STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP2503-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DESHAWN HAROLD JEWELL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS CIMPL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the trial court err when it correctly answered a question from the jury during deliberations in the absence of Defendant-Appellant Deshawn Harold Jewell and his attorney? If so, was the error harmless?

In the absence of Jewell and his attorney, the court correctly answered "No" to the jury's question whether the packet of six photographs compiled by police for the array but not shown to the victim was arranged in the same order as the photos in the array actually shown to her.

On postconviction review, the trial court held that there was no error, but if it erred in answering the jury's question in the absence of Jewell and his attorney, the error was harmless.

This Court should affirm.

2. Did Jewell prove by clear and convincing evidence that the trial court relied on an improper factor at sentencing: his denial of guilt?

At sentencing, the trial court questioned the sincerity of Jewell's apology to the robbery victim and expression of remorse given that he maintained his innocence. The court considered a number of relevant sentencing factors, including Jewell's failure to accept responsibility as reflected in his insincere apology and expression of remorse for a crime he said he did not commit.

This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case does not merit oral argument or publication. It involves the application of established principles of law to the facts.

INTRODUCTION

1. Jewell had no right to be present in person or by counsel when the trial court gave a correct, one-word answer to the jury's question during deliberations on an undisputed point of fact. Jewell had nothing to gain by being present either in person or through counsel when the court wrote its answer. Even if he and counsel should have been present, the error was harmless because the court would have answered the jury's question the same way, and the jury's verdict would have been the same.

2. The trial court did not punish Jewell for maintaining his innocence at sentencing. It did, however, consider as negative factors (among others) his insincere apology to the victim and expression of remorse for a robbery he insisted he did not commit when exercising his right of allocution. Jewell accepted no responsibility for the robbery even though he claimed that he accepted full responsibility for it.

STATEMENT OF THE CASE

After a trial held on August 19–21, 2015, a Milwaukee County jury found Jewell guilty of one count of robbery by use of force and one count of bail jumping. (R. 28; 29; 69:6.) The trial court imposed a thirteen-year sentence on the robbery count, consisting of eight years of initial confinement followed by five years of extended supervision; and a concurrent sentence of one year of initial confinement followed by one year of extended supervision on the bail jumping count. (R. 70:25.)

Jewell filed a postconviction motion arguing that the trial court erred when it answered a question from the deliberating jury in the absence of Jewell and his attorney, and when it considered his refusal to admit guilt at sentencing. (R. 45.)

The trial court denied the postconviction motion without an evidentiary hearing in a written decision and order issued on December 14, 2017. (R. 58, A-App. 101–05.) Jewell appeals from the judgment of conviction and the order denying postconviction relief. (R. 59.)

The trial

When C.F. walked to her car after leaving a nearby Milwaukee bar with a friend around closing time on March 21, 2015, a car drove up, and its driver jumped out. He demanded that C.F., who was about to enter the driver's side of her car, hand over her purse or he would shoot her. (R. 66:13–19.) She refused and, after a brief struggle, the man grabbed her purse, ran to his car, and drove off. C.F. went to his car and tried to break the window. (R. 66:19, 28, 46–47; 67:34–36.) When the man drove off, C.F. unsuccessfully tried to pursue him in her car to get a license plate number, but she damaged her own car in the process. (R. 66:19–20.) C.F. saw the man's face both during the struggle and when she pounded on the window of his car. (R. 66:19–21, 47.) C.F. positively identified Jewell as her assailant at trial. (R. 66:20–21.)

During the struggle for the purse, C.F. knocked the assailant's red and black knit Chicago Bulls hat off of his head, and he fled without it. (R. 66:22–23, 29, 43, 47.) Police found the hat in the middle of the street right where C.F. said she was robbed. (R. 17; 18; 66:44, 47; 67:37–38, 40.) Jewell was the "major contributor" of most of the DNA found inside the hat by State Crime Laboratory analysts. (R. 21:2–3; 24:1; 66:52, 86–88, 90, 96, 101.)

A little more than one month after the robbery, Milwaukee Police Officer Jeffrey Emanuelson put together a six-man photo array of Jewell and five fillers to be shown to the victim. Emanuelson initially placed the six photos into what is called a "six pack," which is not shown to the victim.

