STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT D. SPENCER,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

Appeal No. 2018AP000942 CR
Trial Case No. Case No. 2014CF005088

(Milwaukee Co.)

APPEALED FROM THE JUDGMENT OF CONVICTION AND SENTENCE FILED JULY 24, 2015 AND THE ORDER DENYING THE DEFENDANT'S POSTCONVICTION MOTION FILED MAY 4, 2018 THE HONORABLE STEPHANIE ROTHSTEIN PRESIDING.

JOHN J. GRAU
Attorney for Defendant-Appellant
P. O. Box 54
414 W. Moreland Blvd. Suite 101
Waukesha, WI 53187-0054
(262) 542-9080
(262) 542-4860 (facsimile)
State Bar No. 1003927

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

Statutes Cited:

STATEMENT OF ISSUES

1. Was the defendant denied his Sixth Amendment right to counsel when the trial court interviewed and dismissed a juror?

2. Was the defendant's Constitutional Right to Due Process and Equal Protection violated when the trial court considered the race of the defendant and of trial participants when overruling the defendant's objection to the juror's dismissal.

3. Did the trial court erroneously exercise its discretion in dismissing the juror?

4. Was trial counsel ineffective for failing to object to hearsay testimony that bore on the causation element of felony murder?

STATEMENT ON NECESSITY OF ORAL ARGUMENT & PUBLICATION OF OPINION

Respondent-appellant does not request oral argument. The issues presented can be fully argued in the parties' briefs. We believe publication is warranted. The propriety of the trial court's interview of a juror without counsel being present, after the conclusion of testimony but prior to deliberations, and the subsequent dismissal of the juror, believe presents an issue of first impression. The propriety of the trial court's considering the race of

trial participants when determining whether to dismiss the juror also presents an issue of first impression. If error is found, the applicability and scope of the harmless error doctrine also warrants publication.

STATEMENT OF THE CASE

The defendant was convicted in Milwaukee County Circuit Court of one count of felony murder by causing the death of Mr. T. M., while committing an armed robbery as party to a crime contrary to secs.943.32(2), 939.05 and 940.03 Wis. Stats. T.M. was an alleged accomplice of the defendant's. The defendant was also convicted of one count of possession of a firearm by a felon, contrary to secs. 941.29(2)(a) and 939.50(3)(g) Wis. Stats.

Following his conviction the defendant timely filed a notice of appeal and a postconviction motion. The postconviction motion alleged that the defendant was denied his Sixth Amendment right to counsel when the trial court interviewed a juror out of counsel's presence after the close of testimony. It also alleged that trial counsel was ineffective for failing to object to hearsay testimony that bore on the causation element of felony murder. The postconviction motion was denied without a hearing.

In addition to the Sixth Amendment and ineffective assistance issues referenced above, the defendant also is

appealing the dismissal of the juror over the defendant's trial objection.

STATEMENT OF FACTS

The trial began on June 22, 2015 with jury selection. On June 23, prior to testimony, pretrial motions were addressed. One of the issues raised by the defense was that the jury panel was unconstitutionally unfair because the panel of 35 only included 2 African Americans. The defense alleged that the practice of using driver's licenses to summon jurors resulted in an unconstitutional racial composition of the jury panel. The court ruled that the manner in which jurors was summoned did not violate the defendant's constitutional rights. (R.179:22-32).

After pretrial matters had been addressed, the State argued to the jury and presented its theory of the case. The State argued that T.M. was killed over a debt and a disagreement over the debt between the defendant and Mr. R. S. The State told the jury that R.S. was outside a residence where he had a car towed when he was approached by Mr. Spencer and T. M., who was described as a friend of both Mr. Spencer and R.S. The State argued that the defendant grabbed R.S. with a firearm in his hand and went through his pockets, taking money and a cell phone. (R.179:48,49). The State stated that R.S. broke free and

ran away, and that Mr. Spencer then shot at him. (R.179:49).

The State informed the jury that it would hear that there was a second person with a firearm shooting from a window to protect R.S. The State alleged that T.M., Mr. Spencer's alleged accomplice, was shot during the exchange of shots. (R.179:49). To that end the prosecutor stated: "... you will hear that there is a second person with a firearm that day. They are going to be right in front of the residence shooting from a window. And they are going to return fire. They are going to protect R.S. They are going to be shooting at the defendant." (R.179:49).

It was on the basis of the above argument that the State claimed that the death of T.M. was caused by the alleged armed robbery.

Defense counsel's theory of defense was in essence that the jury would not be able to determine who did what beyond a reasonable doubt. (R.179:58).

In the evidentiary portion of the trial an important witness for the State was Mr. Lerone Towns, a truck driver. Mr. Towns testified that the night of the incident he picked up a vehicle at Sherman and Lloyd in Milwaukee. (R.181:124). The call for the tow came in under the name Mr. Green. (R.181:129). He testified that he made

arrangements with R.S. to tow the car to 23rd and Townsend (R.181:125). When he arrived at the drop off site he talked to R.S. about transactional details (R.181:131,132). He testified that R.S. indicated he needed to get money for the payment and went to the door of the residence. Mr. Towns was obtaining information off the vehicle when he heard a commotion at the door. (R.181:133). He saw two men standing in front of R.S. Their backs were to Mr. Townes. (P.134). He never saw their faces. (R.181:136). The men started "scuffling". (R.181:137). At one point a lighter skinned man pulled out a handgun. (R.181:137). He reached into R.S.'s pockets. (R.181:139) After a short scuffle, the man with the handgun dragged R.S. across the street. (R.181:139). They were then out of his sight. (R.181:141) He heard gunfire. (R181:142). R.S. then ran past Mr. Townes. (R.181:143) When the gunfire stopped, Mr. Towns got back in his truck and left. (R.181:144). The car he was towing was still on his flatbed. (R.181:145). He called his dispatcher and told him what happened. (R.181:144). While driving back to the shop he received a call from R.S. telling him another location for dropping off the vehicle. (R.181:145). When he dropped the vehicle off R.S. showed up with a man identified as Mr. Green. (R.181:150). Mr. Townes

was later contacted by police but was unable to identify the two alleged robbers. (R. 181:148).

