STATE OF WISCONSIN COURT OF APPEALS
DISTRICT I

Appeal No. 17-AP-2503-CR
Milwaukee County Case No. 15-CF-2002

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DESHAWN HAROLD JEWELL,
Defendant-Appellant.

ON APPEAL FROM THE SENTENCE, JUDGMENT OF CONVICTION, AND THE ORDER DENYING JEWELL'S POSTCONVICTION MOTION, ENTERED BY THE HONORABLE DENNIS CIMPL

BRIEF AND APPENDIX OF DESHAWN JEWELL, THE DEFENDANT-APPELLANT

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1. Whether the circuit court violated Jewell's right to be present, his right to counsel, and his right to have his case decided on the evidence when it answered the deliberating jury's question to his detriment with a fact not in evidence *in absentia*.

The circuit court ruled it answered the jury's question correctly and that any error was harmless.

2. Whether the circuit court violated Jewell's right to remain silent by punishing Jewell for remaining silent in the face of the Court's insistence upon a confession at sentencing.

The circuit court ruled that it did not violate Jewell's right to remain silent and that its questions and comments pertained to Jewell's remorsefulness.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted because this case presents a novel issue of law. Oral argument is not necessary because the facts and issues are not complex.

STATEMENT OF THE CASE

Jewell appeals a judgment of conviction for armed robbery and bail jumping entered after a jury verdict. Jewell also appeals the circuit court's decision denying his postconviction motion.

STATEMENT OF FACTS

C.F. was robbed leaving a Milwaukee tavern around 2 a.m. on March 21, 2015 by a stranger who threatened to shoot her (R1:2). C.F. resisted, but the robber took her purse (*id.*) During the scuffle, the perpetrator's hat fell to the ground (*id.*) The hat was submitted to the State crime lab for DNA testing, which was completed more than a month later. DNA testing revealed Jewell and two other individuals' presence on the hat (R66:95).

After the DNA testing results were received, Officer Jeffrey Emanuelson (who investigated the crime from the outset (R67:6-7)) prepared a photo array containing Jewell's picture (R1:2). Emanuelson testified he created the photo array by gathering pictures of Jewell and five similar-looking individuals. He put each of the photos in a folder then added two empty folders, all eight of which were shown to C.F. on April 29, 2015 (R66:53-55). Through Emanuelson, the State introduced a document colloquially described as a "six-pack" (R19; R66:55-56; App. 201-202). According to Emanuelson, a six-pack is a police-created document that contains photographs of the six individuals shown during a photo array, along with their identifying information (*id.*). Emanuelson did not describe the six-pack numbering system; that is, how or when the individuals were put into the six-pack document (*see* R66 & R67).

Emanuelson testified that C.F. was not shown the six-pack during the photo array—she was shown the eight folders (R66:60; R67:21). Emanuelson explained that, pursuant to police department protocol, Jewell could only have been in folders two through five,

because the target is never in folders one or six and seven and eight are empty (R67:20-21). Emanuelson testified he did not know which folder Jewell was in, but knew that Jewell was in folders two through five (*id.*:20-21). Emanuelson testified that C.F. picked out folder three, which he said contained Jewell's photo (R66:60-61; App. 301).

Emanuelson did not in any way record the administration of the photo array (R67:12). Emanuelson violated the Milwaukee Police Department's protocols by not having C.F. sign the back of the photo she selected (R67:12; *see also* R19). Emanuelson also did not conduct the array using the preferred double-blind method (because he knew that Jewell was the target) (R67:20). Nor did Emanuelson document C.F.'s certainty in her identification (R67:18). He agreed that alcohol, lighting, distance, and familiarity with the suspect all affect a witness's ability to reliably identify a perpetrator (R67:18-19).

C.F. testified she was shown pictures in eight folders (R66:24). She said she identified Jewell, but did not say which folder Jewell was in (R66:24). Before looking at the folders, she was confident she would identify the stranger who robbed her because Officer Emanuelson told her "he was going to get him." (R66:30). Emanuelson violated police department protocols by giving C.F. this encouraging feedback (R67:17).