The "six pack" included Jewell's photograph in the number two position. (R. 19:1, A-App. 201; 66:52–54, 60–61.) The "six pack" is intended to be used by police only internally and in court. (R. 66:56, 60–61.) The normal process is to take those six photos from the "six pack" and shuffle them. They are then placed into six of eight folders to be displayed to the victim, with the last two folders left blank. Although they are shuffled, the suspect's photo is never placed inside the first or the sixth folder. Each folder is then handed individually to the victim for viewing. (R. 66:54–56.)

Officer Emanuelson prepared the "six-pack" that included Jewell's photograph in the second position. (R. 19:1, A-App. 201; 19:3, A-App. 202; 66:60–61.) Emanuelson gave the six photos to his partner, Officer Kohler, who shuffled them and placed them inside six of the eight folders to be used in the array. (R. 66:60; 67:21, 38–39.) Emanuelson did not know into which folder Jewell's photo was placed by Kohler. Emanuelson knew only that Jewell's photo was not in the first or the sixth folder, or in the seventh and eighth folders which were left empty, in keeping with best practices. (R. 67:21–22.) As Kohler explained:

> My partner, Officer Emanuelson, had prepared the array, and part of that process is to shuffle the folders. This way the person showing the photo array, and in this case my partner, Officer Emanuelson, does not know the order or where the suspect is located in there. So my role in the matter was to shuffle them and place the suspect, like I said, where he doesn't know it is.

(R. 67:38–39.)

After it was shuffled by Kohler, Emanuelson displayed the eight-folder array to C.F. at her mother's house on April 29, 2015. (R. 66:24–25, 33.) Before Emanuelson showed C.F. the array, he had her read and he read to her a supplementary form that informed her of all the following: the person who committed the crime "may or may not be

included"; the folders were shuffled so that Emanuelson did not know whose photo was in which folder; C.F. should not feel that she must make an identification; it is as important to exclude the innocent as it is to identify the perpetrator; the photos are in no particular order and she is to view them one at a time; she must open each folder without letting the officer see inside and should take as much time as necessary; after looking at each folder, she must circle "yes" or "no" underneath the number corresponding to each folder located at the bottom of the supplementary form to indicate whether she believes the person in that folder was her assailant; if she identifies anyone, the officer will then ask how certain she is. (R. 19:2, A-App. 301; 66:57–60.) Emanuelson made no comments while C.F. viewed each separate folder. (R. 67:22.)

After being so instructed, C.F. reviewed each of the eight folders and circled "yes" under number "3," the folder containing Jewell's photo, on the supplementary form. (R. 19:2, A-App. 301; 66:61–62; 67:23.) C.F. said she was "100 percent" certain the man depicted in the photo insider folder number "3" robbed her. (R. 67:16.)

Emanuelson testified that Jewell wore his hair differently at trial than at the time of his arrest, (R. 67:23–24.) Jewell did not testify. (R. 68:46–47.) He and defense counsel decided not to put on an alibi defense. (R. 68:49.)

At the jury's request, the "six-pack" was published to the jury without objection at the close of the State's case. (R. 67:46–47, 50.) During deliberations, the jury sent out a note asking once again to see the "six-pack." (R. 27:2.) The trial court, in the absence of Jewell and the attorneys, sent the "six pack" in. (R. 69:3–4.) This was only after both sides had agreed that the "six-pack," and most other exhibits, could be sent back if requested by the jury. (R. 68:93, 95.) Shortly after receiving the "six pack," the jury sent out another note asking the court: "Is the 6 pack numbering system the same as the [sic] order as the photo/folders in the photo array?"

(R. 27:1, A-App. 401.) The trial court, again in the absence of Jewell and his attorney, wrote on the note "No," and sent it back in. (R. 27:1, A-App. 401.)

The trial court put this all on the record when the attorneys returned for the verdict that afternoon. (R. 69:3–4.) Defense counsel did not object, but stated with regard to the second note that she would have preferred the court instructed the jury to rely on its collective memory. Defense counsel, however, added this: "Although I do know as a defense attorney that the six-pack and the photo array are never the same." (R. 69:4–5.)[1] The court responded that it

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[1] Jewell does not acknowledge defense counsel's concession in his brief and argues for the first time that the difference between the numbering system in the "six pack" and the array shown to the victim is now a disputed fact. (Jewell's Br. 9, 11.) Defense counsel also did not argue to the jury at trial that the numbers on the "six pack" corresponded to the same numbers for the photos in the array on the supplementary form circled by the victim.