The State's key identification witness was R.S. himself. He indicated that he knew T.M. since kindergarten. He identified Mr. Spencer as a person he knew as D or D Dog (R.182:23), and that he knew Mr. Spencer for a couple of months. He also identified Mr. Errion Green-Brown as a friend. (R.182:24). R.S. identified the residence at 23rd and Townsend as being a residence of his. (R.182:25). He indicated that Errion resided there also, as did Mr. Danny McKinney. (R.182:27).

Regarding the events of Sept. 8, 2014, he indicated that Errion's sister was using one of "the" cars when an axel broke. R.S. went to the location where the car had broken down and met with a tow truck. He had the car towed to 23rd and Townsend. (R.182:28). He testified that when the tow arrived at 23rd no one was outside the residence and that Danny McKinney was upstairs. He indicated that Mr. Green-Brown was not present. (R.182:29).

R.S. indicated that when the tow truck arrived he went in the house to use the bathroom. (R.182:30). He indicated that at one point he was approached by two males. He testified that he recognized T.M. as one of the two males but he did not recognize the other. (R.182:31).

R.S. indicated that the lighter skinned of the two people who approached him had a gun in his hand. The individual reached into R.S.'s pockets and took a couple of dollars and a phone. (R.182:32,33). He reiterated that he did not know who it was. (R.182:34).

R.S. further testified that he saw a minivan and thought that he was going to be put in the van. (R.182:36). He broke away and heard shots being fired. (R.182:37). He did not know who fired the shots. (R.182:37). He testified that he was later told that "Danny" fired from the residence to protect him. (R.182:37,38). He testified that he got in his car and drove off. (R.182:38).

In short, R.S. denied that Mr. Spencer was involved in the incident.

R.S. was declared an adverse witness and was questioned extensively by the State regarding statements he made to detectives prior to trial wherein he allegedly identified the defendant as the person with T.M. (R.182:46). Nevertheless, R.S. insisted that Mr. Spencer was not the individual involved. (R.182:50). At one point R.S. indicated that, "(t)hey threatened me if I didn't cooperate; they would lock me up and charge me with the crime." (R.182:32).

On cross-examination by defense counsel R.S. testified that he was arrested shortly after the incident in the middle of the night and questioned for about an hour. (R.182:56). He indicated that he was subsequently interviewed a number of times, and that he was throwing up during interviews. (R.182:57). He testified that he was sick when he was arrested. (R.182:59).

R.S. indicated that when he was interviewed he was trying to give answers he thought would please the police. (R.182:62). He testified that when he was questioned by the police they repeatedly asked him if he had a gun. (R.182:64). He indicated that he was told by police that he would be charged. (R.182:65). He was afraid of being charged with what Mr. Spencer was charged with. (R.182:65,66). He indicated that when he talked to the police he thought that if he helped the police he would not "end up where Mr. Spencer is." (R.182:71). He indicated that Mr. Spencer did not take any money from his pocket but that he thought the police were saying that if he didn't give up Mr. Spencer he would be charged. (R.182:73).

R.S. also testified that at one point he was questioned by detectives who were seeking information about Mr. Errion Green-Brown. (R.182:.60,61). He indicated he

gave a different name for Mr. Green-Brown because he didn't want to get him in trouble. (R.182:64).

The defendant alleged in his postconviction motion that police reports indicated that Danny McKinney refused to be interviewed by the police.(R.147:7).

On June 26 the trial day began with a conference which the trial transcript indicates began at 8:59 a.m. After the conference a recess was taken. (R.184:19). When the court reconvened the court stated that it had been advised that a juror was not feeling well.

Over objection, the juror was excused. Additional facts shall be provided in the pertinent argument sections below.

ARGUMENT

The defendant argues that his Sixth Amendment right to counsel was violated when the court interviewed the juror without defense counsel being present, that his due process and equal protection rights were violated when the trial court dismissed the juror, and that the trial court erroneously exercised its discretion when it excused the juror.

The defendant also argues that trial counsel was ineffective for failing to object to the admission of hearsay testimony. Specifically, trial counsel failed to

object to hearsay testimony identifying Danny McKinney as returning fire to protect R.S. at the time of the alleged robbery.

I. THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN THE TRIAL COURT INTERVIEWED A JUROR IN CHAMBERS.

After the completion of testimony on June 25th, the case was adjourned to the 26th.

On June 26th, the day began with a conference which the trial transcript indicates began at 8:59 a.m. After the conference a recess was taken. The transcript indicates that the recess lasted 45 minutes. (R.184:19). When the court reconvened the court stated that it had been half an hour or forty five minutes since it earlier went off the record. The court indicated that it had gone off the record because it had been advised that a juror was not feeling well. The court told the attorneys that it had had the bailiff take the juror into chambers to give her a quiet place to rest, to see if she would feel better. (R.184:19). The court then stated:

> She is not well enough to proceed. And when I asked her about 15, 20 minutes ago if she thought she would feel well enough to proceed in any particular length of time, her answer was very tentative and she said unlikely basically and she didn't know how long she would be before she could participate. She is, if you want to

know the details, queasy, light headed, just unwell generally.

I did inquire. She said she's been having some health issues as of late and believes that these are – her words – "the reminisce" of some health issues that have been going on I think last week (sic).

I conferred with the attorneys. We met in the back. I advised the attorneys going along what was the cause for the delay and what was being done to assist the juror and we agreed to wait and we've now waited a significant period of time. And I have to be mindful that we have the remaining 12 sitting back in the jury room waiting to move forward.

I understand the significance of this for both sides, frankly. This is the only African-American juror on the panel. But I am not prepared to put her health at risk by having her continue to go to deliberations when she is so unwell. After we met, the defense asked a question for purposes of the record which I do not find inappropriate. I did ask – I inquired along the lines of the concern the defense had. I asked the juror if her stress or not being well enough to proceed had anything to do with her service as a juror or with the behavior of any of the other jurors. Her response to me was "Oh, no. This has nothing to do with the trial." So I'm satisfied with that response. I've made my record. (R. 184:20,21).

The court then indicated that the juror was excused for cause. Defense counsel was the told that she could make her record. Counsel stated:

> At the outset of this trial when the panel was impaneled and after the composition of the potential jurors was revealed, I expressed to the court concern about the underrepresentation of minorities at that point in the room. The following morning I brought a Swain challenge based on the pool of people that is from the Department of Transportation's photo ID and state ID records and that it underrepresented African-

> Americans. The court denied the challenge, ruling that I had not met my burden of proof. (R.184:22,23).

