STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP000948-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SEAN N. JONES,

Defendant-Appellant.

Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief, Both Entered in Eau Claire County Circuit Court, Judge Michael A. Schumacher, Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Was the evidence presented at trial sufficient to support the verdict finding Sean Jones guilty of armed robbery as party to the crime?

   The circuit court answered "yes." (82:1-2; App. 199-200).

2. Is Jones entitled to a new trial in the interest of justice because the real controversy was not fully tried?

   The circuit court answered "no." (82:2-4; App. 200-202).

3. Did the circuit court erroneously exercise its sentencing discretion?

   The circuit court answered "no." (82:4; App. 202).

4. Is Jones entitled to additional sentence credit under Wis. Stat. § 973.155?

   The circuit court answered "no." (82:5; App. 203).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is warranted. The issues presented involve the application of settled law to the facts of this case and can be fully addressed in the parties' briefs.

STATEMENT OF THE CASE AND FACTS

Sean N. Jones was charged with being party to the crime of armed robbery of a Rodeway Inn in Eau Claire. (5; 13). Jones pleaded not guilty and the case proceeded to trial.[1]

The basic facts adduced at trial showed that around 2:30 a.m. on May 29, 2016, two masked African American men entered the lobby of the Rodeway Inn in Eau Claire. (94:143, 150-51, 177-78, 245; App. 106, 113-14, 140-41). One man—the taller of the two—approached the clerk, S.E., who was seated behind the desk, and told her to sit still or not move. (94:151-52; App. 114-15).[2] The second man—who was shorter—went around the corner of the desk, keeping his back to S.E. (*Id.*). The shorter man procured a plastic bag and handed it to S.E., who unlocked the cash drawer and began emptying the drawer's contents into the bag. (94:153; App. 116). While S.E. was doing that the taller man said "the deposit drawer, too"; in response S.E. told him she did not have a key for that drawer. (94:154-55, 157; App. 117-18, 120). At that point the shorter man walked backward toward S.E. and started taking items of the cash drawer and placing them in the bag. (94:159-60; App. 122-23).

---

[1] Jones was represented by counsel before and at the start of trial. Counsel moved to withdraw the week before trial, but the court denied that motion. (21:92:2-9). Before the start of the second day of trial, however, Jones asked the court to allow him to represent himself, and after a colloquy the court granted his request. (95:5-19). Counsel remained as standby counsel for the rest of the trial.

[2] S.E.'s testimony about the robbery is included in the Appendix (104-162). On the second day of trial she was recalled briefly to lay foundation for a document admitted in evidence. (95:195-201). That testimony is not essential to an understanding of the issues raised on appeal, so it is not included in the Appendix.

After the cash drawer was emptied the shorter man walked out from behind the desk and headed to, and then out, the door, still keeping his back to S.E. (94:166-67; App. 129-30). The taller man, who had not moved, remained standing in front of the desk. (94:167; App. 130). As S.E. looked toward the taller man he quickly lifted his shirt to reveal what S.E. believed was the handle of a handgun. (94:167, 187-88; App. 130, 150-51). He told her to stay still and then turned and walked out the door. (*Id.*). S.E.'s description of the event was corroborated by a video taken from the surveillance camera in the lobby of the motel and introduced at trial as Exhibit 14. (41:3:40 to 5:25; 95:22-24, 122-24).[3]

S.E. called police to report the robbery. She told them she believed that one of the men may have been Sean Jones, a person she knew by the nickname "Sneak." (94:168-69, 190; App. 131-32, 153). Police were familiar with Jones, so they began looking for him near places he frequented. About half an hour after the robbery police saw Jones driving; they stopped his car and arrested him. (94:203-07, 217). He was alone in the car. (94:213). A search of Jones and his car found $286 in cash, but no gun and none of the clothes or masks worn by the two men who robbed the motel. (94:209, 214, 234-35, 255, 260-62; 95:24-28, 29-30, 110). Jones denied he was involved in the robbery. (94:211-13, 271).

Later on the same day Jones was arrested S.E. told police that a co-worker's cell phone charger had been taken from the cash drawer during the robbery. (94:162-66; App. 125-29). She said she coiled the charger and wrapped it with a piece of paper from the Rodeway Inn on which she wrote the name of the co-worker who owned the charger.

[3] References to video exhibits will be to the minute and second marks—*e.g.*, 41:1:01-2:02.

(94:164; 95:196; App. 127). Jones's estranged wife, Cassandra, who took possession of Jones's car after his arrest, found the note (but not the charger) in the car and eventually turned it over to police. (95:41-44, 128-41, 195-97). A photograph of the interior of Jones's car shows that in the front passenger foot well there is a cell phone charger that appears to match the general description of the charger allegedly taken from the cash drawer. (32).

At a pretrial motion hearing the state indicated that it would be eliciting evidence that the police know Jones from "past professional contacts" and that his nickname is "Sneak." Jones (then represented by counsel) objected. The court ruled the witnesses could refer to Jones's nickname, but could not go into whether Jones has been arrested or convicted previously. (93:36-38; App. 101-03). After S.E. and the prosecutor made multiple references to Jones's nickname early in her testimony Jones renewed his objection; the court overruled it. (94:147-49; App. 110-12).

The jury found Jones guilty of the charge. (96:110). The circuit court sentenced Jones to 13 years, 6 months of imprisonment, consisting of 9 years, 6 months of confinement followed by 4 years of extended supervision. (97:53; App. 182). After the parties indicated they did not agree on whether Jones was entitled to any sentence credit, the court set credit at zero and said it would consider the issue further if Jones submitted authority for his request for credit. (97:55-56; App. 184-85).