Jewell is also wrong when he claims that no one explained why there were different numbers corresponding to the photos in the "six pack" and in the array as reflected in the supplementary form. Emanuelson and Kohler both unequivocally testified that the photos in the "six pack" are shuffled before being put into the folders to be shown to the victim. (R. 66:60; 67:21, 38–39.)

Lastly, Jewell is wrong when he claims the "six pack" was put together after the array was shown to the victim on April 29, 2015. (Jewell's Br. 11.) Emanuelson unequivocally testified that he put the "six pack" together and then gave it to Officer Kohler to shuffle before the April 29 array. (R. 66:60–61.)

> Q[.] Had they been prepared and shuffled before you got there, or how did that work?
>
> A[.] I prepared them, and then Officer Kohler shuffled them.

would have declined counsel's collective memory suggestion and would have answered the question the same way had Jewell and counsel been present. (R. 69:5.)[2] The court agreed with defense counsel, based on its own experience, that "six-packs" and photo arrays do not share the same numbering system. (R. 69:5.)

The jury found Jewell guilty of both charged counts. (R. 69:6.)

Sentencing

At sentencing on September 1, 2015, the prosecutor relied on a number of relevant factors in support of his request for a substantial prison sentence with at least eight years of initial confinement. (R. 70:8.) Those factors included: Jewell's criminal record, his past failures on probation, the severity of this crime, its impact on the victim, Jewell's committing the robbery while out on bail, his trying to fabricate an alibi from his jail cell, the need to protect the public, the need to deter others, and the need to punish. (R. 70:5–9.)

> Q[.] When you say I prepared them, does that mean you are the one that selected Mr. Jewell's photo and then the other five photos?
>
> A[.] Yes, I made the six-pack, yes.

(R. 66:60–61.) Jewell points out that the "six pack" has a May 1, 2015, date on it. (Jewell's Br. 11) (R. 19:1; 19:3, A-App. 201–02.) May 1, 2015, is the same day that the complaint was filed and Jewell made his initial appearance in court. (R. 1; 62.) In all likelihood, the "six pack" that had been prepared by Emanuelson before the April 29 array, as he testified, was prepared by him anew on May 1 when Jewell was formally charged for use in subsequent court proceedings. Either way, this makes no difference because (a) this was not an issue at trial, and (b) everyone agreed the numbers *were different* regardless when the "six pack" was prepared.

[2] Jewell ignores the trial court's negative response to counsel's collective memory suggestion in his brief. (Jewell's Br. 9.)

Defense counsel recommended a prison sentence of three years of initial confinement followed by three years of extended supervision. (R. 70:9–10.) The Court then asked Jewell whether he wished to exercise his right of allocution, and he did.

Jewell opened by stating, "I want to apologize to the victim." (R. 70:14.) Given that Jewell denied committing the robbery, the trial court naturally asked: "For what?" Jewell answered: "For what she had to go through as a human being." (R. 70:14.) The court then asked Jewell: "Did you do it?" Before he could respond, the court added: "You don't have to tell me." (R. 70:14.) To this, Jewell responded: "I just wanted to say that I was convicted and I take full responsibility for what happened to her." (R. 70:14–15.) The court explained to Jewell that the only way he could accept full responsibility for the robbery "is if you are the guy that did it. If you are not prepared to admit that, you are not taking full responsibility." (R. 70:15.) The court explained further to Jewell that the jury determined he was "the cause." The court again advised Jewell: "But you don't have to admit it if you don't want to." (R. 70:15.) Jewell responded: "I don't want to put that on the record." (R. 70:15.)

Jewell was not, however, done apologizing for what he did not do. "I do want to apologize and I wish this never happened to her." (R. 70:15.) "I just want to say that I apologize to the victim. I didn't know that is how she was feeling" (apparently referring to the feelings expressed in her victim-impact statement summarized in the prosecutor's remarks (R. 70:5)). (R. 70:19.)

The trial court exercised its discretion on the record. It relied on a number of relevant sentencing factors. (R. 70:19–25.) The court considered relevant factors such as the need to punish Jewell and to deter others (R. 70:19–20); the need to rehabilitate Jewell (R. 70:20); the seriousness and violent nature of the crime (R.70:20, 22); the impact on the victim

(R. 70:22–23); Jewell's failure to learn from past mistakes (R. 70:23); the need to protect the community (70:20, 22); Jewell's having committed the robbery while out on bail (R. 70:21); and Jewell's character (R. 70:21).