Counsel went on to move for a mistrial because of the removal of the Juror (R.184:23).

It is our contention that the court's communication with the juror outside the presence of Mr. Spencer and his attorney violated Mr. Spencer's right to counsel, as guaranteed by Article I, § 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

In the defendant's postconviction motion he alleged that he was denied his Sixth Amendment right to counsel when the court questioned the juror out of counsel's presence. Although the record seems to show that the court's discussions with the juror were outside the presence of counsel, to be safe the defendant's postconviction motion affirmatively alleged that counsel would testify that the trial court's discussions with the excused juror were outside of the presence of counsel, and that the defendant did not waive counsel's presence at the questioning of the juror. (R.147:13).

The trial court denied the motion determining that the questioning of the juror did not constitute a critical stage in the proceeding, and even if it was error to

question the juror outside the presence of counsel, the error was harmless. We disagree with both findings. In this section of the brief, we will address whether the questioning of the juror constituted a critical stage in the proceeding. In a later section we address the harmless error question.

An accused has a right to be represented by counsel at all critical stages of a trial. The right to have counsel present is guaranteed by Article I, Section 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. See **State v. Anderson**, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d ¶67, and **State v. Alexander**, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126, ¶29.

A defendant's Sixth Amendment right to counsel has been described as the right "... to have counsel at every stage where he or she needs aid in dealing with legal problems." **State v. Koller**, 2001 WI APP 253, 248 Wis. 2d 259, ¶62.

The constitutional right to be assisted by counsel has been addressed in a number of contexts involving jurors. For example, the right applies whenever a court communicates with deliberating jurors. See **Anderson**, ¶¶43 & 69; **State v. Burton**, 112 Wis. 2d560, 565, 334 N.W.2d 263

(1983); **State v. Koller**, 2001 WI App 253, ¶62, 248 Wis. 2d 259, 635 N.W.2d 838. In **State v. Lehman**, 108 Wis. 2d 291, 321 N.W.2d 212 (1982) our supreme court indicated that when the court questions a deliberating juror about his or her request to be removed, it should be done in "... the presence of all counsel and the defendant." **Lehman** at 300.

The requirement that counsel be present when the court interviews a juror in mid trial has also been noted by our supreme court. **Alexander**, cited above, addressed a defendant's right to be present himself when a trial court interviewed jurors in chambers *during* the trial. The lead opinion in **Alexander** indicated that Alexander did not have a constitutional right to be present himself at the discussions in chambers with the jurors. The court stated, "(a)ll the Constitution requires is the presence of defense counsel." ¶29. Because defense counsel was present, Alexander's Sixth Amendment rights were not violated.

This case involves the individual questioning of a juror after the evidentiary portion of the trial had concluded, but before deliberations had begun. Consistent with the requirement that counsel be present when a court interviews a juror during the trial, and during deliberations, a defendant should be entitled to counsel's

presence during the questioning of a juror after the close of evidence, but before deliberations have begun.

A requirement that counsel be present during the contact with the juror that occurred in this case is also consistent with the purpose of requiring counsel's presence during a critical stage in the proceedings.

The record reflects that the defendant felt that a true jury of his peers would include at least one African-American. At the outset of the trial the defendant challenged the jury pool on the basis that it lacked sufficient numbers of African Americans. His objection was denied and the jury was chosen. The juror dismissed in this case, juror #2, was the only African American on the jury. When objecting to the juror's dismissal counsel argued that the presence of one African-American on the jury could reduce "systemic bias" (R.184:24).

It was reasonable for Mr. Spencer to desire a diverse jury. The benefits of a diverse jury has been articulated by Justice Thurgood Marshall in the U.S. Supreme Court ruling, **Peters v. Kiff**, 407 U.S. 493, 503 (1972). He stated: "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and

varieties of human experience, the range of which is unknown and perhaps unknowable."

Given the importance to the defendant of having a diverse jury, the benefit of having counsel present at the time the juror was questioned is evident. At this stage of the proceeding a juror can only be dismissed for cause. That is a legal determination to be made by a court that an attorney could weigh in on. Furthermore, counsel could have explored the extent and duration of the juror's illness with an eye towards requesting a continuance for a few hours, if appropriate, or even a day.

As the **Anderson** court stated, citing a federal decision: "... the purpose of defense counsel's presence in the context of a trial court's communication with the jury is to allow counsel to 'prime the pump of persuasion' and thus, potentially convince the court to address the jury communication in a manner that would support the defendant's interests." **Anderson** at ¶69.

In short, there were legal issues to be addressed where trial counsel could have acted on behalf of her client and his interests.

For the above reasons we believe the questioning of the juror was a critical stage in the proceedings.

Therefore, the defendant was denied his right to counsel at a critical stage and is entitled to a new trial.

II. THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION WAS VIOLATED WHEN THE TRIAL COURT CONSIDERED THE RACE OF THE DEFENDANT AND OF TRIAL PARTICIPANTS WHEN DENYING THE DEFENDANT'S OBJECTION TO A JUROR'S DISMISSAL.

In response to defense counsel's objection to the juror's dismissal and motion for a mistrial the court stated:

> What I will say for the record is that had this fact pattern been different than what it is, that we may be having a very different discussion. This is not a case where there is an identification that actually took place, No.1. And No. 2, this is not – there is not an issue here in terms of any cross-ratio (sic) identification or a crime allegedly committed by a person of one race upon the victim of another race, however you want to slice it. What I think is appropriate to note for the record is that obviously the defendant is African-American given the arguments that have been made, although I don't know that we specifically said that. The defendant is African-American. Detective Graham as he sits here in the courtroom and has sat here in the courtroom throughout the trial is an African-American man. We've heard from Mr. Gary Moore who is a witness, also an African-American man; Anita Cathey, African-American woman; Ms. Davis who gave the offer of proof but did not testify, African-American woman; Kiara Gaines, African-American woman; Lerone Towns, an African-American man; (R.S.), an African-American man; Quintessa Gaines, an African-American woman. These citizens have all testified,

> and I think it's important to note their race for the record as one as the defense has raised the issue. Sometimes records unfortunately are silent because everybody assumes that they're all sitting in the trial court. So I will add those facts to the record as the court has observed them through the course of the trial. *And as I indicated, if we had individuals of other races involved as witnesses in this case, we may be having a different conversation.* But we don't so I decline to speculate. And thank you, both of you. Your arguments are noted. Your objection is noted. Your motion for mistrial is noted and denied. (R.184:26)

When first reading the above one wonders whether the court's comments were actually in response to the defense objection to the dismissal of the juror, or was a response to something else; however, in its decision denying the defendant's postconviction motion the court wrote: "(a)fter trial counsel objected to the removal of the only African American jury member and moved for a mistrial, the court set forth its reasons why it was denying the motion, noting in its reasons that many of the witnesses for the State were African American as well." (R.163:8). It is clear therefore that the trial court felt it was relevant to the dismissal of the juror that many of the trial participants were African American. We assert that such an analysis is improper and contrary to law.