Officer John Kohler testified that C.F. was hysterical, angry, and upset when he and Emanuelson arrived at the scene of the crime (R67:33). Kohler further testified he shuffled the folders before Emanuelson

administered the photo array to C.F., but he was not present when it was administered (R67:37). Kohler did not describe the six-pack numbering system (*see* R67).

During closing, the State argued there were no problems with C.F.'s identification of Jewell (R68:65-72). The defense argued the investigation was inadequate, that C.F. was mistaken, and cast doubt upon the reliability of her identification by highlighting:

- inaccuracies and substantial omissions in her initial identification (R68:74);
- the lighting issues (it was dark outside) and her troubles identifying Jewell in court (*id.*:76); and
- that C.F. was potentially intoxicated having recently left a tavern (*id.*:81).

Before retiring to deliberate, the jury was told to ask questions in writing and "the Court will talk to the attorneys before answering" them (R68:90). The jury retired to deliberate around 11:45 a.m. (R69:2), then

> At approximately 1:45, they sent out the first question. 'May the jurors see the six-pack photo exhibit?' And pursuant to negotiation—or our talking before we adjourned in the morning, I sent back Exhibit 5.
>
> And they immediately sent back another [] note to me saying 'is the six-pack numbering system the same as the order on the photo/folders in the photo array?' [Jewell was] Number 2 [in the six-pack], [and in] the folders was Number 3. Based upon the testimony that we received on how the six pack was put together and based upon my 40 years of doing this, they are never the same; or if they are the same, it's coincidence. In fact, they never can be the same because number 1 in – the number 1 folder is always blank so is the number 7 folder, if I

> recall the testimony right. So therefore, I sent back the answer no with regard to that. And it was shortly after that that they came back with a verdict.

(R69:2-3; App 401). Before the jury returned with their guilty verdicts, the Court acknowledged it was mistaken in its understanding of the numbering system after the prosecutor noted that folders "seven and eight are blank . . ." (R69:5).

At sentencing, the following happened during Jewell's allocution:

> THE COURT: Mr. Jewell, do you want to say anything?
>
> JEWELL: Yeah. I want to apologize to the victim.
>
> THE COURT: For what?
>
> JEWELL: For this. For what she had to go through as a human being.
>
> THE COURT: Did you do it?
>
> JEWELL: Sir?
>
> THE COURT: You don't have to tell me.
>
> JEWELL: I just wanted to say that I was convicted and I take full responsibility for what happened to her.
>
> THE COURT: The only way you can take full responsibility is if you are the guy that did it. If you are not prepared to admit that, you are not taking full responsibility. You can express remorse for what

	happened to her that night, but the question is: Are you the cause? The jury said it was. But you don't have to admit it if you don't want to.
JEWELL:	I don't want to put that on the record.
THE COURT:	Okay.

(R70:14-15). After questioning Jewell about some of his life decisions, the court turned to its sentencing remarks. Towards the end of its remarks, the court said:

> You say you are sorry. But the question is: for what? For what the woman went through. I can buy that. You accept absolutely no responsibility for what you did that night. If you were truly sorry, you would of (sic) got up and said, Judge, I did it. Then I could give you points for that. But I can't give you points for that.

(R70:22).

DISPOSITION IN THE CIRCUIT COURT

Jewell moved for postconviction relief (R45). He argued that the circuit court deprived him of a fair trial by answering the jury's six-pack-numbering-system question with facts not in evidence to his detriment and without his or his counsel's presence (*id.*). Jewell also argued that the circuit court violated his right to remain silent by imposing a greater sentence when Jewell refused to confess to the crime at sentencing (*id.*).

The circuit court rejected Jewell's claims, finding that it answered the jury's question correctly, albeit by flawed reasoning, and that because Jewell's presence would not have been helpful in answering the jury's

question, any error was not prejudicial (R58:3-4; App. 103-104). The Court additionally wrote that its colloquy with Jewell "merely afforded an opportunity to see how he perceived himself in this case following the jury's guilty verdict and to what extent he was really taking responsibility, all of which was pertinent to his character and his rehabilitation needs." (R58:5; App. 105). It therefore denied Jewell's claim for a new sentencing.

Jewell now appeals (R59).

