers after the presentation of evidence, acquittal is required.

Wisconsin's standard JI-140 ("Instruction"), given in this case, violated due process because it did *not* communicate to jurors that they *must* acquit if they have reasonable doubt.

After Fennell's sentencing, two research studies published in academic journals reported a statistically-significant increase in conviction rates whenever the dual directives closing JI-140 -- "…you are not to search for

doubt. You are to search for the truth" (hereafter "Dual Directives" -- were included in instructions defining the State's burden of proof. [6]

The two studies, (41, 42, 43.), summarized in more detail infra, empirically prove that the Dual Directives *in fact* cause jurors to convict where they would *not* have convicted if instructed without the Dual Directives; and *in fact* cause jurors to convict even when reasonable doubt exists, thus based on a reduced standard of proof, contrary to due process.

This standard-of-proof reducing effect is first proven by the 2016 study designed, executed, and published jointly by Wisconsin attorney Michael Cicchini and Professor, Chair of Psychology, and Director of the Law & Justice Program at Beloit College, Dr. Lawrence T. White. *See* Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. Richmond L. Rev., pp. 1139-1167 (2016) (available at http://lawreview.richmond.edu/wp/wp-content/uploads/2016/06/Cicchini-504.pdf) (41.) ("First Study").

The First Study, passim, tests the impact of the Dual Directives found in Wisconsin's standard instruction JI-140 on jurors' decision-making. This controlled study proves that jurors who hear the Dual Directives (as found in JI-140) convict at a *significantly* higher rate than jurors who receive

[6] The same language here dubbed the "Dual Directives" was, in the court below, referred to as the "truth language" or "search for the truth language." That language is: "…you are not to search for doubt. You are to search for the truth." Such language is part of the standard JI-140 given in this case and is also the variable whose effects on the jury are empirically tested in the two studies addressed in this Brief, as explained infra.

jury instructions *not* containing the Dual Directives. The conviction rate of jurors who received the Dual Directives was nearly *double* that of the group that received a "beyond reasonable doubt" instruction without the Dual Directives, and was statistically *identical* to that of the group that received *no* "reasonable doubt" instruction whatsoever. (40, passim.) [7]

The scientific robustness of the First Study, and the legal implications of its results, are explained in the Decision Re Motion for Reconsideration of Decision Modifying Burden of Proof Jury Instruction, entered on August 10, 2017, by the Honorable Steven G. Bauer, Circuit Court Judge for Dodge County Circuit Court, in Case No. 16CF196. ("Judge Bauer's Decision") (50 (Exhibit D, attached to Defendant's Reply to State's Amended Response to Motion for Postconviction Relief).) Judge Bauer's Decision, penned by a jurist with expert training in statistics, accessibly explains the scientific underpinnings of the First Study and its valid implications for criminal trials. [8]

With its large sample size and the revealed large difference in conviction rates, the First Study allows to conclude -- with *more than 97 percent certainty* -- that the

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[7] The statistical significance of the First Study's findings, and the study's limitations, are fully explained in the First Study. (40, passim.)

[8] Fennell did not, and does not, rely on Judge Bauer's Decision as a binding or persuasive authority. In his Reply to the State's Amended Response (48.) Fennell offered Judge Bauer's clarifying Decision for the postconviction Court's consideration, as rebuttal of the State's attacks the Studies' validity -- because Judge Bauer had received graduate education in statistics and thus was eminently able to rebut the same attacks in his Decision. (50:4 and the attached Exhibit D.) Fennell here refers to Judge Bauer's decision in the same spirit of expert clarification of the Studies' scientific validity.

authors did not commit a "Type I error." [9] This translates into a more than 97 percent certainty (1-*p*) that the authors did not obtain a "false positive" when testing their hypotheses regarding how the inclusion of Dual Directive in the jury instruction on "beyond reasonable doubt" in fact impacted jurors' conviction rates. (41:1154-1156, 42:1155 et seq., passim.)

