STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT DARIS SPENCER,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Appeal No. 2018AP942 CR
Trial Case No. Case No. 2014CF5088

(Milwaukee Co.)

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

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I. Spencer Was Denied His Right to Counsel at a Critical Stage.

The State begins its critical stage argument by attempting to distinguish a number of cases involving communication by the trial court with jurors outside of the presence of defense counsel. The State argues, without elaboration, that **Tulley**, **Koller**, **Anderson**, and **Bjerkaas** involved critical stages because counsel could have potentially convinced the court to address communications from the jury in a manner that would have supported the defendant's interests. The State argues: "So the question boils down to whether defense counsel could have potentially convinced the circuit court to address its communications with Juror 2 about the details of her illness and her ability to proceed in a manner that would have supported Spencer's interests." (State's brief at Page 14.)

The State's argument is too narrow. It does not take into account the factual differences between this case and the cases referenced above.

As we pointed out in our brief, 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.

The State doesn't explicitly say so, but we assume the State is claiming with respect to **Koller** and **Bjerkass** that, since the communication with the jurors involved requests for information, counsel's presence would have been helpful to ensure that the information requested was accurately conveyed to the jury. Indeed, that that is why the communications were determined to be harmless, i.e. because the court's information was accurate.

Anderson was a little different. In **Anderson**, during deliberations, the jury wanted to rehear certain testimony . The court denied the request. On appeal the court's actions were determined to have constituted prejudicial error because "... defense counsel *might have* been able to persuade the circuit court to grant the jury's request or to phrase its response in

different, more understandable terms had counsel been included in the circuit court's decision." **Anderson** at ¶100.

Given that **Anderson**, like **Koller** and **Bjerkass**, involved a request from the jury for information, in those situations defense counsel's role could have been to "shape" the court's response to the jury.

This case is factually distinct. In this case, one juror was personally interviewed by the court to determine whether the juror would be excused. There was no request for information from the juror. Consistent with **Anderson** however, the ability to observe the juror personally in order to evaluate the severity of the juror's health issues *might have* allowed counsel to lay a foundation for the retention of the juror. Therefore, it was counsel's *presence* at that interview that was required. Counsel should have been present at those discussions.

Burton is another case the State attempts to distinguish from ours. In **Burton** the defendant argued that the trial judge's entry into the jury room, after four hours of deliberation, to check on the status of the jury's deliberations, was improper. The State's attempt to explain why **Burton** implicated a critical stage and Mr. Spencer's case does not, is a stretch. The State argues that in **Burton** defense counsel's presence at the time of those two brief entries into the jury room might have prevented the court from interrupting the jury's deliberations, and

therefore the trial court's actions occurred at a critical stage of the proceedings. Spencer's interest in retaining the only African-American juror was at least as important as a defendant's interest in not having a jury's deliberations momentarily interrupted.

The State also argues that Spencer was not denied counsel at a critical stage because counsel's presence was not needed, in part, because the interview "... simply involved information gathering." (State's brief at page 15.) This argument is not persuasive. Being present at the time information was gathered regarding the appropriateness of discharging the only African - American on the jury *might have* been beneficial to the defendant. For example, counsel could have explored the history of the illness and how long the juror might need to recover, or at least to proceed. Defense counsel's presence *might have* been helpful in attempting to see to it that the juror was retained on the jury.

The State also compares this case to **Gribble**. **Gribble** is not helpful, and is not on point. In **Gribble** the trial court, prior to the case being called, informed the parties that it intended to finish the process of taking requests from prospective jurors to be excused due to hardship. It was determined by the court of appeals that the court performed administrative functions that could have been carried out by the

clerk of court under Wis. Stat. 756.03, and therefore the questioning of the prospective jurors did not involve a critical stage in the proceedings. These facts are nothing like the facts presented herein. Certainly, in this case, a clerk would not have been allowed, nor would have presumed to be able to, dismiss a juror after the close of testimony.

The State also argues that the defendant's interests were adequately protected because defense counsel moved for a mistrial and renewed her **Swain** challenge. Those actions only underscore the importance to the defendant of retaining the juror on the panel. The fact that both motions were unsuccessful also underscores the importance of counsel's presence when the trial court interviewed the juror.