We have not found a case that directly addresses or holds that a court may not consider the race of trial

participants when determining whether to discharge a juror. However, criminal defendants are entitled to equal protection of the law, and equal protection principles do not allow race based decision making in the administration of justice. For example, it has been held that: "(a) defendant's race or nationality may play no adverse role *in the administration of justice*, (including at sentencing)." **United States v Leung**, 40 F.3d 577 at 586 (citing **United States v. Edwardo-Franco**, 885 F.2d 1002, 1005-06 (2d Cir. 1989); **United States v. Borrero-Isaza**, 887 F.2d 1349, 1355-56 (9th Cir. 1989)).

It has also been observed that "(s)ince the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice", **Hill v. Texas**, 316 U.S. 400, 406 (1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process," **Avery v. Georgia**, 345 U.S. 559, 562 (1953); see also **Alexander v. Louisiana**, 405 U.S. 625, 632 (1972).

Additionally, it has been observed that competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See **Thiel v. Southern Pacific Co.**, 328 U.S. 217, 223 -224 (1946). A

person's race simply "is unrelated to his fitness as a juror." **Id., at 227** (Frankfurter, J., dissenting).

Our contention that the trial court should not have considered the race of the participants when considering whether to dismiss the juror is consistent with the Wisconsin Supreme Court's reasoning in **State v. Harris,** 2010 WI 79, 326 Wis. 2d 685. In that case the defendant argued that he was entitled to resentencing because the circuit court at sentencing made comments such as calling the mother of his children his "baby momma." The court of appeals had determined that the circuit court's comments would have suggested to a reasonable observer that the sentencing court improperly relied on race or gender when imposing sentence.

The supreme court overturned the court of appeals because the defendant had not shown that the trial court *actually* considered race at sentencing. The State had argued that "... a reasonable observer's perception of the court's comments is not indicative of whether the court improperly relied on race or gender." **Harris** at ¶2. The supreme court agreed. It stated, "(w)e conclude that Harris has not met his burden of proving by clear and convincing evidence that the circuit court actually relied on race or gender." **Harris** at ¶67.

In our case, unlike in **Harris**, it is clear that the trial court actually took the race of trial participants into account when determining whether to discharge the juror. It stated so at the time, and reiterated its consideration of the race of the trial participants in its decision on the defendant's postconviction motion. It was error to do so.

III. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT DISMISSED THE JUROR.

In addition to the argument made above, the defendant asserts that regardless of any arguable constitutional violation, he is entitled to a new trial because the trial court erroneously exercised its discretion when it dismissed the juror. If this court does not agree that the consideration of the race of the trial participants rises to the level of constitutional error, it is our position that it certainly constitutes an erroneous exercise of discretion.

Our supreme court has indicated that, in general terms, properly exercising discretion is not synonymous with decision-making. It contemplates a process of reasoning. **State v. Gallion**, 2004 WI 42, 270 Wis. 2d 535, ¶3.

The court of appeals has held: an erroneous exercise of discretion occurs when the circuit court does not consider the facts of record under the relevant law *or does not reason its way to a rational conclusion*. **State v. Davis**, 2001 WI 136, ¶ 28, 248 Wis. 2d 986, 637 N.W.2d 62.

The discretion that must be exercised by a trial court when considering whether to excuse a sitting juror has been described in **State v. Lehman**, 108 Wis. 2d 291, 321 N.W.2d 212, 300. The **Lehman** court stated:

> When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. The juror potentially subject to the discharge should not be present during counsel's arguments on the discharge. The circuit court's efforts depend on the circumstances of the case. The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.
>
> The term discretion contemplates a process of reasoning. The process depends on facts that are of record or that are reasonably derived by inference from the record. Discretion must in fact be exercised by the circuit court, and the circuit court must set forth on the record the basis for its exercise of discretion. Adherence to this practice facilitates the

> decision-making process of the circuit court in the first instance and aids appellate review.

Lehman at 300,301.

As the above cited law makes clear, when questioning a juror a trial court is directed to make careful inquiry and to attempt to avoid discharging the juror. Also, the questioning should be in the presence of counsel and the defendant. Additionally, discretion must in fact be exercised, and must reflect a process of reasoning that leads to a rational conclusion. Application of these considerations shows that the trial court erroneously exercised its discretion when dismissing the juror.

In this case the questioning of the juror was not done in the presence of counsel or the defendant. The record gives us very little information regarding the extent, duration, or severity of the juror's health issue and as such the record does not reflect that the inquiry was carefully done with an eye toward retaining the juror. These factors alone indicate that the court erroneously exercised its discretion. Significantly however, the court also erroneously exercised its discretion when it considered the race

of the trial participants when determining the appropriateness of discharging the juror.

The trial court's comments at the time defense counsel objected, along with its written decision on the postconviction motion, show that the fact that the vast majority of trial participants were African American somehow justified, in the court's mind, excusing the sole African American on the jury. This thought process does not reflect a reasoning process leading to a rational conclusion. It is hard to understand what the link is between the fact that the trial participants were African American and the determination to dismiss the only African American on the jury. Taking the court's statements at face value, we are left to wonder whether the juror would have been retained if the trial participants were not African American, or whether the juror would have been retained if she were not African American, and why any of that mattered.

We submit that the fact that many of the trial participants were African American does not justify the discharge of the only African American on the jury. The race of trial participants has nothing to do with a juror's qualifications and is clearly unrelated

to whether a juror is fit to sit as a juror. The race of trial participants should not play a role in a court's decision whether to discharge a juror from further service. That the court took the race of the trial participants into account when making its decision indicates that the court did not reason its way to a rational conclusion.

By considering the race of trial participants the court erroneously exercised its discretion.