The standard-of-proof-reducing effect of the Dual Directives was *again proven and refined* by Cicchini and White's 2017 follow-up replication study, which tested (and confirmed) the reliability of the original findings from the First Study. *See* Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 Columbia L. Rev. Online, March 1, 2017, pp. 22-35 (pre-publication draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2813596) (43.) ("Second Study").

The Second Study *again* finds a statistically significant difference in conviction rates between mock jurors who were instructed on "reasonable doubt" without the Dual Directives and the jurors who received the Dual Directives instructing them "not to search for doubt" but to "search for the truth." (43:30-32.)

Moreover, the Second Study identifies the cognitive link between the Dual Directives (as appended to jury instruction defining "beyond reasonable doubt") and jurors' higher conviction rates. Specifically, jurors who received the Dual Directives were nearly *twice* more likely ($p = 0.01$) to indicate, in their response to a post-verdict question, that *"[e]ven if I have a reasonable doubt about the defendant's*

[9] The *more than 97 percent certainty* is evidenced by the obtained *p*-values of 0.023 and 0.028.

guilt, I may still convict the defendant[.]" (emphasis added). Furthermore, jurors who held this erroneous belief, regardless of what instructions they received, actually convicted at a rate *2-1/2 times higher* ($p < .001$) than jurors who correctly understood the burden of proof (as requiring acquittal whenever reasonable doubt lingers). (43:33.)

Together, the Two Studies supply thus-far *uncontroverted empirical proof* that the Dual Directives, when included in instructions defining the State's burden of proof, have these multiple effects:

1. They cause jurors to believe that a "guilty" vote is allowed even when reasonable doubt exists.

2. They cause jurors to convict at *significantly* higher -- double -- rates, compared to jurors who did not hear the Dual Directives, and

3. They in effect reduce the State's constitutionally-mandated burden of proof: from "beyond reasonable doubt" to something like "preponderance of evidence."

Through its Dual Directives portion, the Instruction given in Fennell's case clearly, repeatedly, forcefully conveyed to the jurors the above messages. It was first preliminarily placed in the jurors' minds on the first day of trial, before the opening statements. (67:81-82.) It was then expressly re-stated, after the evidentiary phase ended, in the oral jury instructions read by the court. (69:36-37.) And it was sent into the jury room in written form. (69:27 (court stating jury instructions would be sent into deliberations with the jury).).

So inculcated into the jurors, the Instruction violated due process, because (as proven in the Two Studies) it caused the jurors erroneously to conclude -- from the Dual Directives -- that the State's burden of proof is *lower than* "beyond a reasonable doubt" and allows conviction even when reasonable doubt exists.

Ultimately, Fennell's jurors were directed "*not* to search for doubt," but instead "to search for the truth," and they presumptively did just that. *LaCount,* 2008 WI ¶23 (jurors are presumed to follow the instructions given by courts).

First, the jurors stopped searching for doubt. They stopped asking: "do I (still) have reasonable doubt?" They stopped testing the State's evidence against the measure of "reasonable doubt." They stopped assessing any doubts they had, to see if they persisted.

Second, the jurors *instead* "searched for the truth," i.e. weighed the State's evidence to see whether it supported a probably true narrative, or supported the State's narrative as probably more true than the Defendant's. Such weighing effected not the *heightened* "beyond a reasonable doubt" burden of proof, but a reduced burden, akin to the "preponderance of the evidence" standard, in violation of due process. [10]

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[10] This effect of the Dual Directives on Fennell's jury is also supported by case law. Courts have recognized that instructing a criminal jury "to not search for doubt" but "to search for truth" misstates the jury's constitutional duty and improperly reduces the State's burden of proof. See *State v. Berube*, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (instructing the jury in a criminal prosecution to "search for truth and not for reasonable doubt both *misstates the jury's duty* and *sweeps aside the State's burden*.") (emphasis added). Courts have also recognized that commanding the jurors to "seek for the truth" causes them to ask whose version of events is more likely true -- the government's or the

Fennell asserts that the above shows this: once directed "not to search for doubt" but "to search for the truth," those of Fennell's jurors who felt that the State's version of events was *likely more "true"* than Fennell's found Fennell "guilty," contrary to due process. Even if only *one* juror in Fennell's case cast the "guilty" vote based on such rationale, the "guilty" verdict was not reached based on the State's constitutionally-mandated burden of proof. Therefore, the convictions may not stand.