The State also dismisses our reference to **State v. Alexander** arguing that that court did not examine the question posed herein. The State is too quick to dismiss **Alexander**. As we indicated in our brief, **Alexander** addressed a defendant's right to be present *himself* when a trial court interviewed jurors in chambers. In that case, during the trial, two jurors at separate times approached the bailiff to discuss a potential bias issue. To resolve the matter the judge held separate in-chambers discussions with both jurors. Both of Alexander's attorneys and the prosecutor were present for those discussions. Alexander raised a 6th Amendment challenge because he was not present.

Significant to the court's determination that Alexander's right to be present was not violated was the fact that his attorneys were present. The court recognized that there were times when a fair trial did not necessitate the presence of a *defendant* when the court interviews jurors during a trial. It is in that context that the court in **Alexander** stated:

> That is why our better-reasoned case law provides that whether a defendant must be present when a court meets with members of the jury "admits of no categorical "yes" or "no" answer. ... All that is required when the court communicates with members of the jury is that the defendant's *attorney* be present." (Emphasis by the court.) ¶25.

The supreme court reiterated the point later in the opinion stating: "(a)ll the Constitution requires is the presence of defense counsel." **Alexander** at ¶29.

The court pointed out that his attorneys were permitted to leave chambers to speak with him whenever they needed his input. Because defense counsel was present, Alexander's Sixth Amendment rights were not violated. **Alexander** at ¶30.

Rather than look to our supreme court's statements in **Alexander** for guidance, the State asks that this court consider **Randolph**, a case out of Nevada, to be persuasive. The State incorrectly asserts that the Nevada court found that an ex parte communication during deliberations did not occur at a critical stage. That case was decided on the basis of harmless error.

II. The Denial of Counsel Was Not Harmless Error.

We argued that in the context of this case a harmless error analysis should not be used. That is because of the nature of the case. We believe our brief explains the difficulty of employing a harmless error analysis when dealing with the dismissal of the only African-American from the jury after the close of evidence. The State does not address our arguments.

Regarding how to apply harmless error if warranted, the State dismisses the thoughtful approach to that question of the D.C. circuit under facts similar to ours. The State indicates this court cannot overrule precedent, yet does not cite any binding precedent regarding the application of harmless error to facts such as these.

The State's harmless error analysis wrongly places the burden on the defendant to show that he would have been acquitted. However, as the State indicated at page 13 of its brief, the burden is on the beneficiary of the error to establish lack of prejudice.

The State does not discuss **Tulley** in its harmless error analysis. In **Tulley** the court interviewed jurors on the venire alone. The court determined that, because the prospective jurors with whom the court spoke in camera were not on the jury, the State had shown harmless error. ¶11. As we argued in our brief, sitting jurors are not fungible just because they passed muster in voir dire. The State has not shown the absence of prejudice.

III. Spencer Has Not Forfeited His Right to Challenge the Trial Court's Determination to Dismiss Juror 2.

The State argues that Mr. Spencer has forfeited his right to challenge the trial court's decision to excuse Juror 2. That is simply incorrect.

As we pointed out in our brief, after the court interviewed the juror, whether the juror was to be excused was addressed on the record. The court recited the conversations it had with the juror, summarized what had occurred, and then excused the juror for cause. The court commented that it knew "one of you might have some motions to bring..." and indicated they could state their positions "succinctly for the record" (R.184:22). Defense counsel explained how she had expressed her concern regarding the underrepresentation of minorities on the jury, and pointed out that she had brought a **Swain** challenge on that basis. Counsel then appropriately moved for a mistrial (R.184:23,24).

It was in response to counsel's mistrial motion that the court elaborated on its reasons for excusing the juror. On appeal Spencer has claimed that the court's reasoning in support of its determination to dismiss the juror evinces an erroneous exercise of discretion and, by taking racial characteristics of trial participants into account, the trial court not only erroneously exercised its discretion, but also violated the defendant's constitutional rights. This is a typical attack on a

trial court's reasoning for denying a mistrial motion. There is no forfeiture issue.

As we stated in our brief, a trial court properly exercises its discretion when it has examined the facts, applied the proper standard of law, *and engaged in a rational decision-making process*. **State v. Bunch**, 191 Wis. 2d 501, 506-507, 529 N.W.2d 923,925 (Ct. App. 1995). All we have argued on appeal is that the court did not engage in a rational decision-making process when it ruled on the defendant's mistrial request, even to the extent that its decision making process violated his constitutional rights by taking race into account.