IV. THE TRIAL COURT'S DENIAL OF COUNSEL AND CONSIDERATION OF THE RACE OF TRIAL PARTICIPANTS ARE ERRORS NOT SUBJECT TO HARMLESS ERROR ANALYSIS.

We have argued above that the trial court erred when it dismissed the juror on three bases. First, that the trial court violated the defendant's Sixth Amendment right to counsel when it interviewed the juror; second, that the defendant's due process and equal protection rights were violated when the court took the race of trial participants into consideration when it dismissed the juror and third, that the court erroneously exercised its discretion when it dismissed the juror.

The State will undoubtedly argue that should any of the defendant's substantive arguments claiming error have merit, the error would be harmless. The State argued to the

trial court that the erroneous dismissal of a prospective juror does not automatically require reversal if an impartial jury has been impaneled.

The State argued that the test for harmless error was whether the defendant received a trial before an unbiased jury. The trial court agreed with the State and held that even if it had erred by dismissing the juror, the defendant had received a fair trial with twelve impartial jurors. It therefore found that if there was error, it was harmless. (R.163:8).

We do not believe that the complained of constitutional errors should be subject to a harmless error analysis.

A. The Denial of the Defendant's Right To Counsel Should Not Be Evaluated For Harmless Error.

A harmless error analysis should not be conducted regarding the denial of the defendant's right to counsel. That is because generally, a violation of a defendant's Sixth Amendment right to counsel has been identified as structural error.

Regarding a defendant's right to counsel, the Wisconsin Supreme Court has previously stated that:"(o)rdinarily, the absence of counsel at a critical

stage of a proceeding is not subject to harmless error analysis." **State v. Anderson**, 291 Wis. 2d 673, ¶74.

The Wisconsin Supreme Court has recently stated the following regarding harmless error.

> The United States Supreme Court provides the rubric we use in categorizing trial errors. The potentially harmless ones, it says, are those that "occur[] during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." United States v. Gonzales-Lopez, 548 U.S. 140, 148 (2006) (quoting Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991)) (internal marks omitted). Only a very limited number of errors "require automatic reversal," because "most constitutional errors can be harmless . . . ." Nelson, 355 Wis. 2d 722, ¶29 (quoting Fulminante, 499 U.S. at 306) (internal marks omitted). In fact, "there is a strong presumption that any . . . errors that may have occurred are subject to harmless error analysis." Neder v. United States, 527 U.S. 1, 8 (1999) (quoting Rose v. Clark, 478 U.S. 570, 579 (1986)).
>
> A "structural error," on the other hand, is not discrete. It is something that either affects the entire proceeding, *or affects it in an unquantifiable way*: Structural errors are different from regular trial errors because they "are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." Structural defects affect "[t]he entire conduct of the trial from beginning to end." An error also may be structural Nos. 2017AP1413 & 2017AP1414 9 because of the difficulty of determining how the error affected the trial. State v. Pinno, 2014 WI 74, ¶49, 356 Wis. 2d 106, 850 N.W.2d 207 (quoted source omitted); see also Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) ("The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial.").8 So we recognize a structural error by how it "affect[s] the framework within which the trial proceeds, rather than being simply an error in the trial process itself." Id. at 1907 (quoting Fulminante, 499 U.S. at 310) (internal marks omitted). That is to say, structural errors "permeate the entire process."

Nelson, 355 Wis. 2d 722, ¶34.9 Upon encountering structural error, we must reverse.

In re S.M.H., 2019 WI 14, 385 Wis. 2d 418, 922 N.W.2d 807, at ¶¶14,15.

The Wisconsin Supreme Court's prior pronouncement that a violation of a defendant's Sixth Amendment right to counsel is structural error is consistent with the court's reasoning in **S.M.H.** This is because the denial of the defendant's right to counsel is a violation of the defendant's rights that was not part of the presentation of the case to the jury; the error is not quantifiable; the error defies analysis by harmless-error standards and it is also difficult, if not impossible, to determine how the error affected the trial.

United States v. Gonzalez Lopez, 548 U.S. 140, is an example of a case where the error complained of was not subject to harmless error analysis because of the difficulty of determining how the error affected the trial. **In Gonzalez Lopez** the trial court refused to permit a defendant to be represented by his counsel of choice in violation of the Sixth Amendment. Justice Scalia, writing for a 5-4 majority, determined that such an error must be treated as structural (and thus not subject to review for harmlessness) because of the difficulty in assessing how alternate counsel might have performed. He stated that

"Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." **Id** 149,150.

In our case any attempt to discern what would have happened if counsel had been present at the questioning of the juror is speculative. As we mentioned previously, perhaps counsel could have explored the possibility of an adjournment for a few hours or a day. The court's description of the juror's basically feeling "unwell" and needing to lie down with the symptoms being "reminisce" of something she had been dealing with in the past indicates that the juror had been handling the situation, and might very well have been able to continue if given some more time. However, given the vague state of the record regarding the health problems the juror was experiencing, there is no way of knowing what might have occurred had counsel been present during the juror's questioning.

In spite of the above, we acknowledged below that our supreme court indicated in **Anderson** that a harmless error analysis may apply to certain violations of the Sixth Amendment right to counsel. **Anderson** at ¶76. Two such cases referenced by the court in **Anderson** were cited by the State to the trial court. Those were **State v. Koller** 2001 WI App 253, 248 Wis. 2d 259, 635 N.W.2d 838 and **State v. Bjerkaas**,

163 Wis. 2d 949, (Ct. App. 1991). The cases are distinguishable on their facts. Both cases involved the court answering questions posed by the jury.

In **Koller**, during deliberations, the jury sent a note to the court indicating that it wanted to see a doctor's report and a nurse's testimony. The court told the jury through a bailiff that the items were not available. Error was assumed but held harmless because the doctor's report was not in evidence and the nurse's testimony was consistent with their having been an assault.

In **Bjerkaas**, the jury sent a note asking whether entrapment was an issue to be considered. The court wrote "no" on the note and sent it back to the jury room. The parties agreed that "constitutional error" had occurred, however, it was determined to have been harmless because it had already been determined that an entrapment instruction was not required. It was a legally appropriate response and therefore not prejudicial. **Bjerkaas** at 958, 959.

The above fact situations have expressly been identified as exceptions to the rule that the absence of counsel is not subject to harmless error analysis. A case such as ours, where the violations of the defendant's rights resulted in the dismissal of a juror, are qualitatively different than cases where a court answers

questions posed by a jury. A judge's instructions regarding the law or other communications with a jury can be reviewed for accuracy. No such analysis can be performed here.