C. The Two Studies' empirically prove that the determinations of the *Avila* court were erroneous, and that the holding relying on those determinations also is error.

The Two Studies refute and disprove -- with unrebutted empirical evidence -- the determinations and holding of the Wisconsin Supreme Court in *State v. Avila*, 532 N.W.2d 423, 429 (1995).

Based on a linguistic/legal analysis, the *Avila* court determined that "it is not reasonably likely" that JI-140 (including the Dual Directives) would reduce the State's burden of proof. Id. at 429.

But the Two Studies prove empirically that the Dual Directives in JI-140 *in fact measurably reduce the State's burden of proof*, to something like the "preponderance of evidence" standard of civil cases. See supra. Such conclusions prove that *Avila's* determinations and holding are

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defendant's -- thereby importing a "preponderance of the evidence" standard unsuited for criminal prosecutions. See *United States v. Gonzales-Balderaz*, 11 F.3d 1218, 1223 (5th Cir. 1994) ("[S]eeking the truth suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of the evidence standard.")

unsound and contrary to facts; and that *Avila's* holding upholds jury instructions that violate fundamental due process.

Fennell submits that *Avila's* determinations and holding do not survive the empirical reality-check of the Two Studies. Fennell asks this Court to take judicial notice of the Two Studies' empirical data, results, and conclusions; or to certify this issue to the Wisconsin Supreme Court, which alone may overrule *Avila*.

This Court can take judicial notice of facts not subject to reasonable dispute, if they are generally known within the territorial jurisdiction of the court *or* are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. See Sec. 902.01(1) and (2), Stats; *State ex rel. Cholka v. Johnson*, 85 Wis. 2d 400, 402, 270 N.W.2d 438, 440 (Ct. App. 1978), rev'd on other grounds, 96 Wis. 2d 704, 292 N.W.2d 835 (1980). Courts have taken judicial notice of the reliability of underlying principles of speed radar detection. *State v. Hanson*, 85 Wis. 2d 233, 270 N.W.2d 212 (1978) (court properly took judicial notice of the reliability of underlying principles of speed radar detection); *Sisson v. Hansen Storage Company*, 2008 WI App 111, 313 Wis. 2d 411, 756 N.W.2d 667, 07-1426 (judicial notice may be taken at any stage of the proceeding; an appellate court may take judicial notice when it is appropriate).

This Court may take judicial notice of the reliability of the underlying scientific principles of the Two Studies, just like the *Hanson* court took judicial notice of the reliability of underlying principles of speed radar detection.

This Court should take judicial notice of the facts proven by the Two Studies, because the Two Studies are

"sources whose accuracy cannot be reasonably questioned," as shown in Judge Bauer's Decision. (50, attached Exhibit D, passim). Judge Bauer's Decision explains that the underlying scientific principles and methodologies of the First Study are generally accepted in the scientific community and widely practiced in social sciences as reliable. (50, attached Exhibit D, passim.). The Second Study has the same underlying scientific principles and methodologies, and replicates the First Study. Both Studies warrant judicial notice.