ARGUMENT

I. The Circuit Court Violated Jewell's Constitutional and Statutory Right to be Present, his Right to be Free from Prejudicial Extra-Record Information, and his Right to Counsel by Answering the Deliberating Jury's Question in the Absence of Jewell and his Counsel, to Jewell's Detriment, With Facts Not in the Record.

A. Standards

Jewell's right to due process guarantees his right to be physically present during the judge's interactions with jurors. U.S. Const., Amend. XIV; Wis. Const., Art. I, Sec. 8; *State v. Anderson*, 2006 WI 77, ¶ 38, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by State v. Alexander*, 2013 WI 70, ¶¶ 26-29, 349 Wis. 2d 327, 833 N.W.2d 126 (right not conferred by Confrontation Clause); *Snyder v. Massachusetts*, 291 U.S. 97, 105-108 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964); *Rogers v. U.S.*, 422 U.S. 35 (1975); *U.S. v. Neff*, 10 F.3d 1321, 1325 (7th Cir. 1993). Jewell's right to

be present is also statutorily guaranteed. Wis. Stat. § 971.04(1)(b).

Jewell also has the constitutional right to the assistance of counsel during critical stages of his trial. U.S. Const., Amend. VI, XIV; Wis. Const., Art. I, Sec. 7, 8; *Anderson*, 2006 WI 77, ¶¶ 74-76; *Maine v. Moulton*, 474 U.S. 159, 169-70 (1985); *U.S. v. Cooper*, 591 F. 3d 582, 588 (7th Cir. 2010). Communications with the jury during deliberations are a critical stage at trial. *Anderson*, 2006 WI 77 at ¶ 76.

Finally, Jewell has the constitutional right to have the jury decide his case based upon the evidence presented at trial, in other words, free from extra-record infiltration. U.S. Const., Amend. VI, XIV; Wis. Const., Art I, Secs. 5, 7, 8; *State v. Poh*, 116 Wis. 2d 510, 526, 343 N.W.2d 108 (1984); *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965); *Neff*, 10 F.3d at 1326 (7th Cir. 1993).

All these rights was violated when the Court communicated with the jury without Jewell or his counsel's presence and answered their deliberative question with facts not in the record. For each of these claims, the court's standard of review is *de novo*. *State v. Anderson*, 2006 WI 77 at ¶ 66 (application and interpretation of constitutional provision is reviewed independently); *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 14, 358 Wis. 2d 1, 851 N.W.2d 337 (statutory interpretation is reviewed *de novo*).

B. Jewell's Rights Were Violated

First, as the transcript makes clear, neither Jewell nor his counsel were consulted before the circuit court

answered the jury's question about the difference, if any, between the six-pack numbering system and the photo array (R69:2-4). Furthermore, Jewell's counsel explained that she would have recommended telling the jury to rely on their collective recollection of the evidence if she'd been consulted, which demonstrates that Jewell and his counsel's presence would not have been useless (R69:3-4). *State v. Alexander*, 2013 WI 70 at ¶22. Therefore, Jewell's right to be present and his right to counsel during trial were violated when circuit court answered the jury's question.

Second, the circuit court's answer relied upon facts not in the record, which violated Jewell's right to have the jury decide his fate based on facts in evidence. No witness explained the six-pack numbering system, nor its relationship, if any, to the photo array shown to C.F. The closest anyone came was when Officer Emanuelson was asked to explain what a six-pack is; however, he said only: "it is a photo of each people that we have in the line up. The victim or the - - the victim never sees this. This is for internal use only and for court." (R66:55) (all punctuation in original). Neither Emanuelson nor any other witness explained how or when the numbers were assigned to individuals in the six-pack (*see generally* R). No witness testified that the numbers assigned to the individuals *in this* six-pack were necessarily different from the numbers of the folders *in this* photo array (*see generally* R).

Accordingly, by answering the jury's question with a fact not in evidence and in Jewell and his counsel's absence, the Court violated Jewell's: (1) constitutional right to be present; (2) statutory right to be present; (3) constitutional right to counsel; and (4) his

constitutional right to have his case decided free from extra-record infiltration.