Another factor the court considered was Jewell's failure to accept responsibility. "You say you are sorry. But the question is: For what?" (R. 70:23.) "You accept absolutely no responsibility for what you did that night." (R. 70:23.) The court explained to Jewell that if he was truly sorry, he would have said, "Judge, I did it. Then I could give you the points for that. But I can't give you points for that." (R. 70:23.)

The court sentenced Jewell to a prison sentence on the robbery count of eight years of initial confinement followed by five years of extended supervision; and on the bail jumping count, to a concurrent term of one year of initial confinement followed by one year of extended supervision. (R. 70:25.)

The order denying postconviction relief

In its decision and order denying postconviction relief, the trial court denied that it erroneously answered "No" to the jury's inquiry about the "six pack" of police photos. "It did not consist of an explanation of how the folders were presented" to the victim. (R. 58:3, A-App. 103.) "[T]he court's response to the jury was the correct response . . . the jurors *were not provided with inaccurate information*." (R. 58:3, A-App. 103 (emphasis by the court).)

The court next held that sending the note to the jury in the absence of Jewell and defense counsel did not deny him a fair trial. (R. 58:3–4, A-App. 103–04.) Jewell "could not have gained anything by being present when the court provided the written response of 'No' to the jury's question." (R. 58:4, A-App. 104.) The court's written response "merely confirmed what the jury had already heard during the course of the trial – that the folders were shuffled prior to being shown to the victim." (R. 58:4, A-App. 104.)

The court next rejected Jewell's argument that it punished him for exercising his Fifth Amendment privilege against self-incrimination at sentencing. The court correctly noted that it was entitled to consider "his remorse and the type of responsibility he claimed he was taking." The court "specifically told him he didn't have to admit to anything." (R. 58:5, A-App. 105.) Jewell's failure to accept responsibility "was pertinent to his character and his rehabilitation needs." Given the overwhelming evidence that Jewell was the robber, "this was a factor which the court believed should be considered." (R. 58:5, A-App. 105)

STANDARD OF REVIEW

The issue whether Jewell was denied his constitutional or statutory right to be present personally or through counsel when the trial court answered the jury's question is one of law, subject to de novo review in this Court. *State v. Alexander*, 2013 WI 70, ¶ 18, 349 Wis. 2d 327, 833 N.W.2d 126.

This Court reviews the trial court's sentence for an erroneous exercise of discretion. *State v. Alexander*, 2015 WI 6, ¶ 16, 360 Wis. 2d 292, 858 N.W.2d 662. The sentencing court erroneously exercises its discretion if it relies on clearly irrelevant or improper factors. *Id.* ¶ 17.

ARGUMENT

I. The trial court properly answered "No" to the jury's question whether the numbering system in the "six pack" of photos was the same as that in the eight-folder array shown to the victim.

A. The limits on a trial court's ability to communicate with the jury during deliberations

Jewell had the statutory and constitutional right to be present throughout the trial. *May v. State*, 97 Wis. 2d 175, 186, 293 N.W.2d 478 (1980); *State v. Koller*, 2001 WI App 253, ¶ 61, 248 Wis. 2d 259, 635 N.W.2d 838; Wis. Stat. § 971.04(1)(b). When, as here, the defendant's absence does not deprive him of the right to confront witnesses or evidence, his challenge to the court's communication with the jury is rooted in the Due Process Clause. *Alexander*, 349 Wis. 2d 327, ¶¶ 20 n.6, 26. His presence is required "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *May*, 97 Wis. 2d at 186 (citing, *inter alia*, *Snyder v. Massachusetts*, 291 U.S. 97, 107–08 (1934), and *Leroux v. State*, 58 Wis. 2d 671, 690, 207 N.W.2d 589 (1973)). *Accord Alexander*, 349 Wis. 2d 327, ¶¶ 22, 24–25. The due process inquiry is "fact-specific." The defendant's right to be present whenever a court communicates with the jury is not "absolute." *Id.* ¶ 28.