One hallmark of reliability is that the Two Studies were properly designed "controlled experiments" whose participants received the same hypothetical fact patterns involving fictional parties and witnesses. Both experiments were designed to test selected hypotheses: (1) the First Study was designed to test the hypothesis that "when truth-related language [i.e. the Dual Directives] is added to an otherwise proper beyond a reasonable doubt instruction, the truth language not only contradicts but also diminishes the government's burden of proof;" (2) the Second Study was designed to test whether the results of the First Study would be replicated; and if yes, to test what (if any) cognitive link existed between the Dual Directives and the mock jurors' "guilty" verdicts. See Michael D. Cicchini, The Battle over the Burden of Proof: A Report from the Trenches, 79 U. Pittsburgh L. Rev., No. 1 (2017), pp. 8-9. [11]

Reliability is ensured by the fact that the Studies relied on test subjects (mock jurors) in a controlled setting, consistent with the hallmark principles of social psychology research, and using procedures considered optimal by

[11] At the time of this Brief's drafting this article was available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2916389. Fennell here cites to the pagination of the article as found at this source, which was the only pagination available.

researchers studying the effects of jury instructions on verdicts. See e.g. Sheri S. Diamond, Illuminations and Shadows from Jury Simulations, 21 L. & Hum. Behav. 561 (1997) (discussing use of mock jurors and mock trial simulations to evaluate juror behavior); Marc W. Patry, Attractive But Guilty: Deliberation and the Physical Attractiveness Bias, 102 Psychol. Rep. 727 (2008) (using mock jurors to test the impact of a defendant's attractiveness on juror verdicts); Lawrence T. White, Juror Decision Making in the Capital Penalty Trial, 11 L. & Hum. Behav. 113 (1987) (using mock jurors to test the impact of various factors on jurors' willingness to impose the death penalty).

The Two Studies' underlying principles and methodologies -- of scientifically-designed controlled case-summary studies with mock jurors, whose resulting data were processed through well-tested statistical algorithms -- are widely accepted and commonly used in the social sciences, because they are proven efficient and effective. By using random assignment such controlled experiments guarantee that precisely the one isolated variable under scrutiny -- the Dual Directives -- produces the given effect: the higher conviction rate and lower burden of proof. Michael D. Cicchini, The Battle over the Burden of Proof, at p. 10.

The Two Studies also reliably ensure that the double conviction rate among jurors exposed to the Dual Directives was "statistically significant," in light of the sound "underlying scientific principles" of mathematical and statistical analysis. The scientifically reliable analysis consisted of the calculation of a statistic dubbed the "*p*-value," which depicts the probability that a false positive result was obtained in testing a hypothesis. Based on a well-accepted method, or algorithm, such calculation resulted in the *p*-value of 0.028 and 0.033 in the two studies,

respectively. Id. at pp. 10-11. This translates into the reliable conclusion – made with over 96% certainty -- that the high conviction differential was caused precisely by the Dual Directives. Id.

Nothing indicates that the Two Studies are scientifically unsound or yield biased, unreliable data or conclusions, as Judge Bauer's Decision explains, passim. (50.)

For all the above reasons, this Court should take judicial notice of the facts discovered through the Two Studies and of the conclusions derived from such facts.

In the alternative, Fennell asks this Court to certify this issue to the Wisconsin Supreme Court, so it may review its analysis and holding in *Avila* in light of the Two Studies and reassess the constitutional validity of JI-140 (with its Dual Directives) consistent with such Studies.

D. The jury instruction defining the State's burden of proof confused the jury.

When a jury instruction error – e.g. confusing wording -- goes to the integrity of the fact-finding process, discretionary reversal by this Court is warranted even though defense counsel did not object to the erroneous instruction. *State v. Hatch*, 144 Wis. 2d 810, 824, 425 N.W.2d 27 (Ct. App 1988) ("We have the discretionary power to review a waived instructional error if the error goes to the 'integrity of the fact-finding process.'" (citation omitted)).[12]

To determine whether the challenged instruction was not harmless error, this Court may consider whether the "overall meaning" communicated to the jury correctly stated

[12] Here defense counsel did not object to the giving of JI-140.

the law. *Id.* at 826 (court of appeals concluded that the "the instructions, taken in their entirety, render[ed] any error harmless because the overall meaning communicated by the instructions was a correct statement of the law.").

"A jury instruction is tainted and in error if 'a reasonable juror could misinterpret the instructions to the detriment of a defendant's due process rights.'" *State v. Dodson*, 219 Wis.2d 65, 86, 580 N.W.2d 181 (1998) (citation omitted).

