STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP942-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT DARIS SPENCER,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. After the close of evidence but before deliberations began, the circuit court questioned a sick juror in chambers, outside the presence of counsel. The court then conferred with counsel for both sides. Defense counsel posed a question for the juror, which the court relayed. Upon being satisfied that the juror was sick, the court excused her for cause.

Did the circuit court violate Defendant-Appellant Robert Daris Spencer's right to counsel?

The circuit court held that no error occurred. It further determined that any error was harmless.

This Court should affirm.

2. Has Spencer forfeited his challenges to the circuit court's excusal of the juror for cause?

The circuit court did not answer this question.

This Court should answer, "yes."

3. Did the circuit court err in denying Spencer's ineffective-assistance claim without an evidentiary hearing?

The circuit court did not answer this question.

This Court should answer, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication may be warranted under Wis. Stat. § (Rule) 809.23(1)(a)2.

INTRODUCTION

Following his convictions for felony murder and felon in possession of a firearm, Spencer filed a postconviction motion raising two claims. First, he argued that the circuit court denied his right to counsel when it engaged in an ex parte

communication with a sick juror after the close of evidence but before the jury started deliberating. Second, he contended that his trial counsel was ineffective for failing to object to hearsay at trial. The court denied both claims without an evidentiary hearing.

This Court should affirm. The circuit court did not violate Spencer's right to counsel at a critical stage. Even if it did, the error was harmless. Further, Spencer was not entitled to an evidentiary hearing on his ineffective-assistance claim because he insufficiently pled prejudice, and regardless, the record conclusively shows that he is not entitled to relief.

Finally, Spencer forfeited his right to assert his two new challenges to the circuit court's dismissal of the sick juror.

STATEMENT OF THE CASE

The charges

On September 8, 2014, T.M. suffered a gunshot wound to the head, ultimately leading to his death. (R. 1:1–3.) Milwaukee police officers found him lying face down in a pool of blood on N. 23rd Street. (R. 1:1.) Specifically, T.M. was located "in front of the address of 3407 N. 23rd Street." (R. 1:1.)

Police collected eight bullet casings in the area. "Detective Rutherford observed a bullet hole in the front window of the residence at 3407 N. 23rd Street." (R. 1:2.) He also saw a bullet hole in the aluminum siding of that home. (R. 1:2.) Across the way and to the southeast, Detective Rutherford found two "spent .40 caliber casings" in the street in front of 3402 N. 23rd Street. (R. 1:2; 36.) He also observed a bullet strike to a tree just south of 3402 N. 23rd Street. (R. 1:2.) Across from 3402 N. 23rd Street and to the southeast, Detective Rutherford saw "approximately six .40 caliber spent casings that were on the sidewalk and on the street" that "was

on the north side of the residence of 3398 N. 23rd Street." (R. 1:2; 36.)

After investigating the bullet casings, police concluded that the "eight casings were fired by two different firearms." (R. 1:2.) It appeared that the six casings in front of 3398 N. 23rd Street came from one gun, while the two bullet casings in front of 3402 N. 23rd Street came from a second firearm. (R. 1:2.) Police used trajectory rods and determined that "the paths of the bullets" seemed to be consistent "with someone in the area of 3398 N. 23rd Street shooting or returning fire in a northwest direction as well as somebody in the area of the casings in front of 3402 shooting or returning fire in a southeast direction consistent with two shooters engaged in a gun fight." (R. 1:2.)

Police later spoke with Lerone Towns, who witnessed the shooting. (R. 1:3.) Towns said that he towed a vehicle to 3398 N. 23rd Street that night. (R. 1:3.) The man who asked for the tow, R.S., told Towns that he needed to go into the house for money. (R. 1:3.) Towns was filling out paperwork when he heard "a noise coming from the area of where [R.S.] was standing." (R. 1:3.) He saw "two black males standing next to" R.S. (R. 1:3.) The first suspect was holding a handgun and patted down R.S.'s pockets. (R. 1:3.) He eventually grabbed R.S. by the back of the shirt and started walking him across the street. (R. 1:3.) The second suspect, later identified as T.M., followed. (R. 1:3.) Approximately 30 seconds after the men left Towns's sight, Towns heard gunshots and saw R.S. running toward him. (R. 1:3.) As R.S. ran past Towns, Towns heard multiple gunshots while getting into his truck to leave. (R. 1:3.) He never saw who was shooting. (R. 1:3.)

Police interviewed R.S. (R. 1:3.) He said that he was dealing with the tow truck driver outside 3398 N. 23rd Street when he saw Spencer and T.M. approach him. (R. 1:3.) Spencer said, "Where the money at?" (R. 1:3.) Spencer went into R.S.'s pockets and "took approximately $200 to $400" and

R.S.'s cell phone. (R. 1:3–4.) According to R.S., Spencer then grabbed his collar and said, "Come with me you're going to die." (R. 1:4.) R.S. saw that Spencer had a semi-automatic handgun pointed at R.S.'s side. (R. 1:4.) R.S. stated that as Spencer "dragged him northbound across W. Townsend Avenue and up the sidewalk," he broke free from Spencer's hold. (R. 1:4.)

R.S. told police about the shooting. He explained that, as he fled, he saw Spencer fire a shot at him. (R. 1:4.) He then heard additional shots. (R. 1:4.) R.S. ran past the tow truck driver and into the alley, where he waited for the gunfire to stop. (R. 1:4.) According to R.S., he later talked to his friend "Danny" about the shooting. (R. 1:4.) Danny told R.S. that he saw the fight from the residence at 3398 N. 23rd Street. (R. 1:4.) R.S. said that Danny fired shots from the residence to protect R.S. from Spencer and T.M. (R. 1:4.)