C. The Errors Were Not Harmless

Because each of Jewell's rights was violated, the burden is on the State to prove beyond a reasonable doubt that the error was harmless; *i.e.*, that there is no possibility the error contributed to the verdict. *State v. Peterson*, 220 Wis. 2d 474, 487, 584 N.W.2d 144 (1998) (statutory violation); *Poh*, 116 Wis. 2d at 532-33 (extra-record infiltration); *Anderson*, 2006 WI 77 at ¶ 45 (right to be present); *State v. Koller*, 2001 WI App 253, ¶ 62, 248 Wis. 2d 259, 635 N.W.2d 838 (right to counsel to assist in answering jury's questions).

There is more than a possibility the circuit court's error contributed to the jury's guilty verdicts.

First, the jury found Jewell guilty "shortly after" the circuit court answered their six-pack-numbering-system question (R69:3). The fact that the jury quickly returned guilty verdicts after the circuit court's response strongly suggests that the court's response may have induced unanimity by ending a debate among members of the jury about the sufficiency of the State's proofs. *See Rogers v. U.S.*, 422 U.S. at 40 (speed of verdict following judge's response to jury's question is compelling proof of harmful effect); *see also Neff*, 10 F.3d at 1327 (same).

Second, the State's case was flawed. After all, if C.F.'s identification and the DNA evidence were compelling enough to convict Jewell, then why would the jury ask for the six-pack exhibit and follow up by

asking whether "the six-pack numbering system [is] the same as the order on the photo/folders in the photo array?" (R68:2-3).

Third, the jury's six-pack-numbering question was material[1] because Jewell was a different number in the six-pack (#2) than in the photo array (#3). (R19 & R67:22). Given that the six-pack was created after the photo array was shown to C.F., it would have been reasonable for the jury to infer that the folder numbers in the photo array would match the numbers of the pictures in the six-pack (R19, App. 201-202, App. 301—photo array done 4/29/15, six-pack prepared 5/1/15). The jury's question therefore appears designed to discern whether this difference was exculpatory (by calling into question C.F.'s identification or the police investigation) or whether the difference was a coincidence that had no bearing on Jewell's innocence. The circuit court's response conveyed that the difference between Jewell being number two in the six-pack and number three in the photo array was a coincidence that had no bearing on Jewell's innocence. The circuit court's response invaded the jury's fact-finding responsibility, directed the jury to disregard what it clearly believed was an issue worthy of debate, and did so in the favor of the State.

[1] This was not, for example, a run-of-the-mill request to be reinstructed on the law or a request to rehear previously-introduced evidence, either of which would not have injected extra-record information into deliberations and which might have rendered dispensable the need for Jewell or his counsel's presence. *Leroux v. State*, 58 Wis. 2d 671, 691, 207 N.W. 2d 589 (1973); *State v. Clarke*, 49 Wis. 2d 161, 175, 181 N.W.2d 355 (1970); *Ramer v. State*, 40 Wis. 2d 79, 85, 161 N.W.2d 209 (1968).

Fourth, the circuit court's response was harmful because the jury was led to believe its questions would be answered after consulting with Jewell and the State (R68:90). Thus, the jury was informed that the issue they thought worthy of debate was resolved by the parties' agreement or at least after consulting them, when, in fact, neither Jewell nor his counsel were ever consulted.

Fifth, the circuit court's response was harmful because the judge's view of the evidence must have carried significant weight with jurors. A judge is a figure of authority and respect during a trial. *State v. McMahon*, 186 Wis. 2d 68, 87, 519 N.W.2d 621 (Ct. App. 1994). For this reason, Wisconsin courts have strongly and "consistently expressed disapproval of a judge's communicating with the jury after it has retired for deliberations" unless the communication is in open court and the defendant and counsel are present. *State v. Burton*, 112 Wis. 2d 560, 569, 334 N.W.2d 263, 267 (1983), *overruled on other grounds by State v. Alexander*, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126. Indeed, on this issue, the Seventh Circuit has explained that the "influence of the trial judge on the jury is necessarily and properly of great weight." *Neff*, 10 F.3d at 1326.