As shown supra, the Two Studies empirically prove that JI-140 (through its Dual Directives) *in fact confuses* jurors regarding the State's burden of proof, "to the detriment of the defendant's due process rights." *Dodson*, 219 Wis.2d at 86. The Studies prove that the charge *as a whole* -- while it contains the Dual Directives -- misdirects the jury. *Hoover*, 2003 WI App at ¶29.

Fennell submits that a plain language analysis of JI-140 "as a whole" also shows that JI-140 was confusing "to the detriment of [Fennell'] due process rights." Id.

The plain language of the Dual Directives in JI-140 gave the jurors two final commands which confused the jurors, because the commands conflicted with the commands given earlier in JI-140 "as a whole." This internal conflict within JI-140 gave the jurors a task impossible to perform, sowing confusion.

JI-140 first informed the jurors that the State bore the burden of proving every element of the crimes "beyond a reasonable doubt" and defined "reasonable doubt." This early portion of the Instruction directed the jurors -- correctly -- to convict *only if* the evidence persuaded them "beyond a reasonable doubt" that every element was so proven. It

correctly directed the jurors to use "reasonable doubt" as *the* measure of the State's success/failure of proving every element.

But the Dual Directives, at the close of the Instruction, contradicted and canceled the correct directives of the early portion. First, contrary to the preceding commands in the early portion, the Dual Directives commanded the jurors "*not to search for doubt*," i.e. not to consider whether any reasonable doubt remained after the evidence was presented. Second, also contrary to the preceding commands, the Dual Directives commanded the jurors "to search for the truth," i.e. to decide which narrative -- the State's or the defendant's -- appeared more "true," or better supported by the presented evidence. See supra.

The Dual Directives confused the jurors because they *flatly contradicted* the directives given earlier in JI-140:

- that the "state must prove by evidence which satisfies [the jurors] beyond a reasonable doubt" all elements of every charge; and

- that jurors must "give the defendant the benefit of every reasonable doubt."

The jurors were given irreconcilable directives in JI-140 "as a whole," thus an impossible and confusing task to perform.

Fennell submits that no juror could "give [him] the benefit of *every* reasonable doubt" (as commanded in the first portion of JI-140) without first identifying every reasonable doubt in existence, by means of "searching" for every reasonable doubt (as forbidden in the Dual Directives).

Fennell submits that "giving the benefit of *every* reasonable doubt" necessarily presupposes first "searching for" every reasonable doubt. After all, "every reasonable doubt" may be identified only through "searching" for it -- before its benefit can be given to the defendant.

Here, the jurors were given contradictory -- thus confusing -- commands in JI-140 "as a whole." The jurors could not logically follow *all* the commands given. When directed "not to search for doubt," they presumptively obeyed, especially that this was one of the *final* commands they heard prior to deliberating.

But in following *this final* command, the jurors did not give -- indeed could not have given -- Fennell the benefit of *every* reasonable doubt, as directed in the early part of JI-140.

Fennell submits that JI-140 "as a whole" misdirected the jury. A correct statement of the law in the first part of JI-140 did not render harmless the incorrect statement in the Dual Directives, because JI-140 *as a whole* gave the jury an impossible task inconsistent with due process, by commanding contradictory and irreconcilable analyses. See *Hoover*, 2003 WI App at ¶ 29.

Simply put, the Dual Directives -- as part of "the whole" JI-140 -- commanded "a reasonable juror" to "misinterpret the instructions [on the State's burden of proof] to the detriment of [Fennell's] due process rights." *Dodson*, 219 Wis.2d at 86.

Such instructional error -- even when waived -- went to the "integrity of the fact-finding process," so this Court should review it and reverse, pursuant to *Hatch*, 144 Wis. 2d at 824 ("We have the discretionary power to review a waived

instructional error if the error goes to the `integrity of the fact-finding process."').

When the integrity of the fact-finding process was gravely compromised by such jury instruction error, the guilty verdicts here merit no confidence, the convictions must be vacated, and the case remanded for a new trial with jury instructions which will not confuse the jurors about the State's burden of proof, but will correctly state it.