The State charged Spencer with (1) felony murder, and (2) felon in possession of a firearm. (R. 1:1.)

The trial

The trial opened with jury selection. At the close of voir dire, there were thirteen jurors so that an alternate was available. (R. 177:142–43.)

At trial, the State offered evidence consistent with the allegations in the criminal complaint.

A medical examiner testified that the cause of T.M.'s death was a gunshot wound to the head. (R. 181:218.) The manner of his death was homicide. (R. 181:218–19.)

The evidence showed that on the night of September 8, 2014, multiple gunshots occurred in close succession in the area where police found T.M.'s body. Two residents of the neighborhood testified that they heard numerous gunshots within a small timeframe. (R. 179:62, 64–65, 67–69.) The "ShotSpotter"—an "acoustic gunshot location

system"—recorded eight gunshots in a matter of seconds. (R. 181:94, 99–100, 106.) And Officer Ivy, who was about one-half mile away from the area, heard several gunshots, too. (R. 179:76–77.)

The evidence also established that the gunshots came from two different guns in two different locations. Detective Rutherford testified that he found six bullet casings near the residence at 3398 N. 23rd Street. (R. 180:14–27.) These all came from the same gun. (R. 181:225–26.) Roughly diagonally across the street from the six bullet casings, he found a bullet strike in a tree. (R. 36; 50; 52; 180:11–12, 30–31.) Further diagonally from the tree, police found two bullet holes in the residence at 3407 N. 23rd Street. (R. 36; 52; 59; 179:80–81; 180:11.) This was close to where police discovered T.M.'s body in the street. (R. 36; 59; 179:79–81; 180:11.)

The jurors heard testimony that Detective Hardrath searched the upper unit of 3398 N. 23rd Street. (R. 180:79.) He had received information that someone may have fired shots from the kitchen window during the incident. (R. 180:82.)[1] The view from the kitchen window shows that the tree with the bullet strike was within the line of fire. (R. 105; 180:85.) While it appeared to Detective Hardrath that someone had recently moved out of the unit at 3398 N. 23rd Street, he found a utility bill in Danny McKinney's name. (R. 180:92–93.) According to R.S., Danny lived with him in the upper unit and was home at the time of the incident. (R. 182:27, 29.) When asked whether he knew if anyone had fired from the residence to protect him during the encounter, R.S. said, "Danny." (R. 182:37.) He specified that Danny told him that after the incident. (R. 182:37–38.)

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[1] Detective Hardrath testified that he searched the residence at 3396 N. 23rd Street. (R. 180:79.) Other parts of the record refer to this residence as 3398 N. 23rd Street. (R. 1:2; 36; 180:13–14.) The State uses 3398 N. 23rd Street for consistency.

Officers found two additional bullet casings roughly diagonally across the street from 3398 N. 23rd Street, near where T.M.'s body was located. (R. 36; 56; 57; 180:33–35.) Both came from the same gun—a different gun than the one that fired the six bullet casings in front of 3398 N. 23rd Street. (R. 181:226–27.) Evidence showed that Spencer fired at least one shot from this area during the encounter, aiming toward 3398 N. 23rd Street. (R. 110; 181:138–43; 182:32–37.)

Thus far, the trial evidence established that (1) T.M. died as a result of a gunshot wound to the head, (2) on the night that he died, there were multiple gunshots in close succession in the area where police found his body, and (3) the gunshots came from two different guns in two different locations.

The evidence also showed that Spencer's commission of an armed robbery precipitated these events.

Towns testified consistent with what he told police. While he was trying to complete the tow to 3398 N. 23rd Street, he witnessed an armed robbery. (R. 110; 181:126, 130–31, 134–36, 139–40.) The man with the firearm grabbed R.S. by the back of the shirt and dragged him diagonally across the street, toward where police later found two bullet casings and T.M.'s body. (R. 36; 39; 56; 57; 110; 181:139–43.) T.M. followed. (R. 181:142.) Less than one minute later, Towns heard "nothing but gunfire." (R. 181:143.) He saw R.S. turn the corner and run past him into the alley. (R. 181:145.)

R.S. testified as to the identity of the armed robber. (R. 182:32, 34–37.) Initially, R.S. stated that he recalled the incident involving himself, Spencer, and T.M. (R. 182:24–25.) He then changed course, claiming not to know the identify of the man who robbed him. (R. 182:31, 33, 35.) R.S. acknowledged, however, that he owed Spencer money and that Spencer had been looking for him. (R. 182:40–41.) And he agreed that he told police that Spencer robbed him—

Spencer took $400 and R.S.'s cell phone before shooting at R.S. (R. 182:31–32, 34–37.)[2] R.S. claimed that police "threatened" him into identifying Spencer. (R. 182:32.)

Quintessa Gaines, T.M.'s sister, testified that R.S. told her following her brother's death that "D' Dog" did it. (R. 183:7.)[3] R.S. explained to her that he "fucked up with D' Dog." (R. 183:8.)

And finally, police searched a van that had been parked near T.M.'s body and found a traffic citation and a car-shop receipt issued to Spencer. (R. 181:45–49.) Police also lifted Spencer's print from the van. (R. 181:75.)

After the close of evidence but before jury instructions, the circuit court learned that Juror 2 was sick. (R. 184:20, 24.) Juror 2 was the only African American juror. (R. 184:21.) Over the course of 45 minutes, the court assessed whether Juror 2 could participate in jury deliberations. (R. 184:20–21.) It allowed her to rest in chambers. (R. 184:20.) The court asked about Juror 2's symptoms. (R. 184:20–21.) Juror 2 indicated that it was unlikely that "she would feel well enough to proceed in any particular length of time." (R. 184:20.)

