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

REPLY BRIEF OF DESHAWN JEWELL, THE DEFENDANT-APPELLANT

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ARGUMENT

I.
A New Trial Is Required

A.
The State Concedes Several of Jewell's Arguments

The State acknowledges that the jury deliberating Jewell's case asked the circuit court a question "to clear up its apparent confusion" about factual aspects of the victim's identification of Jewell (State's br. at 14). Because the circuit court answered the jury's question without Jewell or his counsel's presence and with facts not in evidence, Jewell argued that several of his constitutional rights were violated: his right to be present, his right to counsel, and his right to have the jury decide his case based on the evidence adduced at trial (Jewell's br. at 7-10). The State, however, only responds to Jewell's argument that his right to be present was violated (State's br. at 10-19). The Court should therefore find that the State, by not responding, has conceded Jewell's other arguments. *Schlieper v. Dep't. of Natural Resources*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

B.
The Circuit Court Invaded The Jury's Province

During its deliberations, the jury asked for and received trial exhibit five (R19; Jewell Br.-App. 201-202 & 301), which consisted of three pages of police documents pertaining to C.F.'s identification of Jewell. The first page (R19:1) was called a six-pack. It is dated May 1st and has six photographs on it, including Jewell's in location number two. The second page

(R19:2) contains biographical information about the six men in the photographs and was also "prepared" on May 1st (Jewell App. 202). The third page (R19:3) is a report about the photo array shown to the victim, C.F., which shows that on April 29th, C.F. picked photo number three shown to her.

After the jury received these three documents, they asked: "is the '6 pack' numbering system the same as the order as the photo/folder in the photo array?" (R69:2-3; Jewell Br.-App. 401) (spelling in original). The jury's question was not formulated to determine whether "the numbers were different" (*see* State's br. at 14) because exhibit five clearly shows they were—Jewell was number two in the six-pack and C.F. picked photo number three in the photo array (R19), which Officer Emanuelson testified was Jewell (R66:60-61). The jury's question is most reasonably interpreted as an effort to discern whether this difference was exculpatory or whether the difference was a coincidence that had no bearing on Jewell's innocence. Or, as the State puts it, it was a "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." (State's br. at 14).

Without consulting Jewell or his counsel, the circuit court cleared up the jury's confusion by answering the jury's question with an emphatic "NO" (Jewell Br. App. 401). The State, however, had not introduced any evidence about the six-pack numbering system. That evidentiary hole was plugged by the circuit court, to Jewell's detriment. Officer Emanuelson testified that he selected Jewell's photo and five fillers, put them in folders, his partner shuffled them, he showed the folders to C.F., and that he "made the six-

pack" (R66:59-61). But neither Emanuelson nor his partner testified when the six-pack was created[1] nor did they describe the "six-pack numbering system" (*see* R66 & R67); that is, how and why the individuals were ordered and put into the six-pack document the jury received. The fact that at least one juror had questions about the discrepancy between the six-pack and photo array demonstrates that the State had not introduced evidence sufficient to explain the discrepancy; indeed, the State did not provide any testimony or evidence explicitly acknowledging or explaining the difference. Accordingly, the conclusion that the difference in numbers was either exculpatory or meaningless was an inference to be drawn from the evidence. The Court's decision to draw that inference for the jury was thus an invasion of the jury's role as fact-finder. The Court should not have done so outside the presence of Jewell and his counsel and without requesting their input.

C.
Trial Counsel Could Not Have Conceded The Propriety Of The Circuit Court's Answer

The State argues that trial counsel conceded that the circuit court committed no error (*see, e.g.*, State's br. at 14: "[d]efense counsel did not object when the trial

[1] The State speculates (at 6-7 n.1) that the six-pack document was created before the photo array, but this speculation is belied by the record (R19; Jewell br. app. 202). The six-pack shows that it was "prepared" on May 1st, after the photo array was shown to C.F. (R19; Jewell br. app. 301). In Officer Emanuelson's testimony, as quoted by the State (6-7 n.1), he explains that he selected the photos shown to C.F. and that those photos are the ones in the six-pack; however, his testimony does not shed light on when the six-pack document itself was created. The record is clear (R19) that the document itself was created on May 1st.

court later told the parties what transpired in their absence"; "she conceded the numbers were different and, based on her experience, they are always different").

There are two flaws with this argument.

First, counsel was not afforded the opportunity to object at the constitutionally-important moment, which was when the jury asked the question. Her comments were made after the damage had been done—by the time she made them, she had been called into court and told the jury had reached a verdict shortly after the circuit court answered the jury's question on its own (R69:3-5). It is impossible to object to something you don't know is happening. For this reason, a claim that a judge communicated with a jury in the defendant's absence is not considered under the ineffective assistance of counsel rubric, but rather, is a direct challenge in the appellate courts. *State v. Anderson*, 2006 WI 77, ¶¶46-64, 291 Wis. 2d 673, 717 N.W.2d 74 (collecting cases), *overruled on other grounds by State v. Alexander*, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126.