IV. THE SENTENCING COURT ERRONEOUSLY EXERCISED SENTENCING DISCRETION

A. Standard of review.

This Court reviews sentencing decisions under the erroneous exercise of discretion standard. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Sentencing decisions are afforded a presumption of reasonability consistent with our strong public policy against interference with the circuit court's discretion. *State v. Harris*, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409.

B. The sentencing court erroneously exercised discretion.

A proper exercise of sentencing discretion mandates a rational and explainable basis for the sentence. *Gallion*, 270 Wis. 2d at ¶76 (citation omitted). A sentencing court must consider three primary factors: gravity of the offense, character of the offender, and the need to protect the public. *State v. Alexander*, 2015 WI 6, ¶ 22, 360 Wis.2d 292, 858 N.W.2d 662. Proper exercise of sentencing discretion yields "an individualized sentence based on the facts of the case." Id. (*citing State v. Harris (Landray M.)*, 2010 WI 79, ¶ 29, 326 Wis.2d 685, 786 N.W.2d 409) (emphasis added). To

properly exercise discretion, sentencing courts must individualize the sentences to the defendants, based on the facts of each case, by identifying the most relevant factors and explaining how each sentence imposed furthers the sentencing objectives. See *Gallion*, 2004 WI 42 at ¶¶39-48. Courts may not sentence in ways "closed to individual mitigating factors." *State v. Ogden*, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996). A sentence that fits the crime, and not the criminal, is improper. Id. (citing *McCleary v. State,* 49 Wis. 2d 263, 271, 182 N.W.2d 512 (1971)).

"Individualized sentencing" "has long been a cornerstone to Wisconsin's criminal justice jurisprudence." *Gallion,* 2004 WI at ¶ 48. The *Gallion* court cautioned that Wisconsin's shift to "more complete -- and informationally accurate -- sentencing decisionmaking . . . places upon judges the task to more carefully fashion a sentence based upon the severity of the crime, the character of the offender, the interests of the community, and the need to protect the public." Id. at P.29 (emphasis added). Thus proper "sentencing decisionmaking" requires actual consideration of the individual "character of [this] offender." Sentencing discretion is abused when the sentencing court does not "more carefully fashion" a sentence based on "complete" and "accurate" information about -- inter alia -- the individual "defendant's character," but crafts a sentence based only on the "interests of the community and the need to protect the public." One form of abused discretion is giving too much weight (or all weight) to one factor (e.g. need to protect the public) in the face of other contravening considerations (e.g. the defendant's character). *State v. Krueger,* 119 Wis.2d 327, 337-38, 351 N.W.2d 738, 744 (Ct.App.1984).

Fennell has not received individualized sentencing or an individualized sentence stemming from proper exercise of sentencing discretion.

The court erroneously exercised sentencing discretion by fashioning Fennell's sentence without giving *any* consideration to Fennell's individual characteristics or this case's specific mitigating and/or aggravating factors.

Here, the court's entire "sentencing decisionmaking" takes up 2 pages of the transcript. (70:12-14.) Those 2 pages show that, in fashioning sentence, the court did not address any of Fennell's individual characteristics, such as his youth, his potential for rehabilitation, his rehabilitative needs, facets of his character or personality, his complete lack of criminal record, his social and family background, or his cooperative attitude and demeanor during the investigation and prosecution.

The court once used the word "character," but the sole facet of "character" named was Fennell's insistence that he was innocent. Id. at 13. Such reduction of "character" -- to Fennell's plea of "not guilty" -- is contrary to the law of information-rich individualized sentencing. It is erroneous exercise of discretion and warrants a re-sentencing, where aspects of Fennell's character will actually be considered and reflected in the sentence.