The circuit court "conferred with the attorneys." (R. 184:21.) Everyone agreed to wait for a while. (R. 184:21.) Defense counsel also requested that the court ask Juror 2 whether "her stress or her 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." (R. 184:21–22.) Juror 2 said, "Oh, no. This has nothing to do with the trial." (R.

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[2] Police's investigation uncovered a $5 bill near the residence at 3398 N. 23rd Street, and R.S.'s cell phone close to where T.M.'s body was located. (R. 180:25, 32–33.)

[3] The evidence showed that Spencer's nickname was "D-Dog." (R. 182:32.)

184:22.) The court was "satisfied with that response" and excused Juror 2 for cause. (R. 184:22–23.)

Noting that she brought a *Swain*[4] challenge before trial based on the underrepresentation of African Americans in the jury pool, defense counsel moved for a mistrial. (R. 184:23–24.) She noted, "We're now in a situation where we have no African-American jurors." (R. 184:24.) Defense counsel also renewed her *Swain* challenge. (R. 184:25.) She further stated, "[T]he research shows . . . that even the presence of one African-American on a jury can make a difference in terms of reducing systemic bias." (184:25.)

The circuit court denied defense counsel's motion "for the reasons that [it previously] stated." (R. 184:25.) It continued, "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." (R. 184:26.) The court stated, "[T]here 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 . . . ." (R. 184:26.) It then noted "for the record" that many of the witnesses at trial were African American. (R. 184:26–27.) The court concluded that "if we had individuals of other races involved as witnesses in this case, we may be having a different conversation." (R. 184:27.)

Without further objection, the circuit court proceeded to instruct the remaining 12 jurors. (R. 184:27, 33.) The jury convicted Spencer of both charges. (R. 185:5.)

The sentences

The circuit court sentenced Spencer to 18 years' initial confinement and 10 years' extended supervision on the felony-murder count. (R. 137:1.) It sentenced Spencer to five years'

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[4] *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).

initial confinement and five years' extended supervision on the firearm count. (R. 137:1.) The court made these sentences consecutive to each other and consecutive to Spencer's sentence in a different matter. (R. 137:2.)

The postconviction motion

Spencer filed a postconviction motion, raising two claims. First, he alleged that his attorney was ineffective for "fail[ing] to object to hearsay testimony identifying Danny McKinney as returning fire to protect [R.S.] at the time of the alleged robbery." (R. 147:7.) Regarding prejudice, Spencer claimed that the "testimony regarding Danny McKinney was key evidence in the State's theory of felony murder." (R. 147:10.) Specifically, he argued that "[t]he identification of a second shooter at the scene, and the identification of his purpose in shooting, was instrumental in proving an arguable causal connection between the alleged robbery and the death of" T.M. (R. 147:10.)

Second, Spencer claimed that the circuit court violated his right to counsel when it questioned Juror 2 outside the presence of his attorney. (R. 147:12.) He alleged, "The record reflects, and trial counsel would testify, that the trial court's discussions with the excused juror were outside the presence of trial counsel." (R. 147:13.) Spencer continued, "The record also reflects that the defendant did not waive counsel's presence at the questioning of the juror." (R. 147:13.)

The circuit court denied Spencer's motion without an evidentiary hearing. Regarding his ineffective-assistance claim, the court reasoned that the record conclusively shows that he was not prejudiced by trial counsel's failure to object to the hearsay. (R. 163:4–5.) As for Spencer's right-to-counsel claim, the court concluded that there was no violation because its questioning of Juror 2 before deliberations did not constitute a critical stage in the proceedings. (R. 163:7.) The

court further determined that any error was harmless. (R. 163:8.)

Spencer appeals, raising two additional claims that he did not preserve at the circuit court.

ARGUMENT

I. Spencer was not denied his right to counsel. If he was, the error was harmless.

A. Standards of review

Whether a defendant was denied his right to counsel is a question of law that this Court reviews de novo. *State v. Anderson*, 2006 WI 77, ¶¶ 65–66, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by State v. Alexander*, 2013 WI 70, ¶ 28, 349 Wis. 2d 327, 833 N.W.2d 126.

Whether an error is harmless is also a question of law that this Court reviews de novo. *State v. Monahan*, 2018 WI 80, ¶ 31, 383 Wis. 2d 100, 913 N.W.2d 894.

B. Right to counsel and harmless error

1. Right to counsel

The Sixth Amendment ensures a "right to counsel at all critical stages of the criminal process." *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013). "The Supreme Court has not provided a concise explanation of what constitutes a critical stage." *Schmidt v. Foster*, 911 F.3d 469, 479 (7th Cir. 2018). "Broadly, it has described a critical stage as a 'step of a criminal proceeding' that holds 'significant consequences for the accused.'" *Id.* (quoting *Bell v. Cone*, 535 U.S. 685, 696 (2002)); *cf. Anderson*, 291 Wis. 2d 673, ¶ 68 ("A critical stage is any point in the criminal proceedings when a person may need counsel's assistance to assure a meaningful defense.").

"Alternatively, though still broadly, the Court has said that whether a stage is critical depends on whether, during a

'particular confrontation,' the accused faces prejudice that counsel could 'help avoid.'" *Schmidt*, 911 F.3d at 479 (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967)). The Supreme Court has described a critical stage as one where "the accused required aid in coping with legal problems or assistance in meeting his adversary." *United States v. Ash*, 413 U.S. 300, 313 (1973). So has this Court identified the constitutional 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, ¶ 62, 248 Wis. 2d 259, 635 N.W.2d 838.