Jones filed a motion for postconviction relief. (75). He argued: 1) that the evidence was insufficient to support the guilty verdict; 2) that Jones should be given a new trial in the interest of justice because the real controversy was not tried due to omissions from the jury instructions and the admission

of evidence of Jones's nickname and prior police contacts; 3) that the court erroneously exercised it sentencing discretion and so should modify the sentence; and 4) that Jones was entitled to additional sentence credit. (75:4-19, 23-27).[4] After additional briefing by the parties (76; 79) the circuit court denied the motion in a written decision. (82; App. 199-203). Jones appeals. (84).

Additional facts relevant to each issue are set forth below.

ARGUMENT

I. Jones's Conviction Must Be Vacated Because There Was Insufficient Evidence To Support A Finding That He Was Party To The Crime Of Armed Robbery.

A court will not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Jurors are allowed to "draw logical inferences from the evidence, connecting its dots into a coherent pattern." ***State v. Sarnowski***, 2005 WI App 48, ¶12, 280 Wis.2d 243, 694 N.W.2d 498 (citation omitted). A court must accept the reasonable inferences drawn from the evidence by the jury. ***Poellinger***, 153 Wis. 2d at 506-07. At the same time, however, a jury cannot base its verdict on conjecture and speculation; inferences offered in

[4] Jones also argued the circuit court had the authority to waive the DNA surcharge. (75:19-23). He does not renew that claim in this court, as the argument in support of the claim is now foreclosed by ***State v. Cox***, 2018 WI 67, ___ Wis. 2d ___, ___ N.W.2d ___.

support of a verdict are not reasonable and cannot support a verdict unless they are supported by facts in the record. *See* ***State ex rel. Kanieski v. Gagnon***, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972).

In this case the record at trial does not provide a reasonable basis to find or infer that Jones actually knew the taller man who briefly displayed the gun to S.E. was armed. Nor does the record provide a reasonable basis to find or infer that, under the circumstances, Jones should have expected the taller man to be armed with a dangerous weapon as part of the robbery. Instead, concluding that Jones knew the taller man was armed, or that he should have expected the taller man would use a weapon, requires conjecture and speculation. Thus, the evidence is insufficient to support the jury's verdict finding Jones guilty of being party to the crime of armed robbery.

As the jury was instructed in this case, there were two ways in which Jones could be convicted as party to the crime of the armed robbery—that is, robbery by use or threat of use of a dangerous weapon. Wis. Stat. § 943.32(2). The first way was to find Jones *directly committed* the offense. The second way was to find he *intentionally aided and abetted* the person who directly committed it. (52:3; 96:47). To intentionally aid and abet the offense of armed robbery, the jury was instructed, "the defendant must know that another person is committing or intends to commit the crime of armed robbery by use or threat of use of a dangerous weapon and [must] have the purpose to assist the commission of that offense." (52:4; 96:48). *See also* ***Wis. J.I.-Criminal*** 400 (2005) and 1480 (2016). The evidence introduced at trial is not sufficient to prove beyond a reasonable doubt either one of these alternative ways of finding Jones was party to the crime of armed robbery in this case.

First, the testimony of S.E., the Rodeway Inn clerk, does not support the conclusion that Jones directly committed the crime by being the person who carried and briefly displayed the weapon. The police immediately focused on Jones as one of the two men involved in the robbery because S.E. told them she believed he was involved. (94:169, 190; App. 132, 153). S.E. knew Jones because he had been in a relationship with Michelle Mayer, a friend of hers who had also worked at the motel. (94:144; App. 107). S.E. had seen a car drive through the motel's parking lot about a half-hour before the robbery and believed it was Jones's car. (94:144-47, 194; App. 107-10, 157). She also suspected the robbers knew someone who was connected with the motel because the taller man, who approached her at the desk, asked for "the deposit drawer, too," which only employees know about. (94:154-58; App. 117-21). Finally, the shorter man who came behind the desk and emptied the drawer kept his back to her and did not speak. The police believed the shorter man acted that way to avoid being recognized by S.E. (94:180, 195; 95:122-23; App. 143, 158). Further, S.E. was sure the taller man was not Jones because of his voice. (94:180; App. 143).

Based on S.E.'s testimony, then, and as the state argued in closing, the shorter man who went behind the counter and collected the property was Jones. (94:186; 96:65-66; App. 149). But it was the other, taller man—not Jones—who stood at the desk and lifted his shirt to display the handgun moments before walking out. (94:167, 186; App. 130, 149). As the circuit court acknowledged (82:2; App. 200), because the state made no claim that Jones was armed, he could be convicted of armed robbery only if the evidence proves he intentionally aided and abetted the other man's commission of the crime of armed robbery.

To prove Jones intentionally aided and abetted the other man's armed robbery, the evidence must show beyond a reasonable doubt that Jones *knew* the other man was committing or intended to commit the crime of armed robbery *and* that Jones had *the purpose* to assist the commission of that offense. *See* ***Wis. J.I.-Criminal*** 400 (2005) and 1480 (2016). The jury was instructed accordingly. (52:4; 96:48). For the following reasons, there is no evidence on which a jury could find or infer that Jones knew the second, taller man was armed and that he had the purpose to assist in the commission of an armed robbery.