Sixth, the circuit court's answer was incorrect. The jury asked whether the numbering system on the six-pack was the same as the order of the photos in the photo array (R45:16; App. 401). The circuit court told the jury "NO" (*id.*; emphasis in original). Although the circuit court told the jury the numbers were not the same, by acknowledging that "if [the numbers] are the same, it's coincidence", the circuit court admitted the possibility that the numbers *were* the same (R69:3). The circuit court's answer was also based upon its mistaken

view that folders number one and seven are "always blank" in a photo array—a mistake the State quickly pointed out, and to which the circuit court acceded. (R69:5) (State: "Seven and eight are blank . . ." Court: That's correct.) Thus, the circuit court's own explanation of its answer is proof that its answer was incorrect. Moreover, even if the folders were thoroughly shuffled, the odds that four folders would end up in the same order as before the shuffle is 1 in 24. *See* Mario F. Triola, Elementary Statistics 165 (6th ed. 1994).

Seventh, the circuit court's answer directed a finding of fact to the State's benefit about *the* significant issue in the case—the reliability of C.F.'s identification—and this issue is the greatest contributing factor to wrongful convictions. *State v. Dubose*, 2005 WI 126, ¶ 30, 285 Wis. 2d 143, 699 N.W.2d 582. "Eyewitness testimony is often 'hopelessly unreliable.'" *Id., quoted source omitted*. Indeed, as the *Dubose* Court recognized, "eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined. *Id.*, *quoted source omitted.*

In fact, C.F.'s identification of Jewell was rife with issues identified by the seminal case of *State v. Henderson*, 208 N.J. 208, 27 A.2d 872 (2011) (discussing and largely adopting special master's report about trustworthiness of identifications, including testimony from seven experts, thousands of transcript pages, and hundreds of scientific studies). As examples:

- C.F.'s retrieval of her memory could have been

distorted, contaminated, or impaired by Emanuelson's suggestiveness during the photo array. (R66:30), *Henderson* at 246;

- Emanuelson's post-identification feedback could have reduced doubt in C.F.'s mind, engendered a false sense of confidence, and falsely enhanced her recollection of the original event. (R66:30; R67:17), *Henderson* at 253;
- At the time of the event, C.F. was obviously under a high level of stress, which "can diminish an eyewitness' ability to recall and make an accurate identification." (R67:33), *Henderson* at 261;
- C.F.'s opportunity to make the identification was temporally limited, which affects her ability to correctly make an identification. (R66:28), *Henderson* at 264.

In addition to these scientifically-recognized concerns about the reliability of C.F.'s identification, the following aspects of her identification would obviously be called into question as a matter of common sense:

- the fact that there were inaccuracies and substantial omissions in C.F.'s initial identification of Jewell (*see* R68:74);
- the fact that it was nighttime at the time of the event (R68:76);
- C.F. was possibly intoxicated having drank alcohol shortly beforehand (R68:81); and
- that Jewell was a stranger to C.F. before the incident (R66:27).

Accordingly, there are a host of issues with C.F.'s identification of Jewell. These issues were made worse by the lack of careful police work, including that:

- Emanuelson violated policy by not having C.F. sign the back of the photo she selected (R67:12; R19);
- Emanuelson gave encouraging feedback that can lead to a misidentification (R66:30; R67:17);
- Emanuelson did not administer the photo array in a double-blind method (R67:20);
- Emanuelson did not record the administration of the photo array (R67:12); and
- Emanuelson did not document C.F.'s certainty in her identification (R67:18).

Lastly, the jury would have had legitimate concerns with some of the unusual aspects to the administration of the photo array, including:

- C.F. was apparently unable to initially spell her own name correctly, which apparently resulted in her crossing off the beginning of her signature on the photo array form (R67:27, App. 301); and that
- The six-pack document, which Emanuelson testified was prepared *for* the photo array, was created *after* the photo array was administered (R19, App. 201-202, 301).

Given all these legitimate and substantial issues with C.F.'s identification of Jewell, along with these legitimate and substantial issues with the police investigation, it is unsurprising that the jury wanted to see the six-pack exhibit and then wanted to know whether the numbering system between the array and

the six-pack was the same. By telling the jury the numbers were not the same, the circuit court resolved the jury's concerns about the reliability of C.F.'s identification to the benefit of the State, which quickly resulted in guilty verdicts. Accordingly, it cannot be said that the circuit court's response to the jury's question was harmless.