"However described, the Supreme Court has recognized a range of pretrial, trial, and posttrial events to count as critical stages." *Schmidt*, 911 F.3d at 480 (collecting cases). "Critical stages include: a preliminary hearing at which defendant could cross-examine witnesses and otherwise test the evidence against him; arraignments at which defenses must be asserted; entry of a plea; pretrial identification through an in-person line-up; pretrial interrogation by a government informant; sentencing hearings; and deferred sentencing hearings" revoking probation. *Id.* at 492 (Hamilton, J., dissenting) (collecting cases).

The Wisconsin Supreme Court has made "clear that the right to counsel attaches for communications between the circuit court and the jury during *deliberations*." *Anderson*, 291 Wis. 2d 673, ¶ 69 (emphasis added), *overruled on other grounds by Alexander*, 349 Wis. 2d 327, ¶ 28. The reason being: defense counsel's presence allows her "to 'prime the pump of persuasion' and . . . potentially convince the court to address the jury communication in a manner that would support the defendant's interests." *Id.* (citation omitted).

But neither Spencer nor the State has identified precedent holding that an ex parte communication between a sick juror and the court after the close of evidence but before deliberations began constitutes a critical stage for purposes of

the Sixth Amendment right to counsel. So, this Court must resolve this question with reference to precedent applying the "critical stage" standard to other situations, with an eye toward analyzing whether "counsel's absence might derogate from the accused's right to a fair trial." *Wade*, 388 U.S. at 226.

2. Harmless error

Wisconsin courts "have applied harmless error analysis to the denial of the Sixth Amendment right to counsel when the circuit court has had ex parte communications with the jury." *Anderson*, 291 Wis. 2d 673, ¶ 76, *overruled on other grounds by Alexander*, 349 Wis. 2d 327, ¶ 28. This includes ex parte communications between the court and a juror during deliberations, *id.*, ¶ 76; *Koller*, 248 Wis. 2d 259, ¶ 61; *State v. Burton*, 112 Wis. 2d 560, 565–70, 334 N.W.2d 263 (1983), *overruled on other grounds by Alexander*, 349 Wis. 2d 327, ¶¶ 28–29, as well as those conducted during voir dire, *State v. Tulley*, 2001 WI App 236, ¶ 7, 248 Wis. 2d 505, 635 N.W.2d 807.

The reasoning behind applying harmless error to some denials of the right to counsel is that "situations will inevitably arise in which the communication is so innocuous that it cannot be said that the error in any way influenced the jury's verdict." *Burton*, 112 Wis. 2d at 570; *see Anderson*, 291 Wis. 2d 673, ¶ 75. Indeed, "the presumption of prejudice" that applies to complete denials of the right to counsel "is 'narrow.'" *Schmidt*, 911 F.3d at 479 (citation omitted). "It arises only when the denial of counsel is extreme enough to render the prosecution presumptively unreliable." *Id.* "That happens rarely: only once in the thirty-plus years since [*United States v. Cronic*, 466 U.S. 648 (1984)] has the Court applied the presumption of prejudice it described in a critical-stage case." *Id.*

The harmless-error analysis focuses on whether there is a "reasonable possibility" that the error "contributed to the

conviction." *Burton*, 112 Wis. 2d at 571 (citation omitted); *see Koller*, 248 Wis. 2d 259, ¶ 62; *Tulley*, 248 Wis. 2d 505, ¶ 7; *Anderson*, 291 Wis. 2d 673, ¶¶ 114, 117. This Court "examine[s] the circumstances and substance of the communication in light of the entire trial to determine whether the error was harmless." *Koller*, 248 Wis. 2d 259, ¶ 62; *see Burton*, 112 Wis. 2d at 571; *State v. Bjerkaas*, 163 Wis. 2d 949, 957–58, 472 N.W.2d 615 (Ct. App. 1991). "The burden of proof is on the beneficiary of the error to establish that the error was not prejudicial." *Tulley,* 248 Wis. 2d 505, ¶ 7.

C. Spencer was not denied counsel at a critical stage. Even if he was, there is no reasonable possibility that the error contributed to the outcome.

The circuit court properly denied Spencer's right-to-counsel claim for two reasons. First, it did not deny Spencer his right to counsel at a critical stage. Second, any error was harmless.

1. Right to counsel

The alleged critical stage here was a narrow period after the close of evidence and before deliberation when the circuit court communicated ex parte with Juror 2 about her illness. (R. 147:12–13; Spencer's Br. 10–12.) Specifically, the court discerned the details of Juror 2's illness and asked her "if she thought she would feel well enough to proceed in any particular length of time." (R. 147:12; Spencer's Br. 10–11 (citation omitted).)

For this to constitute a critical stage, Spencer must show that this was a situation where he "required aid in coping with legal problems or assistance in meeting his adversary." *Ash*, 413 U.S. at 313; *see Koller*, 248 Wis. 2d 259, ¶ 62. In other words, he must demonstrate that this

circumstance is on par with a court's ex parte communication with a juror during deliberations or voir dire, *see Koller*, 248 Wis. 2d 259, ¶ 61; *Anderson*, 291 Wis. 2d 673, ¶ 23; *Bjerkaas*, 163 Wis. 2d at 957; *Burton*, 112 Wis. 2d at 571; *Tulley*, 248 Wis. 2d 505, ¶ 8, or with the Supreme Court's critical-stage cases. *See Schmidt*, 911 F.3d at 480 (collecting cases). He has not.

The Supreme Court's "critical stage" cases involve situations where defense counsel's presence is necessary to ensure that the defendant receives a fair trial. *Schmidt*, 911 F.3d at 492 (Hamilton, J., dissenting) (collecting cases). Similarly, the above Wisconsin cases involved situations where "the accused face[d] prejudice that counsel could [have] 'help[ed] avoid.'" *Id.* at 479 (quoting *Wade*, 388 U.S. at 227).