Fennell's sentence is not "individualized" to fit "this defendant" or "his crime." Based on the court's 2-page long analysis, any other defendant who pled "not guilty" would receive the very same sentence. The sentence only fits "the crime" understood generically: the epidemic of car-jackings plaguing the community. The sentence aspires to stem that epidemic, but without paying any heed to "this defendant," his individual character and conduct, his individual record or

rehabilitation needs, his individual demeanor, etc. Like all criminal defendants in Wisconsin, Fennell deserves to obtain a sentence that properly, individually fits him, his actions, his demeanor, etc.

V. NEW TRIAL IS WARRANTED IN THE INTEREST OF JUSTICE BECAUSE THE TRUE CONTROVERSY WAS NOT FULLY TRIED

A. Standard of review.

This Court is vested with independent authority to order a new trial under Wis. Stat. § 752.35, paying no deference to the circuit court's determinations. *See State v. Clutter*, 230 Wis. 2d 472, 475-76, 602 N.W.2d 324 (Ct. App. 1999).[13] If this Court believes either that the real controversy has not been fully tried or that it is probable that justice has miscarried, it may, in the exercise of its own sound discretion, enter such order as is necessary to accomplish the ends of justice. *See id.*

The authority to grant a new trial in the interest of justice extends to situations where the right to review is

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[13] § 752.35, STATS. provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

waived by failing to make a proper objection. See *State v. Harp*, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991) (Harp II). This Court need not find a substantial likelihood of a different result on retrial when considering whether a new trial should be granted because the real controversy was not fully tried. See id. at 775.

B. The true controversy -- of Fennell's identity as the armed robber -- was not fully tried when evidence impeaching the credibility of the sole witness who identified Fennell as the robber was never presented.

The true controversy – of Fennell's identity as the armed robber -- was not fully tried when evidence impeaching the credibility of the sole witness who identified Fennell as the robber and who directly tied Fennell to the crime was never presented, as shown supra.

The result of this prosecution depended on the credibility of the victim, who experienced and eye-witnessed the robbery. The sole evidence *directly* tying Fennell to the robbery was that victim's identification of Fennell as the armed robber in a photo array (based on his facial features), which post-dated the crime by several months; and was the victim's in-court testimonial identification of Fennell as the armed robber.

But immediately after the crime, and months before the identifications she later made, the victim told Officer Winkelmann that she had not seen the robber's face, because she was scared during the robbery and in her fear stared at the gun only. (40.)

The victim's incriminating identifications of Fennell as the robber and her incriminating testimony (e.g. stating that she had seen the robber's face) were vulnerable to effective impeachment with the testimony of Officer Winkelmann and

her Report. (50.) Counsel planned to impeach the victim's credibility and the reliability of her identification by introducing Winkelmann's testimony and Report.

But such evidence was never presented -- and the impeachment was never accomplished -- because of defense counsel's failures, which *self-sabotaged* the defense: counsel caused the unavailability of, and therefore failed to present, Officer Winkelmann's testimony, which would impeach the unreliable, late identifications with the victim's initial, near-crime admission that she had *not* seen the gunman's face.

For the above reason, new trial is warranted to ensure that "justice is fairly administered" and the real controversy -- of Fennell's identity of the robber, thus his guilt/innocence of the charged crimes -- is fully tried.

C. The Dual Directives prevented the true controversy – of Fennell's guilt/innocence of the charged crimes -- from being "fully tried" consistent with the constitutionally-mandated burden of proof.

Fennell submits that the Instruction given here warrants discretionary reversal by this Court under Sec. 752.35, Stats, because the Instruction reduced the State's burden of proof impermissibly and confused the jury, thereby preventing the real controversy -- of Fennell's guilt/innocence of the charged crimes -- from being fully tried. See *Vollmer v. Luety*, 156 Wis.2d 1, 4, 456 N.W.2d 797, 799 (1990).

Fennell was found "guilty" by jurors *misinformed* and *confused* about how and when they properly must acquit vs. properly might convict. He was convicted based on an improperly reduced standard of proof, *lower than* the constitutionally-mandated "beyond reasonable doubt" standard, because the jurors were led to believe by the Dual

Directives that they could convict even when they still had reasonable doubt. See supra.