Finally, the conclusion that the circuit court's constitutional errors were harmful is supported by the following three cases, all of which involved the same unique fact pattern here; namely that the trial judge answered the deliberating jury's question of fact with facts not in evidence in the absence of defendant or defense counsel, and all of which resulted in a new trial: *U.S. v. Neff*, 10 F.3d 1321, 1325 (7th Cir. 1993); *State v. McGinnes,* 266 Kan. 121, 967 P.2d 763 (1998); *State v. Ratliff*, 121 Wash. App. 642, 90 P.3d 79 (2004). Counsel has not encountered a case in which this fact pattern has not resulted in a new trial, nor has this fact pattern the subject of any precedential Wisconsin authority discovered by counsel.

Given the common facts between *Neff* (a Seventh Circuit case) and this case, the outcome in *Neff* should be the outcome here: a new trial. Federal cases interpreting federal constitutional provisions are persuasive, albeit non-binding authority on Wisconsin courts. *State v. Duckett*, 2010 WI App 44, ¶ 16, 324 Wis. 2d 244, 781 N.W.2d 522. However, given the lack of precedential authority on *this particular set of facts* in Wisconsin, the persuasiveness of *Neff* is stronger. *See State v. Fettig*, 172 Wis. 2d 428, 444, 493 N.W.2d 254 (Ct. App. 1992).

In *Neff*, the defendant was accused of unlawfully possessing a firearm. 10 F.3d at 1322. The government alleged he broke out of prison in New York, stole a car, then abandoned the car and ripped out its stereo system near his brother's house in Illinois. *Id.* After Neff was arrested, an officer went to his brother's house to look for the stereo system. Neff's sister-in-law showed the officer the room where Neff was staying, then she opened a bag that contained the stereo system and a gun. *Id.* At the police station, Neff was confronted with the gun and allegedly admitted to its ownership. The officer did not record the confession, nor did he submit the gun for any testing. *Id.* at 1322-1323.

During deliberations, the jury asked the court to "clarify some events for us." *Neff*, 10 F.3d at 1322. Specifically, the jury asked about the timing of Neff's arrest, the timing of the officer's retrieval of the gun from Neff's brother's house, and whether Neff was released after his confession. *Id.* at 1323. The Court told the jury the approximate time when Neff was arrested, the approximate time when the officer retrieved the gun, and told the jury Neff was not released from custody. *Id.* The Seventh Circuit could not determine whether Neff's counsel was present when the questions were asked and answered, but could determine that Neff was not present. *Id.*

The Seventh Circuit noted that the lower court's actions went above and beyond simply answering a question of law or letting the jury rehear evidence; instead, that the court introduced facts not in evidence. *Id.* at 1325. The *Neff* court explained the impact this would have had on the jury:

> Surely it is not a stretch of the imagination to assume that when a judge conclusively establishes certain nonexisting facts as a matter of record, a jury would feel free to accept the judge's word on the matter without ever going back to the evidence they had before them and decide if what the judge said was correct.

Neff, 10 F.3d at 1326. The *Neff* Court then turned to the issue of whether the judge's conduct was harmless. It noted that the only issue at trial was Neff's possession of the gun. *Id.* To prove Neff possessed the gun, the government argued Neff's confession was sufficient proof, or, alternatively, that he constructively possessed the gun (because the gun was in a paper sack in a room Neff had recently been in). *Id.* at 1326-27. The Seventh Circuit explained

> It seems likely that, by asking its questions, the jury was not comfortable basing its verdict solely upon Neff's alleged admission to Officer Meldrum. Instead, it appears that the jury, if it was going to convict Neff at all, was going to do so under the government's theory of constructive possession . . . based on the time noted in the margin next to the judge's responses . . . as well as the time indicated by the Clerk in the transcript . . . we can say that immediately after receiving the judge's written responses, the jury arrived at its verdict. Therefore, the district judge's factual findings could well have impermissibly influenced the jury's verdict, and because of this, we are unable to declare that this violation of Neff's Sixth Amendment right to trial by jury was harmless beyond a reasonable doubt.