For example, in *Koller*, *Anderson*, and *Bjerkaas*, the circuit court addressed substantive issues without input from defense counsel. *Koller*, 248 Wis. 2d 259, ¶ 61 (ex parte communication about what evidence the jury could review during deliberations); *Anderson*, 291 Wis. 2d 673, ¶¶ 13–14 (same); *Bjerkaas*, 163 Wis. 2d at 957 (ex parte communication about whether the jury could consider an entrapment defense). Similarly, in *Tulley*, the circuit court engaged in ex parte communications with three prospective jurors, excusing them for cause. *Tulley*, 248 Wis. 2d 505, ¶ 8. Logically, in *Koller*, *Anderson*, *Bjerkaas*, and *Tulley*, had defense counsel been present, she could have "potentially convince[d] the court to address the jury communication in a manner that would support the defendant's interests." *Anderson*, 291 Wis. 2d 673, ¶ 69.

And in *Burton*, while the circuit court did not resolve any substantive issue outside of counsel's presence, it "made two brief entries [into the jury room] at 4:27 and 4:55 p.m., after the jury had deliberated nearly four hours and soon after the deputy had inquired about the status of the jury's deliberations." *Burton*, 112 Wis. 2d at 571. Defense counsel's

presence may have allowed him to prevent the court from interrupting the jury's deliberations.

Here, however, defense counsel's presence during the limited discussion about the details of Juror 2's illness and whether "she would feel well enough to proceed in any particular length of time" (R. 147:12) was not necessary to ensure that Spencer received a fair trial. *Cf. State v. Gribble*, 2001 WI App 227, ¶¶ 10–16, 248 Wis. 2d 409, 636 N.W.2d 488 (circuit court did not violate Gribble's right to counsel during ex parte communications with prospective jurors about hardship and infirmity requests). It is significant to note that this alleged critical stage simply involved information gathering, not the substantive determination to excuse Juror 2 for cause. *Cf. Tulley*, 248 Wis. 2d 505, ¶ 8.

Spencer received the benefit of his counsel's advocacy on the substantive issue of Juror 2's excusal for cause. (R. 184:21–25.) Specifically, defense counsel was involved in the decision to wait some time for Juror 2 to feel better. (R. 184:21.) She also requested that the court ask Juror 2 whether "her stress or her 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," and the court acquiesced to her request. (R. 184:21–22.) Defense counsel also moved for a mistrial and renewed her *Swain* challenge following the court's ruling. (R. 184:23–25.)

So, the question boils down to whether defense counsel could have potentially convinced the circuit court to address its communication with Juror 2 about the details of her illness and her ability to proceed in a manner that would have supported Spencer's interests. *Anderson*, 291 Wis. 2d 673, ¶ 69. It is difficult to imagine what defense counsel could have done in that moment that she could not later do once the court conferred with the parties about the situation. She received the opportunity to assess the veracity of Juror 2's claimed

illness (R. 184:21–22), and she had the chance to request a continuance (R. 184:20–25).

Spencer offers no other ideas. (Spencer's Br. 10–17.) He seems to suggest that defense counsel was disallowed the opportunity to "weigh in on" the circuit court's excusal of Juror 2 for cause (Spencer's Br. 16), but that is not accurate (R. 184:21–25). Spencer contends that "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." (Spencer's Br. 16.) But again, counsel was given the opportunity to assess the veracity of Juror 2's claimed illness and to request a continuance. (R. 184:20–25.) And if Spencer is saying that defense counsel could have elicited *more* information concerning non-legal topics which the court already discussed with Juror 2, there is no reason to believe that is true.

The bottom line is that Spencer cannot point to any concrete example of what prejudice counsel could have helped avoid during that limited discussion in chambers, so he has not shown that he was denied his right to counsel during a critical stage. *See Schmidt*, 911 F.3d at 479–80 (discussing the "critical stage" test). Simply saying that "there were legal issues to be addressed where trial counsel could have acted on behalf of her client and his interests" does not make it so. (Spencer's Br. 16.)

As a final matter, the State notes Spencer's reliance on *State v. Lehman*, 108 Wis. 2d 291, 321 N.W.2d 212 (1982), and *Alexander* to support his position here. (Spencer's Br. 14.) Neither case addresses whether a defendant was denied his right to counsel at a critical stage.

In *Lehman*, the supreme court addressed whether the circuit court erroneously exercised its discretion in discharging a juror during deliberations. *Lehman*, 108 Wis. 2d at 296–301. Because there was "no record that the

circuit court exercised the discretion vested in it to discharge a juror," it found error and declined to address the defendant's constitutional claims. *Id.* at 301 & n.6. The supreme court factored into its decision that "neither the defendant nor the state was given an opportunity to be present when the ill juror was discharged," and it stated that "[w]hen a juror seeks to be excused . . . whether before or after jury deliberations have begun," the "inquiry generally should be made . . . in the presence of all counsel and the defendant." *Id*. at 300–01. But the "circuit court's efforts depend on the circumstances of the case." *Id*. at 300.

In other words, the supreme court in *Lehman* discussed best practices for circuit courts to follow in deciding whether to excuse a juror for cause under Wisconsin law. It did *not* analyze whether such an inquiry constitutes a critical stage for purposes of the Sixth Amendment right to counsel. So, it does not control the outcome of Spencer's challenge here.