The defendant's presence is not required when the trial court answers the jury's written question on a point of law or procedure during deliberations. *May*, 97 Wis. 2d at 186. Neither the constitution nor § 971.04 "require[s] the defendant to be present before the trial court can respond to every question posed by a deliberating jury." *Id.* at 187. *See also Alexander*, 349 Wis. 2d 327, ¶ 4 (no denial of "a fair and just hearing" when the defendant was absent from in-chambers meetings with two jurors to discuss their potential

bias); *State v. Clifton*, 150 Wis. 2d 673, 685–86, 443 N.W.2d 26 (Ct. App. 1989) (no denial of due process when the defendant is absent from in-chambers conferences to address questions of law or procedure).

In determining whether a defendant's presence is required, the court considers whether he could meaningfully participate, whether he would gain anything by attending, and whether his presence would be counterproductive. *Alexander*, 349 Wis. 2d 327, ¶¶ 4, 30 (citing *United States v. Gagnon*, 470 U.S. 522, 527 (1985) (per curiam)). "Adopting a requirement that a defendant must *always* be present whenever a court speaks with members of the jury . . . would impose an unreasonable and unnecessary burden upon trial judges, who would be forced to ensure the presence of defendants at meetings where they had nothing to contribute to their own cause." *Id.* ¶ 25.

The denial of the defendant's right to be present during a portion of the trial, specifically during jury deliberations, is subject to harmless error analysis. *State v. Burton*, 112 Wis. 2d 560, 570–73, 334 N.W.2d 263 (1983), *overruled on other grounds* by *Alexander*, 349 Wis. 2d 327, ¶¶ 23–25; *May*, 97 Wis. 2d at 186; *Koller*, 248 Wis. 2d 259, ¶ 62. In determining whether the error is harmless, the court looks to "the circumstances and substance of the communication in light of the entire trial." *Koller*, 248 Wis. 2d 259, ¶ 62.

B. The trial court did not deny Jewell a fair trial or violate his right to be present when it correctly answered the jury's question in his and his attorney's absence.

Jewell does not challenge the trial court's decision to send to the jury, as requested, the "six pack" of photos collected by Office Emanuelson for inclusion in the eight-folder array shown to the victim. The jury had already seen the "six pack" during trial when it was received into evidence

and published to the jury at the close of the State's case. (R. 67:46–47, 50.) The parties agreed at the close of trial that the "six pack" should be sent back if the jury requested it during deliberations. (R. 68:93–95.) When the jury asked to see the "six pack" again during deliberations, the court had little choice but to send it back.[3]

Jewell challenges only the trial court's decision, in the absence of Jewell and his attorney, to answer "No" in response to the jury's next question whether the numbering system was the same for the "six pack" as for the photo array actually shown to the victim. This is much ado about nothing.

The unchallenged trial testimony was that the numbers assigned to each photo in the "six pack" were not the same as the numbers assigned to each folder in the array shown to the victim because the photos from the "six pack" were shuffled before they were put into the folders displayed to the victim. Defense counsel conceded this: "Although I do know as a defense attorney that the six-pack and the photo array *are never the same*." (R. 69:4–5 (emphasis added).) The trial court concurred based on its forty years of experience that the numbering systems are different because the photos are shuffled before they are put into the array. (R. 69:5.) So, the court correctly answered "No" when asked. To this day, Jewell has offered no evidence that defense counsel and the court were wrong.

Jewell does not explain why he had a right to be present when the trial court gave a correct one-word answer to the jury's question on an undisputed point of fact, given that he

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[3] The trial court has broad discretion in deciding what, if any, exhibits go into the jury room. *State v. Jensen*, 147 Wis. 2d 240, 259, 432 N.W.2d 913 (1988); *State v. Hilleshiem*, 172 Wis. 2d 1, 21, 492 N.W.2d 381 (Ct. App. 1992); *State v. Thompson*, 142 Wis. 2d 821, 841, 419 N.W.2d 564 (Ct. App. 1987).

had no right to be present had the court sent a written answer to the deliberating jury's question on a matter of law or procedure. *May*, 97 Wis. 2d at 186.