Furthermore, the errors in this case are analogous to, if not the same as, errors affecting the framework of the trial. The jurors that hear testimony are certainly part of the framework of the trial. Excusing a juror after the completion of testimony alters that framework. Our jury system expects each juror to bring their individual perspectives and background to the jury room. Individual jurors will evaluate evidence differently. There is no way to recreate how the dismissed juror would have approached deliberations.

The juror's dismissal under these circumstances is not amenable to a harmless error analysis. The defendant should be granted a new trial.

B. The Trial Court's Consideration of the Race of Trial Participants Should Not be Evaluated For Harmless Error.

Taking the race of trial participants into account when determining whether to dismiss a juror also should not be evaluated for harmless error. Dismissal of a juror after taking the race of trial participants into account also constitutes a violation of the defendant's rights that, like the deprivation of the defendant's Sixth Amendment

right, is not part of the presentation of the case to the jury; the error is not quantifiable; the error defies analysis by harmless-error standards and it is also difficult, if not impossible, to determine how the error affected the trial. Also, the composition of the jury affects the framework within which the trial proceeds, not the trial process.

Furthermore, as the **S.M.H.** court stated: "(t)he purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." A basic constitutional guarantee that should be insisted upon is that the race of trial participants not affect a trial court's administration of justice. Failure to do so should be considered structural error.

V. IF A HARMLESS ERROR EVALUATION IS CONDUCTED, THE TEST FOR HARMLESS ERROR SHOULD BE WHETHER THE STATE CAN PROVE THAT THE EVIDENCE OF GUILT WAS OVERWHELMING. THE EVIDENCE OF GUILT WAS NOT OVERWHELMING.

If this court agrees that error occurred, but believes that the error is subject to harmless error analysis, the question becomes, how is the error to be analyzed?

Below the State cited **State v. Mendoza**, 227 Wis. 2d 838 (1999) for the proposition that a defendant is entitled

to a fair and impartial jury, and that his rights go to those who serve, not those who were excused. (R.157:12).

In **Mendoza** the defendant objected to the dismissal of four prospective jurors who the defense felt should not have been struck because of their prior criminal records. The Wisconsin Supreme Court determined that one of the jurors was struck erroneously. Nevertheless, it found harmless error because the defendant conceded that an impartial jury convicted him.

We don't believe **Mendoza** is applicable. We do not agree that the appropriate test for harmless error, in this case, would be whether the defendant is able to show that the jury was biased against him. There is a factual difference between this case and **Mendoza**. The juror in this case was dismissed *after* the close of testimony. That is an important distinction.

We have not found a Wisconsin case addressing the test for harmless error for the improper dismissal of a sitting juror after the close of evidence. We believe the reasoning of the District of Columbia Court of Appeals in **Hinton v. United States**, 979 A.2d 663, 682 (D.C. 2009)is sound, and that the test for harmless error when a court erroneously dismisses a sitting juror is not measured by whether the remaining jurors were biased.

In **Hinton**, the trial court was found to have erroneously exercised its discretion when it removed a sitting juror on the fifth day of trial. After determining that the court erred, the appellate court addressed whether the defendant had to show prejudice, and whether the error was harmless.

The court first rejected the argument that the defendant had to show prejudice. The court determined that, consistent with typical harmless error analysis, the burden was on the State to show that the error was harmless. The court felt that this was in line with normal practice in criminal cases.

Most importantly, the court also rejected the analogy drawn by the government to situations that occur during voir dire, where the trial court erroneously rejects a juror forcing the defendant to exercise a peremptory strike. In such cases a defendant would need to show that the jurors that sat were biased. When addressing the argument that Hinton would have to show that the jury that convicted him was biased, the court stated:

> In support of a specific-prejudice requirement, the government argues that a mid-trial decision to replace an empaneled juror with an alternate is analogous to a decision to excuse a prospective juror in pretrial voir dire. We assumed the aptness of that comparison in *(Nathaniel) Thomas.* But on closer examination,

we think the two situations are not analogous. Voir dire "serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."] Peremptory challenges, in turn, are themselves "auxiliary" in nature; they are granted "to help secure the constitutional guarantee of trial by an impartial jury." Thus, what is ultimately at stake for the defendant when a juror is erroneously excused for cause in voir dire is the defendant's Sixth Amendment right to an impartial jury. Ordinarily, the erroneous excusal of a prospective juror for cause can have no adverse effect on the impartiality of the chosen jury or the defendant's rights, for it "cannot cause the seating of a biased juror." All the empaneled jurors, having been "vetted for cause ... [are], by definition, fair and impartial." Since a defendant generally "has no right to have any particular person sit on the jury" so long as the defendant's Sixth Amendment right to an impartial jury is preserved, it makes sense that a defendant complaining on appeal of the erroneous excusal for cause of a prospective juror should have to show prejudice — specifically, as we said in *Tate*, that as a result of the error, an empaneled juror "failed to conscientiously apply the law and find the facts." In effect, the burden of persuasion with respect to prejudice, normally on the government, is shifted to the appellant because the record of the voir dire shows affirmatively that the error was "cured" by the selection of an impartial juror.

But that is not necessarily so with respect to erroneous mid-trial removals of empaneled jurors. Once they start hearing and considering the evidence, individual jurors may evaluate it differently, and they may no longer be viewed as fungible merely because they have passed muster in voir dire. At that point, more than just the defendant's right to an impartial jury is at stake when the judge erroneously replaces a juror with an alternate. Then, as explained above, such an error also may threaten the independence of the jury's decision-making from undue judicial influence and the defendant's basic rights to

> trial by jury and a unanimous verdict — threats that we have concluded Rule 24(c) is intended to prevent. This is not to say that the erroneous replacement of an empaneled juror can never be found harmless — a matter we discuss below, in Section III — only that the impartiality of the substituting alternate and the resulting jury does not, by itself, necessarily dispose of the issue.