As S.E.'s testimony and the motel lobby surveillance video make clear, at no time during the incident did either man pull out a weapon and obviously or overtly display it, nor did either man say anything to S.E. to suggest one of them had a weapon. (41:3:26 to 5:37; 94:188, 197, 199; App. 151, 160, 162). Indeed, as already noted, the shorter man said nothing at all during the incident. (94:153, 195; App. 116, 158).

Further, the two men separated immediately upon entering the lobby, and the shorter man continuously kept his back to S.E. while securing a plastic bag and emptying the cash drawer. (41:3:50 to 5:10; 94:181; 95:123; App. 144). The taller man stood on the other side of the desk, obscured by the desk itself from view of the camera and the shorter man. (41:3:50 to 5:20; 94:153-54, 166-67; App. 116-17, 129-30). S.E. testified that the taller man briefly lifted his shirt to quickly reveal the gun handle only *after* the shorter person had finished collecting items from the cash drawer and was already moving away from her and back around the desk. (94:167, 197-98; App. 130, 160-61). Again, the taller man said nothing about a weapon, even at this point. (94:199; App. 162). And "he didn't keep his shirt up very long …. It

was quick, and then it wasn't long before he left the building." 94:187-88; App. 150-51).

The taller man is obscured from view while he is standing in front of the desk (the position he maintained during the entire incident), so the surveillance camera video does not show the taller man lifting his shirt much less show the weapon S.E. testified she saw. However, given the time line in S.E.'s testimony (94:166-67; App. 129-30), the weapon would have been shown after S.E. closed the cash drawer and turned back toward the taller man before sitting down. (41:5:14 to 5:18). The video shows that at the moment the taller man very briefly revealed the weapon, the shorter man had his back both to S.E. *and* the taller man, for he was walking away from S.E. and around the end of the desk as he headed to the door, which he immediately opened and exited, actions that meant he was turning away from where the taller man was standing. The shorter man's view of the taller man was also blocked by the cabinets on the end of the desk and the hood pulled up over his head. (41:5:10 to 5:20). In fact, S.E. testified that she thought the shorter person was not looking at the taller one "because I think he was exiting from the desk at that time" when the weapon was very briefly displayed. (94:198; App. 161).

While there is sufficient evidence to conclude the two men went to the Rodeway Inn to commit a robbery, based on S.E.'s testimony and the video of the incident there is no basis on which a reasonable jury could find or infer that Jones knew the taller man was armed. A display of the weapon or one man's verbal reference to a weapon could be a basis to find or infer one actor knows the other is armed. But here there was no overt display of a weapon and neither man said anything to S.E. about a weapon. *Cf.* ***Roehl v. State***, 77 Wis. 2d 398, 404-08, 253 N.W.2d 210 (1977) (evidence

sufficient to convict defendant for being party to the crime of armed robbery where co-actor openly displayed weapon during robbery); ***Frankovis v. State***, 94 Wis. 2d 141, 148-51, 287 N.W.2d 791 (1980), *overruled on other grounds by* ***Poellinger***, 153 Wis. 2d at 504 n.5 (evidence sufficient to show defendant was party to the crime of robbery based on his participation in act of restraining victim while his property was taken).

Similarly, evidence of what the two men did or said to each other to plan and prepare to commit the robbery could be a basis to find or infer Jones knew the taller man was armed. But there is no such evidence here. While surveillance cameras from outside the motel show the two men standing near the lobby for some 10 minutes before entering, there is no weapon displayed during that time and no audio or other evidence to indicate what, if any, discussion the two had about the robbery. (42; 95:118-20).

Further, after his arrest Jones made no statement indicating that he knew the second man was armed. (94:211-13, 271). Nor was there a statement from the second man—who was never identified or apprehended—that he informed or discussed with Jones that he would be armed. Finally, Jones was stopped and his car searched about half an hour after the robbery. No weapon was found on Jones or recovered from his car. (94:255, 260-62; 95:110).

Yet the circuit court concluded it was reasonable for the jury to infer from the evidence that the men planned and committed an *armed* robbery because they planned and committed *this* robbery; "they appear together in the parking lot before entering the lobby, stand for 10 minutes, enter the lobby, and then separate and take different roles in taking property." (82:2; App. 200). But if these facts tell us the

robbery was planned, they do not tell us all the details of the plan, for planning a robbery does not necessitate planning an *armed* robbery. Thus, evidence showing a plan to commit *a robbery* cannot by itself provide a basis to prove the extra elements necessary to prove aiding and abetting an *armed* robbery—namely, that Jones knew the other person had a weapon and that Jones had the purpose to assist an armed robbery. Without some kind of direct evidence from the lead-up to the robbery or the robbery itself—*e.g.*, a display of a weapon, a verbal reference to a weapon, a discussion in advance about using a weapon—concluding or inferring that Jones knew his accomplice was armed is based on nothing but sheer speculation or guesswork that the planning of this robbery included discussions about using a weapon.

It is true that "an aider and abettor may be guilty not only of the particular crime that to his knowledge his confederates intend to commit, but also for different crimes committed that are a natural and probable consequence of the particular act that the defendant knowingly aided or encouraged." ***State v. Ivy***, 119 Wis. 2d 591, 596-97, 350 N.W.2d 622 (1984). *See also* ***State v. Asfoor***, 75 Wis. 2d 411, 430-31, 249 N.W.2d 529 (1977). One crime is the natural or probable consequence of another if it was a result to be expected, not an extraordinary or surprising result. ***Wis. J.I.-Criminal*** 406 (2005), at 3. Whether the charged crime is a natural and probable consequence of an intended crime is to be determined based upon all the facts and circumstances in a particular case, not merely on the abstract quality of the offenses. ***Ivy***, 119 Wis. 2d at 600; ***Wis. J.I.-Criminal*** 406 at 3.