The racial composition of the jury was an issue in this case from the opening bell. After the close of evidence, and after meeting with the juror, the court excused the juror. Defense counsel moved for a mistrial. After allowing the defense to make its record, the court elaborated on its decision. The defendant has appealed. There is no forfeiture here. There is no sandbagging here.

The State does not defend the decision making process of the court because it cannot be defended.

IV. Counsel Was Ineffective For Not Objecting.

The defendant filed a postconviction motion arguing trial counsel was ineffective for not objecting to prejudicial hearsay bearing on the causation element of felony murder. The trial

court did not address whether counsel was ineffective, ruling that the evidence on the causation element was overwhelming. We argued on appeal that the evidence relied on by the trial court to find the evidence to be overwhelming did not address the issue raised. The State, in a footnote, agrees that the trial court focused on incorrect evidence when ruling, but argues that the motion was insufficiently pled, and that the evidence was nevertheless overwhelming. We disagree.

The State does not argue that the testimony was not hearsay. The State does not dispute that the argument to the jury at trial was that T.M. was killed as a result of shots being fired to protect R.S., or that the purpose of the shooting provides the necessary causal connection between the alleged robbery and the shooting of T.M. Rather, the State argues that the issue was insufficiently pled because "Spencer's allegation that the hearsay was 'key evidence' in the State's theory of felony murder ... 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." (State's brief at page 26.)

The abundance of evidence that the State cites in support of its argument consists of a string of citations at page 27 of its brief that it argues indicate that gunshots came from two different guns at two different locations, one being the

residence at 3398 n. 23rd street; the fact that that there was testimony that Danny McKinney was home at the time of the shooting; evidence that a utility bill was found with his name on it; the fact that "... unconnected to the hearsay, the jury learned that police had information that someone may have fired shots from the kitchen window ... during the encounter"; and that there was a bullet strike in a nearby tree. (State's brief at Pages 26,27.)

The above evidence hardly establishes that Danny McKinney fired from the residence at the time of the incident to protect R.S.

Regarding the string cite referring to casings and pictures of the scene, the State ignores testimony from its own witness that it could not be determined from the location of the casings when the shots were fired or where anyone was when they were fired. (R.180:46).

Regarding the argument that the police had " ... information that someone may have fired shots from the kitchen window ... "; that testimony does not prove anything. The State's brief does not inform this court that the "information" referred to was clearly limited by the State at trial. It was not substantive evidence of a shooting. The statement came in response to a foundational question seeking to establish why a search was conducted. The questioning went as follows:

Q. And, *simply for purposes of what you were doing*, did you have any reason to believe that these windows may have been involved or used during the incident that you were investigating.
A. There was information that we had that shots were possibly fired from the residence and specifically, the kitchen windows.
Q. So you went looking to see if you could find any evidence?
A. Correct
Q. Did you find casings in the area?
A. No.
Q. There does appear to be a broom though?
A. Yes. Did you look to see if the trash, to see if there were casings that had been swept up and left in the area?
A. Yes. There was not. (R.180.82)

As can be seen, to avoid a hearsay objection, the State made it clear that the question was foundational, only seeking an explanation of why the search was conducted. If anything, the response highlights the paucity of evidence linking Danny McKinney to any shooting to protect R.S.

The State does not cite any evidence that directly addresses the purpose of the shooting, i.e. to *protect* R.S. In short, there was no evidence, other than the unobjected to hearsay, that established that, at the time of the incident, Danny McKinney was firing a gun with the intent of protecting R.S.

The State's last argument is that the record conclusively shows that Spencer was not prejudiced by the failure of counsel to object because the record establishes that there were eight gunshots between two firearms in a matter of seconds. We have

already shown how the casings alone do not establish why or when shots associated with the found casings were fired.

As we pointed out in our brief, the State never argued that the defendant shot T.M. There was no direct evidence as to when T.M. was shot or why he was shot. It was the hearsay testimony that Danny McKinney was shooting to protect R.S. at the time of the incident that tied the State's case together.

Dated: _____, 2020.

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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 13 pages long including this page.

Dated: _____, 2020.

GRAU LAW OFFICE

By: _____
John J. Grau

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: _____, 2020.

GRAU LAW OFFICE

_____
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