Try as he might, Jewell does not adequately explain why this mattered. He does not explain how he and his counsel could have meaningfully participated or what he would have gained by being there. *Alexander*, 349 Wis. 2d 327 ¶¶ 4, 30. Jewell did not argue that the court's "No" answer was wrong. Defense counsel conceded that the numbering systems are different. The court would have answered the jury's question the same way even if he and his attorney were present. Defense counsel did not object when the trial court later told the parties what transpired in their absence. Defense counsel merely suggested that the court could have told the jury to rely on its collective memory instead, but she did not object on the ground that the court violated Jewell's right to be present in person and through counsel. The court responded that it would have rejected counsel's suggestion and would have answered the jury's question the same way had Jewell and his attorney been present. The trial court had every reason to believe that, just as defense counsel did not object to sending the "six pack" to the jury during deliberations, counsel would not have objected to its correctly answering the jury's question to clear up its apparent confusion about the numbering systems for the photos in the "six pack" and for the photos in the array; an issue that was a "red herring" because everyone agreed the numbers *were different*.

Jewell now claims for the first time in this Court that the different numbering systems for the "six pack" and for the array was a disputed factual issue at trial. (Jewell's Br. 11.) It most certainly was not. Defense counsel never made it an issue at trial, and she conceded the numbers were different and, based on her experience, they are always different. (R. 69:4–5.) The trial court concurred based on its own

experience. (R. 69:5.) Jewell's current counsel offers nothing here to contradict trial counsel's concession or the trial court's consistent finding of fact that the numbers are always different. *See supra* note 1.

Jewell's case is like *State v. May*, in which two defendants were charged with delivering amphetamines as parties-to-the-crime. One defendant, May, testified that he suspected a police set-up and did not participate in the second delivery by his cohort. *May*, 97 Wis. 2d at 179–80. During deliberations, the jury sent a note to the court with this question: "By withdrawing from a conspiracy[,] has a person removed themselves [sic] from aiding and abetting the commission of a crime?" In the absence of May and his attorney, the court, as here, answered by writing on the note: "No." *Id.* at 180. When later told by the court what had transpired in his absence, defense counsel objected. The trial court overruled the objection because, it held, its answer to the jury's question was correct. *Id.* at 181.

The Wisconsin Supreme Court held that May suffered no prejudice because the court's "No" answer to the jury's question was correct. *May*, 97 Wis. 2d at 184. The court rejected May's argument that he was denied the right to be present at trial because "there was no 'hearing' or need for a hearing before the trial court answered the jury's written question concerning the effect of withdrawal from a conspiracy by communicating a one-word answer to the jury. A fair and just trial was not thwarted by the court's answering that question outside the defendant's presence." *Id.* at 186. The jury asked "a question of law and the trial court answered it correctly." *Id.* The court's correct one-word answer to the jury's question also did not violate Wis. Stat. § 971.04 because the communication involved "a question of law, and therefore the defendant's absence at the time of the communication did not result in a" violation of the statute. *Id.* at 188.

As in *May*, Jewell failed to prove he was denied due process or that the trial court violated Wis. Stat. § 971.04 when it correctly answered the jury's question "No" in his and his attorney's absence. Jewell had nothing to gain by being there. Jewell's right to a fair trial was not thwarted by his and his attorney's absence.

C. Any error was harmless.

Jewell essentially seeks automatic reversal just because he and his lawyer were absent when the court answered the jury's question. Wisconsin law is clear that a defendant is not entitled to automatic reversal in this situation or even in more extreme ones. There is to be no reversal if the communication with the jury in the absence of the defendant and defense counsel was harmless.

Even assuming the trial court erred in responding to the jury's note in the absence of Jewell and his attorney, the error was harmless because it is clear beyond a reasonable doubt that the outcome would have been the same. *Burton*, 112 Wis. 2d at 570–73; *May*, 97 Wis. 2d at 186. *See generally State v. Harvey*, 2002 WI 93, ¶ 44, 254 Wis. 2d 442, 647 N.W.2d 189.

Burton is instructive. In *Burton*, the trial judge twice intruded on the jury's deliberations without notice to or the presence of the defendant or counsel for the state and the defense. *Burton*, 112 Wis. 2d at 563.The judge first entered the jury room at 4:27 p.m. *Id.* This followed on the heels of an *ex parte* visit by "the deputy" seven minutes earlier, who told the judge that the jury was unable to agree on a verdict, "not withstanding the fact that the case was submitted to you at about 12:30." *Id.* The judge then discussed arrangements for contacting relatives, told the jury he would take their verdict at any time, but if they were unable to reach a verdict by 10 p.m., he would decide whether to put the jurors up for the night in a hotel or release them to return the next morning.