In ***Ivy*** the supreme court rejected the idea that armed robbery is *never* a natural and probable consequence of robbery. Instead, it held that because robbery is a violent

crime in that it involves the threat or use of force, there *may* be numerous situations in which it would be reasonable to find that armed robbery is a natural and probable consequence of robbery, *based on the facts of the case*:

> For example, if a person intends to rob an armored money truck, it is likely that the person would have to use a weapon during the robbery in order to successfully accomplish the robbery. Similarly, if a person intends to rob a bank or business that is guarded by armed security guards, it is likely that the person would have to use a weapon to successfully effectuate the robbery. If a defendant in either example intended to aid the crime of robbery but actually knew that the person who directly committed the robbery planned to rob an armored money truck, or actually knew that the perpetrator planned to rob a bank guarded by armed security guards, and an armed robbery actually occurred, the defendant conceivably could be liable for the commission of the armed robbery even though he or she did not actually know that the person directly committing the robbery was armed with a dangerous weapon. Under those circumstances, the armed robbery could be considered a natural and probable consequence of robbery and, given the facts the defendant actually knew about the robbery he or she intended to assist, he or she would at least be on notice of the likelihood that the person who directly committed the robbery would be armed with a dangerous weapon and might use that weapon.

Id. at 600-01. Because a defendant acting as a party to a crime in those situations should be on notice of the possibility of the use of a weapon in the commission of the crime, the defendant would not have to have actual knowledge of the use of a dangerous weapon. ***Id.*** at 600, 602. *Cf.* ***Asfoor***, 75 Wis. 2d at 430-32 (defendant properly convicted of aiding and abetting injury by negligent use of a weapon because he could have foreseen shooting as natural and probable

consequence of lesser crime of battery that he intended to aid, where he and accomplices, who were carrying firearms, set out to give victim a "thrashing").

The facts and circumstances in this case do not support the finding that *armed* robbery was a natural and probable consequence of the robbery of this Rodeway Inn. Unlike the examples in ***Ivy***, there is no evidence suggesting a weapon would likely (or even possibly) be necessary to successfully commit the offense. There is no evidence the Rodeway Inn employed armed guards or that the robbery would be confrontational in a way that would require use of a weapon.

In addition, because the taller man asked for "the deposit drawer, too," S.E. believed the men had knowledge of the motel's practices. (94:154-58; App. 117-21). A person with that knowledge would also know there were no armed guards at the business and would know that at 2:30 a.m. there would be little likelihood anyone would be present other than the desk clerk. Further, as already noted above, there is no other evidence on which to base the conclusion that a weapon was discussed or displayed in the planning of the robbery or while the two men were outside before entering the lobby. Accordingly, nothing about the facts and circumstances of this case support the conclusion that the *armed* robbery was a natural and probable consequence of the crime of robbery.

Jones acknowledges this court must give great deference to a jury's verdict and adopt the reasonable inferences that support that verdict. ***Poellinger***, 153 Wis. 2d at 507. But those reasonable inferences must be supported by facts in the record, not on conjecture and speculation. ***Kanieski***, 54 Wis. 2d at 117. While there is sufficient evidence to prove the shorter man—Jones—knew the taller man was committing a robbery and that he intended to assist

in the commission of that robbery, there are no facts in the record at trial to provide a reasonable basis to find or infer that Jones actually knew the second man was armed. Nor are there facts in the record that provide a reasonable basis to find or infer that, under the circumstances, Jones should have expected the taller man would be armed with a dangerous weapon as part of the robbery. Instead, concluding Jones knew the taller man was armed, or that he should have expected the taller man would use a weapon, requires conjecture and speculation. Thus, the evidence was insufficient to support the jury's verdict that Jones is guilty of being party to the crime of armed robbery. The judgment of conviction should be vacated and a judgment of acquittal entered in its stead. ***Ivy***, 119 Wis. 2d at 608.

II. Alternatively, Jones Is Entitled To A New Trial In The Interest Of Justice Because The Real Controversy Was Not Fully Tried.

This court may order a new trial in the interest of justice if it determines that the real controversy was not fully tried. Wis. Stat. § 752.35. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). This court has broad discretion to reverse judgments under this rule, which "enables it to achieve justice in individual cases," though the power should be used only in exceptional cases. ***Vollmer***, 156 Wis. 2d at 11, 21. Such exceptional cases include those where the real controversy was not fully tried because the jury heard improperly admitted evidence that clouded a crucial issue or the jury was erroneously instructed. ***Id.*** at 19-20. *See also* ***State v. Bannister***, 2007 WI 86, ¶41, 302 Wis. 2d 158, 734 N.W.2d 892; ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). These errors may be grounds for a new trial in the interest of justice even if they were not preserved by objection. Wis. Stat. § 752.35; ***Vollmer***, 156 Wis. 2d at 13.

It is not necessary to consider whether a retrial would probably have a different result when deciding whether to grant a new trial on the grounds that the real controversy has not been fully tried. ***Vollmer***, 156 Wis. 2d at 19. A court considers the totality of the circumstances to determine whether a new trial is required "to accomplish the ends of justice because the real controversy has not been fully tried." ***State v. Wyss***, 124 Wis. 2d 681, 735–36, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***Poellinger***, 153 Wis. 2d at 505–06 and n.6.