The **Hinton** court went on to determine whether the error was harmless. The court stated:

> We apply the standard test applicable to non-constitutional errors, for though Rule 24(c) safeguards constitutional rights, the failure to comply with its requirements is not a constitutional violation in itself. In order to conclude that a non-constitutional error was harmless, we must be able to "say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." If the error had a "substantial influence" on the outcome, or if we are "left in grave doubt" as to whether it did, "the conviction cannot stand." Under this standard, the "burden" is not on the appellant to show that he has suffered prejudice; rather, the issue is whether the record eliminates the appellate court's doubt about whether the error influenced the jury's decision. Thus, "when a court is in virtual equipoise as to the harmlessness of the error ..., the court should treat the error ... as if it affected the verdict." If we are to speak, somewhat loosely perhaps, in terms of burdens of persuasion, then we may say that the government bears the "burden of showing the absence of prejudice."

Hinton at 689, 690.

The court went on to note that the government would rarely be able to show a lack of prejudice. It stated,

"(i)n many cases, where twelve impartial jurors have voted unanimously to find the defendant guilty beyond a reasonable doubt, we might be persuaded that the erroneously removed thirteenth juror would not have viewed the evidence differently. Thus, for example, we would suppose that if the government's case is strong and there is no reason apparent in the record to think the erroneously removed juror would have dissented, a reviewing court could be satisfied that the juror substitution had no substantial influence on the outcome. **Hinton** at 692.

In **Hobbs v. United States**, 18 A.3d 796(D.C. 2011), the District of Columbia Court of Appeals again considered a case where a sitting juror was erroneously discharged after the evidence had been presented. The court applied **Hinton** and found that the State's evidence was not overwhelming. The defendant's conviction was reversed.

In **Hobbs** the court addressed an argument that the evidence in that homicide case was overwhelming. The court stated:

> The government's evidence in this case, though clearly strong enough to support a jury verdict of guilty, is not overwhelming. There was no eyewitness testimony establishing that appellant had shot the victim. A witness testified, however, that she heard a man suggest to appellant that all it would take to kill decedent would be one shot to the back of the head, and the decedent was killed in that manner

> some two hours later. Other evidence implicating Hobbs was testimony that Hobbs had admitted killing Teeter. One witness, appellant's younger brother, Elijah Turner, testified before the grand jury that Hobbs admitted the killing, but he testified at trial that he had fabricated his entire grand jury testimony. A second witness who testified about Hobbs's admission was appellant's step-father, Anthony Hardy, a convicted felon and confessed drug addict who originally testified before the grand jury that Hobbs did not admit the killing but later changed his story. ... We cannot find the error was harmless.

Hobbs at 801.

In this case, as in **Hobbs**, there was no eyewitness testimony establishing how T.M. was killed. In this case there were no admissions, as there were in **Hobbs**, although there was, as in **Hobbs**, the recantation at trial of earlier incriminating statements. In this case the recantation was not by the defendant, but by the alleged victim, who, like the witness who recanted in **Hobbs**, was a convicted felon. (See (R.177:10)-R.S. had pending charges of attempted first degree intentional homicide and possession of a firearm by a felon. And see (R.177:18). R.S. had two prior convictions for robbery and battery.)

In our case, although the trial court believed that the proper test for evaluating harm for the improper removal of a juror was whether the defendant received a fair trial before an unbiased jury, it also found that there was overwhelming evidence of the defendant’s guilt

when it denied without a hearing the defendant's postconviction claim that counsel was ineffective for not objecting to inadmissible hearsay. (R.163:5,6).

In holding that there was overwhelming evidence of the defendant's guilt, the trial court referred to various pieces of testimony placing the defendant at the scene. In its decision the court noted that Quintessa Gaines, T.M.'s sister, told the jury that R.S. called her after the incident and said D. Dog robbed him. The court also noted that Tiffany Davis, a friend of T.M.'s, said that she spoke to T.M. on the evening of the incident and that he told her he was at the location where the robbery occurred with D. Dog. The court noted that a fingerprint was found on the vehicle parked near the body and that inside the car was a citation issued to the defendant and a receipt in his name. The court noted that Kiara Gaines, T.M.'s sister, testified that she had dinner with T.M. and D. Dog and that they left together around 6:30 or 7:00 in the tan van that was found at the scene. The court also referenced the detective's testimony regarding the pretrial statements of R.S. (R.163:5,6).

The above facts are far from overwhelming evidence of guilt. In its discussion of the evidence the court omitted the fact that other identifiers were also found at the

scene. Besides Mr. Spencer's fingerprints, testimony indicated that there was an envelope in the glove box of the van addressed to Justin Gray and a Department of Transportation mailing to him as well (R.181:45); the plates on the van were listed to Justin Gray (R.181:58); fingerprints on the van were attributed to Justin Gray(R.181:73,74), a Mr. Jarquise Cunningham (R.181:74)and a Ms. Nakia Olgen (R.181:73); a DNA profile from a fruit punch bottle recovered at the scene matched the profile of Mr. Errion Green-Brown (R.182:11), who was an individual R.S. admitted he lied to protect when being interviewed by the police. (R.182:64).

Furthermore, the trial court erred significantly when it relied in its decision on the testimony of Tiffany Davis. In its decision the court noted that Ms. Davis talked to T.M. "... and that he told her he was at the location where the robbery occurred with D-Dog." (R.163:5). This was the only "testimony" corroborating the pretrial statements of R.S. that placed "D Dog" at the scene. *Tiffany Davis however did not testify at trial. She only testified at a suppression hearing. She never appeared in front of the jury. Her testimony was not evidence.* See (R.180:95).

In this case the only eye-witness besides R.S. was the tow truck driver, Mr. Townes. Despite his presence throughout the alleged robbery, he did not identify Mr. Spencer.

Crucially, the State's case relied primarily on the credibility of R.S.'s pretrial statements to the police, however; not only did R.S. recant those statements, he gave reasons for doing so. He testified that when he was interviewed he gave answers he thought would please the police.(R.182:62). (As indicated above, R.S. had pending charges of first degree intentional homicide and felon in possession.) He indicated that the police repeatedly asked him if he had a gun and that they indicated he would be charged (R.182:64,65). He indicated he was afraid of being charged with what Mr. Spencer was charged with and that if he helped the police he would not end up where Mr. Spencer was (R. 182:65,66,71). He also testified that he lied to protect Errion Green-Brown (R.182:64).

The State's case relied on the testimony of an admitted liar and felon who recanted under oath. This is hardly overwhelming evidence of guilt. The United States Supreme Court has recognized that changes in a witness' story can be fatal to credibility. See eg., **Kyles v. Whitley**, 514 U.S. 419, 444 (1995).