Second, defense counsel's "concession" that the numbers are "always different" is a misunderstanding of rudimentary statistics that even the circuit court understood (R69:3). The circuit court explained its answer to the jury by saying that "based upon the testimony that we received about 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." (R69:3). The circuit court's "coincidence" explanation appreciates the possibility that a suspect can appear in the same position in a photo array as in

the six-pack even if the six-pack is made before the photo array and even if the photos are shuffled (*see also* Jewell's br. at 12-13).

D.
Jewell And His Counsel's Presence Was Required

The State also claims Jewell never articulated why his or his counsel's presence was required (at 14, *citing State v. Alexander*, 2013 WI 70, ¶¶4, 30, 349 Wis. 2d 327, 833 N.W.2d 126). The State misunderstands the import of *Alexander* to this case. In *Alexander*, the defendant was excluded from an in-chambers discussion to examine jurors, but his attorneys were not. *Id.* at ¶2. The *Alexander* Court sought to determine whether the defendant's presence was required and noted that under those circumstances, "[a]ll that is required when the court communicates with members of the jury is that the defendant's attorney be present." 2013 WI 70 at ¶25 (citation omitted) (emphasis in original). Here, unlike in *Alexander*, neither Jewell nor his attorney was present. And, in any event, Jewell explained (at 9), and the State acknowledges (at 14), that Jewell's counsel told the court she would have asked the jury to rely on their collective memory in response to the jury's six-pack question (R69:3-4). This demonstrates counsel's presence would not have been useless. Jewell's presence would have been useful because the jury was asking a question of fact. Who better to aid defense counsel about answering a question of fact than the person accused of the crime who has been in the courtroom for the trial?

E.
Factually Similar Persuasive Cases Compel Reversal

What happened in the circuit court below is unprecedented in Wisconsin jurisprudence.

The only Wisconsin case that is somewhat similar to Jewell's is *State v. Stewart* because it also involved a judge answering a jury's question of fact. *State v. Stewart*, 56 Wis. 2d 278, 284-285, 201 N.W.2d 754 (1972). However, *Stewart* is fundamentally different than Jewell's case because, there, the judge dealt with the jury's question in a non-committal way that benefited the accused. The *Stewart* jury sent out a note asking: "Why does the name of James E. Smith appear instead of James E. Stewart on exhibit #1 evidence card?" 56 Wis. 2d at 283-84. The *Stewart* judge wrote "I do not know" on the note and sent it back to the jury. 56 Wis. 2d at 284. The Stewart court rightfully found the judge's answer harmless:

> The answer . . . was simply innocuous. It gave the jury no substantive information. If the communication did anything it benefited the defendant. The jury must have been in doubt as to the evidence card, otherwise the question would not have been asked. And the judge's reply simply cast more doubt as to its evidentiary weight.

Stewart, 56 Wis. 2d at 285.

Because no Wisconsin case has addressed the specific fact pattern presented here, Jewell invited the Court to look to other jurisdictions for guidance (at 16-19, citing *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)). However, the State does not address or cite any of these three cases, thereby conceding their persuasive force. The State, notably, does not reference *Neff* in any respect, even though Jewell extensively discussed *Neff* and argued that it compelled reversal because, as a factually analogous Seventh Circuit case interpreting an equally applicable constitutional right, it filled the void of Wisconsin authority. (Br. at 16-19, citing *U.S. v. Neff*, 10 F.3d 1321 (7th Cir. 1993)).

Instead of responding to Jewell's argument and the cases he referenced, the State argues that Jewell's case is "like" *May* (br. at 15-16, citing *May v. State,* 97 Wis. 2d 175, 293 N.W.2d 478 (1980)). But Jewell's case is not like *May* because the judge in *May* answered a question of law. There is a well-established and important distinction between questions of law and questions of fact; namely that juries decide facts and judges decide the law. *See* R68:51 (instructing that "[y]ou, the jury, are the sole judges of the facts, and the court is the judge of the law only."); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[i]t is emphatically the province and the duty of the judicial department to say what the law is."); *see also State v. Harvey*, 2002 WI 93, ¶26, 254 Wis. 2d 442, 647 N.W.2d 189 ("the State agrees, as it must, that the necessary elemental facts necessary to convict . . . must be submitted to the jury and proven beyond a reasonable doubt."). Accordingly, *May* is distinguishable because while a judge must decide the law for a jury, a judge cannot decide the facts for a jury.

F.
The Error Was Not Harmless

The State argues that "*Burton* is instructive" on whether the circuit court's error was harmless. (Br. at 16-18, citing *State v. Burton*, 112 Wis. 2d 560, 334 N.W.2d 263 (1983)). Once again, the State misses the mark. In *Burton*, the judge discussed the logistics of deliberation; his "comments did not relate to the substance of the case." *Id.* at 571-73. Moreover, it appears the jury in *Burton* did not return its verdict for a while after the judge's intrusions, *id.* at 573, whereas this jury returned its verdict "shortly after" the judge answered their question (R69:3). A quickly-returned guilty verdict is compelling proof of harm. *Rogers v. U.S.*, 422 U.S. 35, 40 (1975); *see also Neff*, 10 F.3d at 1327. *Burton* is therefore readily distinguished.