The real controversy was not fully tried in this case for two reasons. First, despite the paucity of evidence Jones aided and abetted an armed robbery rather than an unarmed robbery, the jury was not instructed to consider whether Jones was guilty only of robbery rather than armed robbery. Second, improperly admitted testimony referring to Jones's nickname and his prior police contacts clouded the issue at trial by painting Jones as the kind of bad character likely to have been involved in the robbery.

A. The jury should have been instructed using ***Wis. J.I.-Criminal*** 406 and offered the lesser included offense of robbery.

While the defense at trial was focused on whether Jones was involved in the robbery at all, cross-examination of S.E. elicited facts that show the lack of evidence regarding Jones's knowledge that the taller man had a weapon. (94:197-98; App. 160-61).[5] So even though the jury had sufficient evidence to conclude that Jones was involved in the robbery

[5] After trial Jones admitted his involvement in the robbery, but stated consistently that he did not know his accomplice (who he offered to name, but ultimately did not) was armed. (58; 65:7-8; 70:1-3; 97:30-32, 43; App. 172).

and aided and abetted that robbery, the jury would still have to conclude Jones knew the second man had a weapon or that he should have expected the use of the weapon as a natural and probable consequence of the robbery. Even if the court has rejected Jones's argument in the previous section that there is insufficient evidence showing Jones aided and abetted an *armed* robbery, there is scant evidence showing that Jones knew his accomplice had a weapon. That paucity of evidence made it crucial to instruct the jury about how to assess Jones's level of culpability in the crime.

A trial court has broad discretion in instructing a jury but must exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law and assist the jury in making a reasonable analysis of the evidence relating to the elements of the offense. ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996); ***State v. Dix***, 86 Wis. 2d 474, 487, 273 N.W.2d 250 (1979). Proper instruction of the jury is a crucial component of the jury's decision making process—so much so that the validity of the jury's verdict depends on the correctness and completeness of the instructions. ***State v. Perkins***, 2001 WI 46, 243 Wis. 2d 141, ¶40, 626 N.W.2d 762.

Despite the lack of evidence that Jones either knew his accomplice was armed or should have expected his accomplice to be armed, the jury was not given the chance to consider fully whether Jones was guilty of aiding and abetting a *robbery* rather than an *armed* robbery. To assure the jury fully considered that possibility it should have been instructed on two other issues.

First, the jury should have been instructed with ***Wis. J.I.-Criminal*** 406, which would have advised the jury how to decide if the armed robbery was a natural and

probable consequence of the robbery. *Cf.* ***Ivy***, 119 Wis. 2d at 601-02 (whether a crime charged was a natural and probable consequence of the crime with which a defendant allegedly assisted is an issue for the jury to decide in light of the facts of the case). This would have focused the jury's attention on the question of the lack of Jones's knowledge of the weapon and the lack of evidence that Jones should have expected the other person to use a weapon under the facts of this case.

Second, the jury should have been given the lesser included offense of unarmed robbery, ***Wis. J.I.-Criminal*** 1479 (2009). A lesser-included offense jury instruction is proper when: (1) the crime for which an instruction is given is a lesser-included offense of the crime charged, and (2) there are reasonable grounds in the evidence to acquit on the greater charge and convict on the lesser charge. ***State v. Jones***, 228 Wis. 2d 593, 598, 598 N.W.2d 259 (Ct. App. 1999). The evidence must be viewed in the light most favorable to the defendant and to the requested instruction. ***State v. Foster***, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995). "Further, the lesser-included offense should be submitted only if there is a reasonable doubt as to some particular element included in the higher degree of crime." ***Id.*** (quoted source omitted).

All of these requirements are met in this case. Robbery under Wis. Stat. § 943.32(1) is a lesser included of armed robbery under § 943.32(2) because all of the elements in the former are included in the latter. Wis. Stat. § 939.66(1); ***Kimmons v. State***, 51 Wis. 2d 266, 268-69, 186 N.W.2d 308 (1971). The "use or threat of use of a dangerous weapon" element is the single element distinguishing the two offenses, and there are reasonable grounds to doubt Jones either knew the second man had a weapon or should have expected he would use a weapon. Thus, there were reasonable grounds for

a jury to acquit on the greater offense and convict on the lesser. While the trial focused on the question of whether Jones was involved in the robbery, the evidence also necessarily raised the issue of whether the shorter man—whoever he was—actually knew or should have expected the taller man would be armed. Thus, that issue was part and parcel of the real controversy at issue in this case.

The circuit court denied Jones's postconviction claim for a new trial based on the absence of these two instructions because Jones did not request the instructions as a matter of "strategy" and therefore forfeited the claim. (82:2-3; App. 200-201). Jones conceded in his postconviction motion (75:13) and concedes again here that, during the jury instruction conference (96:27-35; App. 163-71), he did not request ***Wis. J.I.-Criminal*** 406 or the lesser included offense of unarmed robbery. That is why he raised the issue in the interest of justice, as instructional errors may be grounds for a new trial in the interest of justice even when there was no objection to the instructions as given. ***Vollmer***, 156 Wis. 2d at 20. Thus, the fact that Jones did not request the instructions is not dispositive of his interest of justice claim.