The supreme court in *Alexander* addressed "whether a defendant must be physically present when a judge holds an in-chambers discussion with a juror during the middle of a trial." *Alexander*, 349 Wis. 2d 327, ¶ 1. The supreme court eschewed the bright-line rule that *Anderson* suggested in favor of a test that asks "whether [the defendant's] absence would deny him a fair and just hearing." *Id*. ¶¶ 1, 28. In discussing non-precedential cases standing for the proposition that a defendant has no constitutional right to be present during a conference in chambers regarding dismissal of a juror, it stated, "All that the Constitution requires at such a conference is the presence of defense counsel." *Id*. ¶ 29.

Like in *Lehman*, the supreme court in *Alexander* did not analyze whether an in-chambers conference regarding dismissal of a juror constitutes a critical stage for purposes of the Sixth Amendment right to counsel. Indeed, even the case that the supreme court cited to support the above proposition did not analyze that question. *See Alexander,* 349 Wis. 2d 327,

¶ 29 (citing *Ellis v. Oklahoma*, 430 F.2d 1352, 1355 (10th Cir. 1970)). Therefore, *Alexander* does not control the outcome of the unique circumstances of this case either.

A persuasive case is *Randolph v. State*, 117 Nev. 970, 36 P.3d 424 (2001). In *Randolph*, the trial court communicated ex parte with a juror about the juror's ability to go forward with deliberations after being informed the juror was a little sick with anxiety. *Randolph*, 117 Nev. at 988–89. The trial court's communication with the juror concerned only the illness, not the subject of the deliberations. *Id.* at 989. The Nevada Supreme Court concluded that Randolph's right to counsel was not violated because the ex parte communication was innocuous. *Id.* There, like here, the defendant "raise[d] only the possibility that the lack of disclosure might have prejudiced him in some indefinite way." *Id.* If such an ex parte communication during deliberations is not a critical stage, then surely the same exchange shortly before deliberation after the close of evidence also is not a critical stage.

For the above reasons, this Court should hold that the circuit court did not deny Spencer's right to counsel at a critical stage.

2. Harmless error

If this Court disagrees, any error is harmless because there is no reasonable possibility that the error contributed to Spencer's conviction. The focus is on "the circumstances and substance of the communication in light of the entire trial to determine whether the error was harmless." *Koller*, 248 Wis. 2d 259, ¶ 62.

The error here would be the denial of Spencer's right to counsel during the circuit court's limited discussion with Juror 2 about the details of her illness and her ability to proceed with deliberations. Thus, the specific inquiry is

whether there is a reasonable possibility that the result of Spencer's trial would have been different if counsel had been present during *that* discussion. *See Bjerkaas*, 163 Wis. 2d at 958 (a circuit court's legally correct response to a jury question renders the denial of counsel harmless error).

To answer the above question in favor of Spencer, this Court would need to make at least two tenuous assumptions. First, that defense counsel could have contributed something to the discussion about the details of Juror 2's illness and her ability to proceed with deliberations that would have kept her on the jury. As discussed above, nothing comes to mind other than what defense counsel already received the opportunity to address.

The second tenuous assumption that this Court would need to make to find harmful error is that Juror 2's presence on the jury could have led to Spencer's acquittal. There is nothing in the record to support that as a reasonable possibility. Like every other juror that served on Spencer's trial, Juror 2 was selected following voir dire, which "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Gribble*, 248 Wis. 2d 409, ¶ 12. Given (1) the assurance that Juror 2 would have been impartial had she deliberated on Spencer's case, and (2) the absence of anything in the record to show that Juror 2 would have viewed the evidence differently than the juror who took her place, any error here is harmless.

Spencer disagrees, but his arguments are unpersuasive. He first argues that harmless-error analysis should not apply, but he acknowledges that precedent supports its application to denials of the right to counsel. (Spencer's Br. 29–30.) Further, while he repeatedly states that the general rule is that a violation of the right to counsel constitutes structural error (Spencer's Br. 26–28, 30), he disregards that "the presumption of prejudice" that applies to

complete denials of the right to counsel is narrow and happens rarely, *Schmidt*, 911 F.3d at 479. His argument also assumes that any error here "resulted in the dismissal of a juror." (Spencer's Br. 30.) As discussed above, that is a tenuous assumption.

Spencer alternatively argues that if harmless-error analysis applies, the sole question should be whether the evidence of his guilt was overwhelming. (Spencer's Br. 32–42.) He urges this Court to disregard precedent regarding the application of harmless error to denials of the right to counsel in favor of a District of Columbia Court of Appeals' decision addressing an erroneous-exercise-of-discretion claim concerning the removal of a sitting juror. (Spencer's Br. 33–42.) But this Court cannot do that. *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

And regardless, the evidence of Spencer's guilt *was* overwhelming. An abundance of evidence established that Spencer committed an armed robbery (with a gun), regardless of R.S.'s recantation at trial. (R. 181:126, 130–31, 134–36, 139–40, 45–49, 75; 182:31–32, 34–37; 183:6–7.) And as discussed more fully in Section III. C. below, the State had plenty of evidence to show that Spencer's commission of an armed robbery was a substantial factor in producing T.M.'s death, which is what it needed to convict him of felony murder.

In arguing otherwise, Spencer makes much of the fact that R.S. recanted at trial, and that police found "identifiers" for other people at the crime scene. (Spencer's Br. 39–41.) But he simply downplays all the evidence that corroborates R.S.'s initial statement to police, and the absence of evidence corroborating that anyone other than Spencer committed the armed robbery.

For the above reasons, this Court should find any error harmless.

II. Spencer forfeited his arguments regarding the circuit court's excusal of Juror 2 for cause.

A. Standard of review

This Court independently reviews whether a defendant adequately preserved an issue for appeal. *State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998).