Id. at 1327. In *Neff* as in this case, a deliberating jury appeared uncomfortable convicting the accused based upon the proofs presented. In *Neff* as in this case, the trial court answered the jury's fact questions with facts not in evidence. In *Neff* as in this case, the trial court took action without consulting the accused. In *Neff* as in

this case, the jury quickly returned guilty verdicts. Given the similarity of facts and the lack of Wisconsin precedents on this particular set of facts, the outcome in *Neff* ought to be the same as here: a new trial.

II. A New Sentencing Hearing is Required Because the Court Increased Jewell's Sentence When Jewell Invoked his Right to Remain Silent.

A sentencing court violates a defendant's constitutional right to remain silent if it imposes a harsher sentence for a defendant's failure to admit guilt after having been found guilty. U.S. Const. Amend. V, XIV; Wis. Const., Art. I, Sec. 8; *Scales v. State*, 64 Wis. 2d 485, 495, 219 N.W.2d 386 (1973); *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008); *Mitchell v. U.S.*, 526 U.S. 314, 327-28 (1999). After all, "[t]he exercise of the right against self-incrimination is a one-way street. If the defendant exercises that right, he may not be penalized for it, even after a jury's determination of guilt." *Scales* at 496.

This Court's standard of review of this issue is *de novo*. *See State v. Nielsen*, 2001 WI App 192, ¶ 32, 247 Wis. 2d 466, 634 N.W.2d 325.

Jewell's sentence was unequivocally harsher because he refused to admit his guilt in the face of questioning from the Court. After Jewell's counsel made her recommendation, the following exchange occurred:

THE COURT:	Mr. Jewell, do you want to say anything?
JEWELL:	Yeah. I want to apologize to the victim.

THE COURT: For what?

JEWELL: For this. For what she had to go through as a human being.

THE COURT: Did you do it?

JEWELL: Sir?

THE COURT: You don't have to tell me.

JEWELL: I just wanted to say that I was convicted and I take full responsibility for what happened to her.

THE COURT: The only way you can take full responsibility is if you are the guy that did it. If you are not prepared to admit that, you are not taking full responsibility. You can express remorse for what happened to her that night, but the question is: Are you the cause? The jury said it was. But you don't have to admit it if you don't want to.

JEWELL: I don't want to put that on the record.

THE COURT: Okay.

(R70:14-15) (emphasis added). Towards the end of its remarks, the circuit court made it clear it would be imposing a harsher sentence because Jewell did not confess to the crime:

> You say you are sorry. But the question is: for what? For what the woman went through. I can buy that. You accept absolutely no responsibility for what you did that night. If you were truly sorry, you would of (sic) got up and said, Judge, I did it.

> Then I could give you points for that. But I can't give you points for that.

(R70:22) (emphasis added).

In its postconviction motion decision, the circuit court reaffirmed that it was relying upon that which *Scales* explicitly prohibits: using Jewell's "lack of remorse" against him. *Scales* at 496. The circuit court wrote that, in fashioning its sentence, it was entitled to consider Jewell's character "and, in particular, his remorse and the type of responsibility he claimed he was taking." (R58:5) (emphasis added).

By explicitly telling Jewell he was receiving a longer sentence than if he had admitted guilt in the face of the circuit court's coercive questioning, the circuit court violated Jewell's right to remain silent. Jewell paid a judicially-imposed price for exercising his constitutionally-guaranteed rights. As such, a new sentencing hearing is necessary.

CONCLUSION

In light of the harmful constitutional errors below, Jewell respectfully requests that this matter be remanded for a new trial and, alternatively, for a new sentencing hearing.

Dated this 1st day of March, 2018.

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FORM AND LENGTH CERTIFICATION

This brief conforms to the rules contained in WIS. STAT. (Rule) § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,166 words.

Dated this 1st day of March, 2018.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. (RULE) § 809.19(12)

I have submitted an electronic copy of this brief, which complies with the requirements of WIS. STAT. (Rule) § 809.19(12). This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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APPENDIX CERTIFICATION

Filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a

minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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