The circuit court also concluded that Jones did not request the instructions as a matter of "strategy." (82:3; App. 201). The record does not support this conclusion. At the time of the jury instruction conference Jones was representing himself. The lack of familiarity with jury instructions one expects with a *pro se* litigant was evident at that conference. The court expressly asked Jones if any instructions were omitted, and he responded "I've never seen this packet before so I wouldn't know." (96:35; App. 171). But at the same time, Jones and the circuit court relied on standby counsel's input about the instructions (*e.g.* 96:31-32;

App. 167-68) and standby counsel said he could not think of any instructions that were missing. (96:29, 34; App. 165, 170). There is no indication in the record standby counsel thought about or consulted with Jones about ***Wis. J.I.-Criminal*** 406 or the lesser-included offense option. At best, then, the record shows Jones's inexperience and ignorance and an absence of advice regarding those instructions from standby counsel, not strategy based on Jones's own thinking or in consultation with standby counsel.

Jones recognizes this court has said it is not inclined to exercise its discretionary power of reversal where the trial error is attributable to a *pro se* defendant's own performance, because "[t]o rescue [a] defendant from the folly of his choice to represent himself would diminish the serious consequences of the decision he made when he elected to waive counsel." ***State v. Clutter***, 230 Wis. 2d 472, 478, 602 N.W.2d 324 (Ct. App. 1999). But that disinclination should not prevail here in light of the clear issues presented by the facts of this case about party to the crime liability for armed robbery and given the reliance the circuit court and Jones were placing on standby counsel's "comments and observations." (96:29; App. 165). Instead, this court should find the real controversy was not tried when the jury was not directed to consider more carefully the lack of evidence of Jones's knowledge of or expectation regarding his accomplice being armed. Accordingly, Jones should be granted a new trial in the interest of justice.

B. Testimony regarding Jones's nickname and his previous police contacts should not have been admitted at trial.

In a pretrial ruling the court allowed reference to Jones's nickname ("Sneak") but not to any prior arrests or

convictions. (93:36-38; App. 101-03). After a few references to Jones as "Sneak" during the testimony of S.E. (94:144-45, 146; App. 107-08, 109), Jones's attorney objected again to the use of the name. The court overruled the objection. (94:147-49; App. 110-12). S.E., two police officers, and the lawyers continued to refer to Jones as "Sneak" multiple times thereafter. (94:149, 150, 153, 169, 172, 192, 193, 194, 203-04, 269, 271; App. 112, 113, 116, 132, 155, 156, 157).

In addition to these uses of Jones's nickname, one officer testified that the dispatch regarding the incident used "a nickname or a street name if you will, of Sneak." (94:269). Moreover, two police officers testified that they knew Jones from past "professional" experience or contacts. (94:204, 205; 95:107).

The state asserted, and the circuit court agreed, that Jones's nickname and prior police contacts were relevant because that is how the witnesses knew and could identify Jones. (82:3-4; 93:36, 37, 38; 94:148-49; App. 102, 103, 104, 111-12, 201-02). As the state also acknowledged, however, the nickname suggests or implies "stealing" and "a sentiment of deception." (93:37-38; App. 102-03). For the following reasons, Jones's nickname had only limited relevance and, once used for its limited purpose, further reference to the nickname should have been precluded because its relevance was substantially outweighed by the danger of unfair prejudice. In addition, references to the officers' prior "professional" experience or contacts with Jones were minimally relevant and substantially outweighed by the danger of unfair prejudice and so should have been excluded.

S.E. testified, and the state argued, that S.E. initially knew Jones only by his nickname, not his given name. (94:144, 148; App. 107, 111). This fact would allow the state

to elicit that fact to lay a foundation for S.E.'s identification of Jones. Likewise, a reference by an officer that police knew Jones as "Sneak" is relevant to establish that S.E. and police are talking about the same person.

But as the circuit court itself implicitly recognized, if S.E. "now knows the defendant as Sean Jones," not just "Sneak," the nickname is irrelevant. (94:148-49; App. 111-12). S.E. *did* identify Jones as Jones (94:145; App. 108) and thus effectively confirmed she knew him and could respond to questions referring to him as Jones rather than "Sneak." (94:172, 177, 179, 196; App. 135, 140, 142, 159). Indeed, S.E. testified she had "slept at the same house as [him]" because she had stayed with Mayer for a time when she was homeless. (94:172-73; App. 135-36). Because S.E. knew Jones as Jones by the time of trial, nothing about repeated uses of the nickname had any tendency to make S.E.'s identification of Jones more probable, particularly since Jones was not disputing that was his nickname. Wis. Stat. § 904.01 ("relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence).

Further, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice … or needless presentation of cumulative evidence." Wis. Stat. § 904.03. Again, references to "Sneak" are wholly cumulative once it is established that Jones, who S.E. has identified in court, is the person S.E. knew by that nickname.

More problematically, the name, as the state conceded, carries highly inflammatory connotations of thievery and dishonesty. That makes reference to the name unfairly

prejudicial. Evidence is unfairly prejudicial when it has "a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. Stated more concisely, unfair prejudice means a tendency to influence the outcome by *improper* means." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992) (citations omitted; emphasis in original). Because the probative value of the nickname evaporated once S.E. identified Jones, the prejudice of the nickname substantially outweighed the probative value. Thus, repeated use of the nickname should have been excluded under Wis. Stat. § 904.03.