The State also argues that the circuit court's error was harmless based upon a misstatement of the applicable standard (State's br. at 18). Jewell is not required to make any showing, much less a "credible showing", that the error contributed to the verdict. That burden rests squarely with the State, to prove beyond a reasonable doubt that there was no possibility the error contributed to the verdict. *Anderson*, 2006 WI 77 at ¶45. Jewell explained why the circuit court's error was harmful in his opening brief (at 10-19) and will briefly summarize those reasons again:

- The verdict came "shortly after" the trial court answered the jury's question (R69:3);
- The circuit court's word is "necessarily and properly of great weight", particularly when answering a question of fact. *Neff*, 10 F.3d at 1326;

- The jury would have believed the circuit court's answer had Jewell's approval because they had been told questions would be answered after consulting with the parties (R68:90);
- The circuit court's explanation of why it answered the question is proof the circuit court's answer was incorrect (Jewell br. at 12);
- Identification was the only contested issue in the case, the jury's question was about C.F.'s identification of Jewell, and the circuit court's answer helped the State on this issue; and
- The State's case was not overwhelming, as demonstrated by the jury's question.

Predictably, the State argues that the evidence against Jewell was overwhelming, but makes no mention of the error itself or its potential impact on the jury (*see* State's br. at 19). The State's argument conflates a sufficiency of the evidence claim (that Jewell has not made) with a claim of harmful error. An error can be harmful even if there was sufficient evidence to convict. *See State v. Jorgenson*, 2008 WI 60, ¶45, 310 Wis. 2d 138, 754 N.W.2d 77 (harmless error factors would be "worthless" if only strength of evidence considered).

The State's case was not as strong as it claims.

First, the State overstates the significance of the DNA evidence (State's br. at 19). The State fails to mention that there were at least two other contributors to the DNA profile recovered from the hat (R66:94). The DNA evidence proved only that at some point before the incident, Jewell and at least two other people came into contact with the robber's hat. The State's expert

conceded that DNA can remain on a hat for a long time, potentially for years (R66:99). She further conceded that she could not tell when or for how long Jewell was in contact with the hat (*id.*:100).

Second, the fact that the victim identified Jewell as the robber should also give the Court pause because "[e]yewitness testimony is often 'hopelessly unreliable.'" *State v. Dubose*, 2005 WI 126, ¶ 30, 285 Wis. 2d 143, 699 N.W.2d 582, *quoted source omitted*. Jewell outlined the scientific, common-sense, and case-specific concerns with the reliability of C.F.'s identification of Jewell in his opening brief and he will not repeat them exhaustively here (br. at 13-15).

Contrary to the State's claim that the evidence was overwhelming, the jury apparently did not think so. That's why the jury asked the judge a question to "clear up its apparent confusion" about the proofs (State's br. at 14). By telling the jury their confusion was baseless, the Court resolved the jury's doubt to the benefit of the State, which quickly resulted in guilty verdicts. The State cannot show beyond a reasonable doubt that the error did not contribute to the verdict.

II.
The Court Improperly Relied Upon Jewell's Invocation Of His Right Against Self-Incrimination To Increase His Sentence

The circuit court clearly conditioned Jewell's receipt of a lesser sentence upon Jewell giving up one of his constitutional rights, then imposed a harsher sentence because Jewell did not give up his right against self-incrimination.

The circuit court attempted to force Jewell to give up his right against self-incrimination by asking "[d]id you do it?" (R70:13). Jewell refused to waive his right in the face of the court's coercive questioning (R70:14). The circuit court then clearly relied upon Jewell's refusal when it imposed sentence, saying "[i]f you were truly sorry, you would have 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). The court's own words are ample proof that it relied upon an improper factor—Jewell's invocation of his right against self-incrimination—when it imposed sentence. (State's br. at 19, *citing State v. Harris*, 2010 WI 79, ¶35, 326 Wis. 2d 685, 786 N.W.2d 409 (requiring a defendant to provide proof that the court relied upon an improper factor)).

The State also misapplies *Baldwin*, arguing that a court never places "undue weight" on an improper factor if the sentence is "well short of the statutory maximum". (State's br. at 20, *citing State v. Baldwin*, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981)). The State's argument would only protect a limited subset of defendants' rights at sentencing, thereby eroding the promise that constitutional rights are made "of substance rather than mere tinsel." *Hoyer v. State*, 180 Wis. 407, 415, 193 N.W. 89 (1923). The State's argument also contradicts *State v. Harris*, where the Court explained that "[d]iscretion is erroneously exercised when a sentencing court actually relies on clearly irrelevant or improper factors . . ." 2010 WI 79 at ¶3. Actual reliance is the key consideration, not how close the sentence is to a maximum sentence. Because the sentencing judge actually relied on an improper factor in fashioning Jewell's sentence, resentencing is required.

CONCLUSION

For the reasons stated in this and his opening brief, Jewell respectfully requests that this matter be remanded for a new trial or, alternatively, for a new sentencing hearing.

Dated this 12th day of June, 2018.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,969 words.

/s/ Geoffrey R. Misfeldt
Geoffrey R. Misfeldt

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

The text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

/s/ Geoffrey R. Misfeldt
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