Justice miscarried when the various effects of the Dual Directives, proven by the Two Studies and summarized supra, *compounded* to undercut "fairness" as follows:

1. The Dual Directives forbade the jurors from searching for "reasonable doubt," contrary to due process as defined in *Winship* and in direct contradiction to the immediately preceding directives correctly defining the jurors' task relative to "reasonable doubt."

2. The Dual Directives *additionally* required the jurors to "search for the truth," when "searching for the truth" or finding "the truth" could not be reconciled with the due-process-compliant commands found in the earlier portions of Instruction; and when juror truth-searching is not due process-sanctioned.

3. Through the Dual Directives, the jury instruction defining the State's burden of proof ultimately, "as a whole," communicated to a statistically significant number of the jurors that they could properly convict Trammel even when they still had reasonable doubt.

4. For the above reasons, Trammel was convicted based on a burden of proof lower than "beyond reasonable doubt," so the question of his guilt/innocence was not litigated "fully" consistent with due process.

Fennell's case parallels *State v. Austin*, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, where the court of appeals reversed and remanded for a new trial in the interest of justice because the jury had been improperly instructed regarding the State's burden of proof, based on the giving of a standard jury instruction which misstated the law. See id. at ¶¶1, 12, 14-16, 18.

The *Austin* court independently reviewed the challenged jury instructions, relying on *State v Ziebart*, 268 Wis.2d 468, 2003 WI App 258, ¶ 16, 673 N.W.2d 369. Upon examining such instruction as a whole, the court agreed with Austin that the instruction on self-defense was erroneous, because the jury instruction *implicitly miscommunicated* the State's burden of proof on self-defense:

> ¶17 "By itself . . . this standard instruction [Wisconsin JI—Criminal 801] implies that the *defendant* must satisfy the jury that he was acting in self-defense. In doing so, the instruction removes the burden of proof from the State to show that the defendant was engaged in criminally reckless conduct.
>
> ¶18 Consequently, we are not convinced that the jury instructions in this case provided the jury with a proper statement of the law of self-defense. [14]

The court reversed and remanded for a new trial in the interest of justice, holding that "by not properly instructing the jury, the circuit court failed to provide it with the proper framework for analyzing that question." Id. at ¶23.

Essentially the same species of jury instruction error tainted Fennell's prosecution: the standard instruction JI-140

[14] The court also ruled that the wholly missing jury instruction on defense-of-other was not "proper," as the State asserted, but was error. Id. at P19.

on the State's burden of proof, as a whole, did not properly state the State's burden of proof, because the Dual Directives implicitly cancelled the correct statement of such burden in the early part of the Instruction, as proven by the Two Studies. See supra. Thus, as in *Austin*, also here "by not properly instructing the jury, the circuit court failed to provide it with the proper framework for analyzing that question," id. at ¶23, and new trial in the interest is proper.

Only a new trial -- free from the above-described compounded jury instruction errors discussed supra -- can ensure that "justice is fairly administered" and the real controversy -- of Fennell's guilt/innocence -- is fully tried, consistent with the required burden of proof.

Fennell asks this Court, in the exercise of its sound discretion, to enter such order as is necessary to accomplish the ends of justice in his case. *See Clutter*, 230 Wis. 2d at 475-76.

CONCLUSION

For the reasons stated above, Martez Fennell respectfully asks this Court to set aside his convictions and order a new trial in the interest of justice, or due to "plain error," or because due process was violated by the Instruction, which *confusingly* and *incorrectly* -- as shown by the Studies -- instructed the jurors regarding when they could find Fennell "guilty" and *improperly* reduced the due-process-mandated higher burden of proof for criminal prosecutions.

Dated this 10th day of June, 2018.

Respectfully resubmitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this **corrected brief** meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is **9007** words.

Dated this 10th day of June, 2018.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 10th day of June, 2018.

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A P P E N D I X

I N D E X
T O
A P P E N D I X

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 28th day of May, 2018.

Signed:

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