Further, two officers testified they knew Jones from prior "professional" contacts or experience. The adjective "professional" makes it clear the officers did not just know Jones from seeing him around town, but that they knew him because he had been the object of police scrutiny. People are an object of police scrutiny when they are suspected of or alleged to have committed unlawful acts. Thus, even without testimony as to the details of the "professional" contacts or whether they resulted in arrest or conviction, the officers' statements were the functional equivalent of saying Jones has committed other bad acts.

Evidence of other bad acts is not admissible except for specific limited purposes. Wis. Stat. § 904.04(2)(a). While identity is a permissible purpose, *id.*, the need for the officers to testify they knew Jones on the basis of their prior contacts was not serving that purpose. The officers were not eyewitnesses to the offense, so the accuracy of their perception of who committed the crime was not being tested. Rather, they were called on to look for Jones after he had

been named as a suspect. Under these circumstances, a simple statement that an officer knows Jones is all that is necessary, and reference to past "professional" contacts had virtually no probative value. And given that the reference to prior police contacts or experience suggests a propensity to violate the law, the slight probative value of how the police know Jones was substantially outweighed by the unfair prejudice created by the phrase.

While one or two unnecessary references to Jones as "Sneak" or to his prior police contacts would not cloud the central issue at trial in this case, the multiple references had a cumulative impact that did. The highly negative connotations of the nickname "Sneak" repeated multiple times and two officers saying they have had "professional" experience with Jones painted a picture of a man who is a serial, untrustworthy lawbreaker, just the kind of person who would engage in robbery. One of the central issues at trial, and the one the parties focused on the most, was whether Jones was one of the persons who robbed the Rodeway Inn, so this picture clouded the jury's consideration of the evidence in an unfairly prejudicial way. Accordingly, Jones should be granted a new trial in the interest of justice.

III. The Court Erroneously Exercised Its Discretion At Sentencing And Thus Should Modify Jones's Sentence.

Sentencing decisions require a trial court to exercise its discretion. ***State v. Ogden***, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996). To be sustained, a discretionary determination must be made using a process of reasoning, which must in turn depend on facts in the record or reasonably inferred from the record. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). In addition,

because discretion "is not synonymous with decision-making," there must be "evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth." ***Id***. at 277 (citations and quotation marks omitted). Thus, "requisite to a *prima facie* valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed." ***Id.*** at 280-81.

To exercise its discretion, a sentencing court must consider three primary sentencing factors: the gravity of the offense, the character of the offender, and the need to protect the public. ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). A sentencing court must specify on the record the objectives of the sentence, the facts relevant to those objectives, the factors considered in arriving at the sentence and how those factors fit the objectives and influenced the sentencing decision. ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, ¶¶40-43, 678 N.W.2d 197. *See also* ***State v. Harris***, 2010 WI 79, ¶29, 326 Wis. 2d 685, 786 N.W.2d 409 (courts "must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives"). Further, the sentence imposed by the court must call for the minimum amount of confinement consistent with the appropriate sentencing factors. ***McCleary***, 49 Wis. 2d at 276; ***Gallion***, 270 Wis. 2d 535, ¶44. Thus, if the court chooses to impose a sentence instead of probation, it must explain why the duration and terms of the sentence will promote the court's sentencing objectives. ***Id.***, ¶¶45, 46, 49.

The court explicitly referred to the primary sentencing factors in this case. (97:45, 52; App. 174, 181). The court indicated its primary objectives were protection of the community and punishment of the offender, and that

achieving those objectives would require "a significant period" of imprisonment. (*Id.*). Yet the court also said it had not given up hope for rehabilitation, noting that though Jones had an extensive prior criminal record he is "bright" and has "some ability to do some good things" but had not made good use of his skills and talents at this point in his life. (97:45-46; App. 174-75). The court noted Jones's programming and treatment needs, including addressing his drug abuse issues, and said that successfully addressing those needs could reduce his risk of offending in the future. (97:47-49, 51; App. 176-78, 180).

The court also noted the nature of the offense—that the robbery was planned, that masks were used to conceal identity, and that Jones's accomplice had a gun—and that Jones was willing to commit a robbery or engage in other offenses to get money rather than taking advantage of his skills and talents. (97:49-50; App. 178-79). Finally, the court noted Jones was 35 years old and referred to the general reduction of recidivism with age, and indicated it intended Jones to be under supervision until he was approximately age 50. (97:53-54; App. 182-83).

Jones acknowledges that the circuit court provided a lengthy statement of its sentencing rationale, one which clearly supports the court's decision to impose a prison sentence as opposed to some other disposition. The court also stated it did not "pick numbers out of the air" because it was considering how old Jones would be when he completed supervision. (97:53; App. 182). Nonetheless, the court's explanation fell short in one narrow but important way—namely, regarding the duration of the components of the sentence in light of the relevant sentencing factors and goals the court identified.

While there is no specific formula or rote phrase a court must employ, it must explain why the duration of the components of the bifurcated sentence advance the objectives of its sentence and why the sentence is the minimum amount of custody or confinement that is consistent with the sentencing factors. ***Gallion***, 270 Wis. 2d 535, ¶¶40-46; ***Harris***, 326 Wis. 2d 685, ¶29. The court's canvassing of the primary sentencing factors in this case was clearly complete, but the court did not explain why the duration of the specific incarceration and supervision components of the bifurcated sentence would advance the objectives of its sentence. The court also failed to explain why the sentence it imposed is the minimum amount of custody or confinement that is consistent with the primary sentencing factors.