Id. The judge's first visit ended with the following admonition: "I ask you to do your best, to go over all of the evidence that was presented to you and consider that in the light of the Court's instructions; and I wish you well." *Id.*

The judge's second foray into the jury room during deliberations was at 4:55 p.m. He opened by stating: "Folks, I don't suppose you have any news for me." *Id.* at 563–64. The judge then advised the jury that he would take a sealed verdict if they arrived at a verdict by 10 p.m., and they would be excused until the next morning. The judge advised further that if the jury did not arrive at a verdict by 10 p.m., they would be released for the night and would return to continue deliberations the next morning. *Id.* at 564. The judge then discussed efforts to make dinner arrangements, telling the jury he "had not anticipated that you would run into this long deliberation, but please take as much time as you believe is necessary to spend on the matter, and we'll arrange for you to go to some dinner place. I think McDonald's is just down the street." *Id.* In response to a juror's question about family arrangements, the judge advised that if the jury would "not be able to reach a verdict soon enough to break into dinner," they should tell the bailiffs who would then make phone calls for them while they continued deliberations. *Id.*

The circuit court denied Burton's motion for a new trial after ruling that the judge's remarks only dealt with the "logistics" of dinner and securing a place should deliberations continue into the evening. *Burton*, 112 Wis. 2d at 564. This Court affirmed. It held that the remarks were not coercive or prejudicial, and the circuit court did not erroneously exercise its discretion in denying the defense motion. *Id.*

The Wisconsin Supreme Court agreed with both the trial court and this Court. It accepted the State's confession that the judge's communications with the jury in the jury room during deliberations without the defendant or defense counsel present amounted to constitutional error. *Burton*, 112

Wis. 2d at 564–65. The court held, however, that this was harmless constitutional error beyond a reasonable doubt. *Id.* at 565–73.

The Court discussed its evolving precedent, which had once held that such contacts required automatic reversal, but more recent precedent was more forgiving. *Burton*, 112 Wis. 2d at 570. The Court then overruled its precedent that required automatic reversal when the judge intrudes on jury deliberations in the absence of the defendant and defense counsel. *Id.*

The court held that the judge's two *ex parte* intrusions on jury deliberations were harmless because nothing in the remarks "caused the jury to feel rushed," and they "mostly concerned dinner arrangements." *Burton*, 112 Wis. 2d at 571. The court rejected the argument that the remarks suggested to the jury that they were deliberating too long or were inconveniencing court personnel. *Id.* at 571–72. Although these comments were "better left unsaid, [they] cannot be taken out of the entire context of the communication." *Id.* at 572. When viewed in proper context and in the context of the entire trial, the court held the error was harmless even though the jury engaged in lengthy deliberations. *Id.* at 572–73. *See also State v. McMahon*, 186 Wis. 2d 68, 85–89, 519 N.W.2d 621 (Ct. App. 1994) (there were six separate communications between the court and the jury during deliberations, but any errors were harmless).

When viewed in proper context, the trial court's decision to answer the jury's question in the absence of Jewell and counsel was harmless. It is clear beyond a reasonable doubt that the error did not adversely affect the jury's ability to arrive at a fair and impartial verdict. *Burton*, 112 Wis. 2d at 572–73. *See Harvey*, 254 Wis. 2d 442, ¶ 44. Jewell makes no credible showing that his and counsel's absence had any adverse impact on the verdict.

The evidence of Jewell's guilt was overwhelming. The victim's identifications of Jewell, both in the array at her mother's house and at trial, were based on having observed Jewell close up during the struggle for the purse and through the window of his car. Her eyewitness identification was given ironclad support by the red and black Chicago Bulls hat filled with Jewell's DNA that C.F. knocked off of his head and that police recovered in the middle of the street right where the struggle for her purse occurred. It is clear beyond a reasonable doubt that the jury's verdict would have been the same had the trial court answered "No" to its question in the presence of Jewell and his attorney.[4]

II. The trial court did not punish Jewell for denying his guilt at sentencing.

Jewell insists that the trial court considered an improper factor at sentencing, his denial of guilt, and in doing so it violated his Fifth Amendment right against self-incrimination. His claim has no merit.

A. The applicable law

Jewell must prove by clear and convincing evidence that the trial court relied on an improper or irrelevant factor at sentencing. *Alexander*, 360 Wis. 2d 292, ¶¶ 2, 17; *State v. Harris*, 2010 WI 79, ¶¶ 34–35, 60, 326 Wis. 2d 685, 786 N.W.2d 409.