B. Forfeiture doctrine

"It is the often-repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal." *State v. Bodoh*, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999) (citation omitted). This includes alleged constitutional errors. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. "The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." *Id.*

"The [forfeiture] rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal." *Huebner*, 235 Wis. 2d 486, ¶ 12. "It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Id.* This rule also "prevents attorneys from 'sandbagging' errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.* (citation omitted).

C. Spencer did not raise his current challenges to the circuit court's excusal of Juror 2 for cause at the circuit court.

On appeal, Spencer raises two challenges to the circuit court's excusal of Juror 2 for cause. First, he argues that the court violated his equal protection and due process rights when it discussed the race of trial participants in explaining

its decision. (Spencer's Br. 17–21.) Second, Spencer contends that the court erroneously exercised its discretion in excusing the juror. (Spencer's Br. 21–25.) He forfeited both claims by failing to raise them at the circuit court.

Regarding his constitutional challenge, Spencer's trial counsel did not object to the circuit court's remarks at trial. (R. 184:25–27.) He thus forfeited his claim and should have raised it through the rubric of ineffective assistance of counsel to obtain review. *See State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). Spencer did not do that (R. 147), possibly because he has 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" (Spencer's Br. 18–19). And Spencer did not even raise his claim directly in his postconviction motion. (R. 147.)

This Court should enforce the forfeiture rule to Spencer's constitutional challenge. His forfeiture deprived the circuit court and the parties of "notice of the issue and a fair opportunity to address the objection." *Huebner*, 235 Wis. 2d 486, ¶ 12. This could have "eliminat[ed] the need for appeal." *Id.*

Moreover, there is a substantial sandbagging concern here because Spencer seeks automatic reversal. Specifically, he argues that his constitutional claim should not be evaluated for harmless error. (Spencer's Br. 31–32.) Allowing a defendant to seek "automatic reversal" without a timely objection would "encourage[ ] gamesmanship." *State v. Pinno*, 2014 WI 74, ¶ 61, 356 Wis. 2d 106, 850 N.W.2d 207. So, the fact that Spencer seeks automatic reversal supports the conclusion that he forfeited this issue by not timely objecting at trial.

Along the lines of gamesmanship, the State also notes that if Spencer's claim is subject to a harmless-error type analysis, he has shifted the burden to address the

harmlessness of any potential error onto the State by not following the "normal procedure" of raising his claim through the rubric of ineffective assistance of counsel. *Erickson*, 227 Wis. 2d at 766.

Finally, the State notes that Spencer has not offered any good reason why this Court should overlook forfeiture in this case. He simply disregards the forfeiture rule altogether. (Spencer's Br. 17–21.) For the above reasons, this Court should hold that Spencer forfeited this claim.

Like his constitutional claim, Spencer did not raise his erroneous-exercise-of-discretion claim at the circuit court. (R. 147.) This deprived the court of an opportunity to explain why it discussed the race of trial participants in excusing Juror 2 for cause, which seems to be Spencer's sole concern here. Spencer himself wonders why: "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." (Spencer's Br. 24.) He continues, "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." (Spencer's Br. 24.)

Spencer's bemusement is exactly why Wisconsin courts utilize the forfeiture doctrine. The circuit court—not this Court—is in the best position to explain why it discussed the race of trial participants in excusing Juror 2 for cause.[5] Without the circuit court's input, both parties and this Court are left to speculate as to what it meant. For this reason, and

[5] Notably, the circuit court's explanation would have informed this Court's analysis on Spencer's constitutional claim, had he properly preserved it.

because Spencer once again neglects to address the forfeiture rule regarding this claim, this Court should apply forfeiture.

III. The circuit court properly denied Spencer's ineffective-assistance claim without an evidentiary hearing.

A. Standards of review

Whether a defendant sufficiently pled his postconviction motion and whether the record conclusively shows that he is not entitled to relief "are questions of law that [this Court] review[s] de novo." *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659.

If a postconviction motion fails to allege sufficient facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *State v. Romero-Georgana*, 2014 WI 83, ¶ 30, 360 Wis. 2d 522, 849 N.W.2d 668. This Court reviews a "discretionary decision to grant or deny a hearing under the erroneous exercise of discretion standard" of review. *Id*

B. Standards for postconviction motions alleging ineffective assistance.

"A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶ 14, 274 Wis. 2d 568, 682 N.W.2d 433. The mere assertion of a claim like ineffective assistance of counsel is not enough. *Id.* "[T]he motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *Id.* ¶ 21 (second alteration in original) (quoting *State v. Bentley*, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996)). The motion should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Id.* ¶ 23; *see also State v. Balliette*, 2011 WI 79, ¶ 59, 336 Wis. 2d 358, 805 N.W.2d 334.

Where a postconviction motion centers on ineffective assistance of counsel, the defendant must set forth specific allegations that explain *why* counsel was ineffective and *how* such deficiency prejudiced the defense. *See Balliette*, 336 Wis. 2d 358, ¶¶ 65, 70. In other words, he must "make the case of" counsel's ineffectiveness. *Id.* ¶ 67.

"To prove deficiency, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Romero-Georgana*, 360 Wis. 2d 522, ¶ 40 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

To prove prejudice, "the defendant must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

C. Spencer insufficiently pled his ineffective-assistance claim and the record conclusively shows that he is not entitled to relief.

The circuit court properly denied Spencer's ineffective-assistance claim without an evidentiary hearing for two

reasons. First, he insufficiently pled his claim.[6] Second, the record conclusively shows that he is not entitled to relief.

1. Spencer insufficiently pled his claim.

Spencer did not adequately allege prejudice in his postconviction motion. "It has been said repeatedly that a postconviction motion for relief requires more than conclusory allegations." *Allen*, 274 Wis. 2d 568, ¶ 15. And that is what we have here.