As in **Hobbs**, the evidence in this case was far from overwhelming, and the defendant is entitled to the reversal of his conviction.

VI. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INADMISSIBLE HEARSAY.

There are two components to a claim of ineffective assistance of counsel: A demonstration that counsel's performance was deficient and that such deficient performance prejudiced the defendant. **State v. Smith**, 207 Wis. 2d 258, 558 N.W. 2d 379 (1997).

To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Smith*** at 273. Normally, judicial scrutiny of an attorney's performance will be highly deferential. The court must determine whether, under all of the circumstances, counsel's conduct was outside the wide range of professionally competent assistance. **Smith** at 274.

Proof of prejudice requires a showing that the defendant was deprived of a fair proceeding whose result is reliable. **Smith** at 275. The defendant need only

demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different. The **Strickland** test is not an outcome-determinative test. The touchstone of the prejudice component is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair". **Smith** at 275-276.

Generally, hearsay is an out of court statement made by a declarant offered into evidence to prove the truth of the matter asserted. Also, generally, hearsay is not admissible. See Wis. Stats., §908.01(3) and §908.02.

In this case, as police reports and the testimony of R.S. indicated, at the time of the shooting neither Mr. Towns nor R.S. saw Mr. McKinney shooting to protect R.S. It was only after being confronted by the police with the fact that casings from two different weapons were found at the scene, and being questioned regarding whether he was shooting, that R.S. told the police that Mr. McKinney had told him that Mr. McKinney had been shooting to protect R.S. (R.147:16,17). The testimony regarding Mr. McKinney's involvement therefore was the repetition of Mr. McKinney's alleged out of court statement, thereby satisfying the first hearsay prong.

The hearsay testimony was also used to prove the truth of the matters asserted. The evidence was used by the State to show that Mr. McKinney was shooting to protect R.S. As we indicated previously, the State informed the jury in its opening statement that it would hear that there was a second person with a firearm that day returning fire *to protect* R.S. (R.179:49).

Also, in its closing, when arguing the elements of felony murder, the State argued "(i)t's all about whether or not the armed robbery killed T.M. and it did. Because if the defendant doesn't go armed—and he's not supposed to because he's a felon—he doesn't go armed over a debt and take T.M. and go to 23rd and Townsend and looking for R.S. and go through his pockets and grabs him by the shirt and drags him to a van and then when he pulls away, pull open the gun and fire, boom, boom and *then you have the return fire protecting R.S.*, ..., that doesn't happen, (T.M)'s alive. And that, ladies and gentlemen, is why this statute and the law works the way it does." (R.184:80).

The above shows that the evidence was used by the State to prove the truth of what was asserted in the statement, and therefore was inadmissible hearsay.

Not only was the testimony inadmissible hearsay, its admission into evidence prejudiced the defense. This is

because the testimony regarding Danny McKinney was key evidence in the State's theory of felony murder. As the jury was instructed, the State had to show that the armed robbery of R.S. was a substantial factor in the death of T.M., i.e. that there was a causal link between the alleged actions of the robber, and the death of T.M. (R.184:49)

The State never argued that the defendant shot T.M. In fact, there was no direct evidence as to who shot T.M, exactly when he was shot, or why he was shot. There was no direct testimony that he was shot during the alleged robbery.

The only eyewitness, the tow truck driver, did not see T.M. being shot, even though he testified that he left after the shooting. There was obviously a time lag between the time he left and the arrival of the police, because not only was he not on the scene when the police arrived, no one was.

The identification of a second shooter at the scene, and the identification of his purpose in shooting, was instrumental in providing a causal connection between the alleged robbery and the death of T.M. To that end, the State made the above referenced argument regarding that link in its closing. As indicated above, the State argued

to the jury that T.M. was killed because of the alleged return gunfire that was intended to protect R.S.

In trial counsel's opening statement counsel indicated that she didn't believe that the jury would be able to determine who did what beyond a reasonable doubt. (R.179:58). To the extent the defense was premised on the notion that the situation was too confusing for a jury to determine what happened, the admission of the hearsay testimony regarding Mr. McKinney undercut that defense.

Furthermore, the defendant asserted in his postconviction motion that there was no strategic reason for not objecting to this evidence and that trial counsel in fact had had no strategic reason for not objecting. (R.147:11)(R.162:1). Therefore, given the fact that the evidence supported the State's case in an important respect, and did nothing to further the defense, counsel erred in not objecting.

As we indicated previously, the trial court did not address whether counsel was ineffective for not objecting, holding that there was overwhelming evidence of guilt. We addressed that claim above, but we believe it is also significant that without the testimony regarding Mr. McKinney the evidence could not be considered overwhelming on the causation element of felony murder. None of the

evidence cited by the trial court that allegedly placed Mr. Spencer at the scene of the robbery addressed the causation element regarding the death of T.M. There was no direct evidence as to the cause of T.M.'s death. It was the hearsay testimony regarding the return fire from Danny McKinney that the State relied on to argue causation. With that testimony out of the case, the evidence regarding the elements of felony murder cannot in any way fairly be characterized as overwhelming.

The defendant submits that the testimony of R.S. regarding Mr. McKinney's shooting to protect R.S. was prejudicial hearsay that should not have been heard by the jury. Counsel was ineffective for not objecting.

CONCLUSION

For the reasons stated herein the defendant respectfully requests that his judgment of conviction be vacated.

Dated: _____, 2019.

GRAU LAW OFFICE

By: _____
John J. Grau
State Bar No. 1003927
Attorney for Defendant-Appellant

P.O. ADDRESS:
414 W. Moreland Blvd. #101
P.O. Box 54
Waukesha, WI 53187-0054
(262) 542-9080
(262) 542-4860 (facsimile)

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief in non-proportional type with a courier font and is 48 pages long including this page.

Dated: _____, 2019.

GRAU LAW OFFICE

By: _____
John J. Grau
State Bar No. 1003927

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

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

I further certify that this electronic brief is identical to the printed form of the brief filed as of this date.

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

Dated: _____, 2019.

GRAU LAW OFFICE

_____
John J. Grau

APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with 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 Wis. Stat. § 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 decision showing the circuit court's reasoning regarding those issues.

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

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

Dated: _____, 2019.

GRAU LAW OFFICE

By: _____
John J. Grau

INDEX TO APPENDIX

PAGE