A court may not enhance a sentence because the defendant refused to admit guilt. *Scales v. State*, 64 Wis. 2d 485, 495, 219 N.W.2d 286 (1974). The defendant is free,

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[4] In response to this damning evidence, Jewell could muster only the puny defense that many people wear Chicago Bulls hats and this Bulls hat, filled as it was with his DNA, could have fallen off or been dropped in the middle of the street right where the robbery occurred at any time; and no one knows for sure when or how Jewell's DNA got inside the hat. (R. 68:80–81.)

however, to waive his Fifth Amendment protection, admit guilt, and express remorse in hopes of receiving leniency. *Id.* at 496. The circuit court may consider as a relevant factor the defendant's lack of remorse. *State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). The defendant's "attitude toward the crime may well be relevant" to the court's consideration of other proper factors. *State v. Baldwin*, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981). The court may properly consider the defendant's lack of remorse and failure to accept responsibility so long as they are considered along with other relevant factors and are not given undue weight. *Id.* If the sentence is well short of the statutory maximum, it indicates that the court did not give undue weight to the defendant's lack of remorse and failure to accept responsibility. *Id.*

B. It was proper for the trial court to question Jewell's expression of remorse and to factor in his failure to accept responsibility.

Jewell was free not to say anything at sentencing. Or, he could accept responsibility and express remorse in hopes of receiving leniency. *Scales*, 64 Wis. 2d at 496. Jewell chose instead to express remorse but *not* admit guilt when given the opportunity to exercise his right of allocution. That was an unwise decision.

Jewell apologized to the victim for something he said he did not do. He expressed remorse to the court for a crime he said he did not commit. The trial court had every right and reason to ask Jewell to explain himself. It had every right and reason to question the sincerity of his apology and his expression of remorse. The trial court determined that Jewell's expression of remorse and apology were feigned because he denied committing the robbery for which he was apologizing and expressing remorse. This is a classic example of a defendant's failure to accept responsibility.

The trial court considered Jewell's lack of sincere remorse along with a number of other relevant and appropriate sentencing factors. These included Jewell's criminal record, the severity of his crime, its impact on the victim, the need to protect the public, and the need to send a message to the community in hopes of deterring others. (R. 70:19–25.) *See generally State v. Gallion*, 2004 WI 42, ¶¶ 43–44, 270 Wis. 2d 535, 678 N.W.2d 197. The court explained to Jewell that he would have been given credit ("points") for coupling his apology and expression of remorse with an admission of guilt, but he failed to do so. (R. 70:23.) From this, it is plain that the court did not punish Jewell for maintaining his innocence; it would have given him *extra credit* for admitting for the first time at sentencing that he committed the robbery. Jewell did not earn those bonus "points" because he left the court with only an insincere apology and expression of remorse for something he insisted he did not do.

The court imposed concurrent sentences totaling eight years of initial confinement followed by five years of extended supervision. These sentences were well short of the statutory maximum for both offenses combined: 46 years. (R. 4.) *See Baldwin*, 101 Wis. 2d at 459 ("The sentence imposed was well within the maximum for which the defendant might have been sentenced.").

In its order denying postconviction relief, the court stated that "it did not pressure him into responding either way. It simply asked for an explanation of the defendant's comment that he wanted to 'take full responsibility for what happened to [the victim].'" (R. 58:4, A-App. 104.) Jewell's contradictory answers were relevant to such properly considered factors as his character, need for rehabilitation and punishment, and failure to accept responsibility. The court insisted that it "did not impose additional punishment for failing to own up to the crime and specifically told him he

didn't have to admit to anything." (R. 58:5, A-App. 105.) The court's explanation in its order denying postconviction relief is to be considered by this Court along with its statements at sentencing when determining whether it considered an improper factor or erroneously exercised its discretion. *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

The trial court did not punish Jewell for exercising his right to be free from self-incrimination. Rather, the court weighed against Jewell (among other relevant factors) his lack of remorse and failure to accept responsibility as evidenced by his attempt to con the court into believing he was sincerely apologetic and remorseful when he was not.

CONCLUSION

This Court should affirm the judgment and order.

Dated this 18th day of May, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,648 words.

Dated this 18th day of May, 2018.

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DANIEL J. O'BRIEN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 18th day of May, 2018.

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