As noted, Spencer alleged that his trial counsel's failure to object to hearsay testimony identifying Danny McKinney as shooting to protect R.S. during the armed robbery prejudiced him because "testimony regarding Danny McKinney was key evidence in the State's theory of felony murder." (R. 147:10.) He specified that "[t]he identification of a second shooter at the scene, and the identification of his purpose in shooting, was instrumental in proving an arguable causal connection between the alleged robbery and the death of" T.M. (R. 147:10.) For support, Spencer notes that the State in closing referenced the "return fire protecting" R.S. in arguing that it had proved that the armed robbery caused T.M.'s death. (R. 147:10 (citation omitted).)

Spencer's allegation that the hearsay "was key evidence in the State's theory of felony murder" (R. 147:10), is conclusory because it entirely disregards the abundance of other evidence showing (1) the presence of a second shooter at the scene, and (2) the second shooter's purpose in shooting.

As noted, various pieces of evidence established that on the night of September 8, 2014, multiple gunshots occurred in close succession in the area where police found T.M.'s body.

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[6] This Court may affirm on this alternative basis. *State v. Holt*, 128 Wis. 2d 110, 124–25, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by statute.*

(R. 179:62, 64–65, 67–69, 76–77; 181:94, 99–100, 106.) Independent of the hearsay, the evidence also demonstrated that the gunshots came from two different guns in two different locations, one of which being the residence at 3398 N. 23rd Street—where the armed robbery occurred. (R. 36; 50; 52; 56; 57; 59; 105; 110; 179:79–81; 180:11–12, 14–27, 30–31, 33–35, 79, 82, 85, 92–93; 181:138–43, 225–27; 182:32–37.)

Also unconnected to the hearsay, the jury learned that police had information that someone may have fired shots from the kitchen window in the upper unit of 3398 N. 23rd Street during the encounter. (R. 180:79, 82.) The jury saw photos demonstrating a direct line of fire between the kitchen window and the tree with the bullet strike, near where police found T.M.'s body, and where Spencer dragged R.S. during the encounter. (R. 36; 105; 180:85.)

Further detached from the hearsay, the jury heard that Detective Hardrath found a utility bill in Danny McKinney's name at 3398 N. 23rd Street. (R. 180:92–93.) Moreover, R.S. told the jury that Danny—R.S.'s roommate—was home at the time of the shooting. (R. 180:92–93; 182:27, 29.) And the evidence showed that when Detective Hardrath searched the residence, it appeared to him that someone had recently moved out—possibly quickly. (R. 180:92.)

The above evidence obviously establishes the presence of a second shooter during the encounter. It also reveals the second shooter's purpose in shooting: to protect his roommate during the encounter, of which he had a front-row seat. Given this evidence, why was the hearsay "key evidence" for the State's case? (R. 147:10) Spencer does not explain it, which is why his claim of prejudice is conclusory.[7]

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[7] Notably, despite a 7-page Statement of Facts in his postconviction motion, Spencer did not mention any of the above

The circuit court correctly denied Spencer's ineffective-assistance claim without an evidentiary hearing.

2. The record conclusively shows that Spencer was not prejudiced by the alleged deficiency.

But regardless, given the above evidence, the circuit court correctly decided that the record conclusively shows that Spencer was not prejudiced by any deficient performance. As discussed above, the State had plenty of evidence to establish that Spencer's commission of an armed robbery was a substantial factor in producing T.M.'s death, which is what it needed to convict Spencer of felony murder. (R. 184:44, 50.) Independent of the hearsay, the State offered evidence to show that Spencer's criminal act precipitated a shootout—approximately eight gunshots between two different firearms from two different locations in a manner of seconds—in the area where police found T.M., who died as a result of a gunshot wound to the head. There is nothing more to it.

Spencer's contrary position is unpersuasive. His appellate brief mirrors his postconviction motion. (Spencer's Br. 42–47; R. 147:7–11.) Thus, his allegations of prejudice are once again conclusory, though his appellate brief could not cure his pleading deficiency anyway. *See Allen*, 274 Wis. 2d 568, ¶ 27.

But even if this Court looked past Spencer's pleading deficiency, his bald assertion of prejudice on appeal defeats his claim. He again argues that "testimony regarding Danny

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evidence, except for the fact that Danny McKinney resided at 3398 N. 23rd Street, and that "[t]estimony was introduced by the State at trial that indicated casings from two different guns were found at the scene." (R. 147:4.)

McKinney was key evidence in the State's theory of felony murder" without discussing all the evidence that the State introduced at trial to support causation. (Spencer's Br. 44–47.) He criticizes the circuit court for not discussing this evidence, but he overlooks that it is *his* burden to prove prejudice. *Strickland*, 466 U.S. at 693.[8] Without any explanation as to why, absent the hearsay, "the evidence regarding the elements of felony murder cannot in any way fairly be characterized as overwhelming" (Spencer's Br. 47), he has not shown that the court erred in denying his claim without an evidentiary hearing.

For the above reasons, this Court should affirm.

[8] The State agrees with Spencer's suggestion that the circuit court focused on the wrong evidence in determining that the record conclusively shows that he is not entitled to relief. (Spencer's Br. 46–47.) But it "is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed." *Holt*, 128 Wis. 2d at 124.

CONCLUSION

This Court should affirm Spencer's judgments of conviction and the circuit court's order denying postconviction relief.

Dated this 22nd day of November 2019.

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 8,511 words.

Dated this 22nd day of November 2019.

_____
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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 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 22nd day of November 2019.

_____
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