Specifically, the court's statements regarding its sentence do not fully explain why 13 years, 6 months, consisting of 9 years, 6 months of confinement and 4 years of supervision, advances its goals. First, the penalty for the offense in this case allows for up to 15 years of extended supervision. Wis. Stat. § 973.01(2)(d)2. Thus, having Jones under supervision until he is 50 may be achieved by imposing a longer period of supervision without necessarily having to impose a long term of initial confinement. Moreover, the goals of significant punishment for Jones and protection of the public can be achieved by a shorter term of confinement. Six or seven years of confinement exceed any term of confinement Jones has served before—the longest of which was four years (63:6)—so a term of confinement in that range will impose significant measure of punishment on him. It will also provide a lengthy period of public protection that will take Jones into his early 40s and still give him ample time for treatment and programming in the prison system.

While how much explanation is necessary for the sentence imposed "will vary from case to case." ***Gallion***, 270 Wis. 2d 535, ¶39, the record here shows that the circuit court did not fulfill its obligation to provide a statement explaining the reasons for selecting the particular sentence imposed. ***Id.***, ¶22, *quoting* ***McCleary***, 49 Wis. 2d at 281. Because the court did not explain why the duration of the specific incarceration and supervision components of the bifurcated sentence advance the objectives of the sentence or why the sentence is the minimum amount of confinement consistent with the primary sentencing factors, the sentence is the result of an erroneous exercise of discretion.

A defendant may seek a modification of sentence when an erroneous exercise of discretion clearly appears on the record. ***State v. Brown***, 2006 WI 131, ¶41, 298 Wis. 2d 37, 725 N.W.2d 262, *citing* ***McCleary***, 49 Wis. 2d at 278. Because the circuit court erroneously exercised its sentencing discretion, this court should remand the case so the circuit court can consider modifying Jones's sentence to provide a lesser term of initial confinement and a longer term of extended supervision.

IV. Jones Is Entitled To 204 Days Of Sentence Credit Under Wis. Stat. § 973.155.

Jones was arrested for the offense in this case on May 29, 2016, shortly after the robbery occurred. (94:203-08). At the time of his arrest he was on probation in Eau Claire County Case Nos. 15-CF-396 and 15-CF-455. (75:28-33; App. 187-92). His arrest for the charges in this case triggered a probation hold. (87:3).

At Jones's initial appearance the court set a signature bond. (4; 7; 87:3). However, Jones remained in custody on the probation hold throughout probation revocation

proceedings. His probation was revoked after a hearing in September 2016, and he was ordered to be returned to court for sentencing after revocation. (75:35; App. 194). On December 19, 2016, he was sentenced to concurrent sentences of three years in prison in each case and given credit for 212 days, which included the time he spent in custody from his arrest on May 29 to his sentencing on December 19 plus some additional time in custody not related to this case. (75:35-39; App. 194-98).

For the following reasons, Jones is entitled to credit toward the sentence imposed in this case for the time he spent in custody between May 29 and December 19, 2016, even though that time was also credited to the sentences imposed after revocation in Case Nos. 15-CF-396 and 15-CF-455.

Wisconsin Statute § 973.155(1)(a) provides that "[a] convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." Under the case law applying this statute, so-called "dual credit"—crediting a single period of custody toward two different sentences—is appropriate when the custody is: (1) connected to the conduct for which both sentences were imposed and (2) the sentences are concurrent. ***State v. Carter***, 2010 WI 77, ¶17, 327 Wis. 2d 1, 785 N.W.2d 516; ***State v. Rohl***, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991).

Dual credit is granted without regard for the timing of the imposition of the concurrent sentences; instead, it is the factual connection between the custody and the conduct for which sentence is imposed that is controlling. ***Carter***, 327 Wis. 2d 1, ¶17, 30-34, 38, 54-56. Further, the custody need not be based *solely* on the case in which credit is

granted. ***Id.***, ¶¶10-11, 57-82 (defendant arrested on both a Wisconsin warrant and Illinois charges was entitled to credit toward concurrent sentence in the Wisconsin case for time served in custody in Illinois after his arrest, but before sentencing on the Illinois charges).

Thus, when a defendant is placed in custody on both new charges *and* a supervision hold that is based in part on the new criminal conduct, the defendant's custody is in connection with both the case for which the defendant is on supervision *and* the case arising from the new criminal conduct. ***State v. Beets***, 124 Wis. 2d 372, 378-79, 369 N.W.2d 352 (1985) (probation hold); ***State v. Hintz***, 2007 WI App 113, 300 Wis. 2d 583, ¶¶3-4, 7-11, 731 N.W.2d 646 (extended supervision hold); ***State v. Davis***, 2017 WI App 55, ¶¶2-4, 8, 377 Wis. 2d 678, 901 N.W.2d 488 (extended supervision hold). *See also* ***Wis. J.I.-Criminal*** SM-34A (2016), at 11, 14, 17.

Dual sentence credit is *not* available for time during which the defendant was in custody and actually serving a sentence for a separate crime. That is because commencing service of a sentence in one case severs the connection between the custody and any other case in which sentence has not yet been imposed. ***Beets***, 124 Wis. 2d at 377-79; ***Carter***, 327 Wis. 2d 1, ¶82; ***Davis***, 377 Wis. 2d 678, ¶¶ 7-10. *See also* ***Wis. J.I.-Criminal*** SM-34A at 10-11, 14. When a defendant is on probation and probation is revoked due to new charges, the defendant generally begins serving the sentence imposed after revocation of probation on the day of sentencing. Wis. Stat. § 973.15(1) (unless stayed, sentence begins on the day it is imposed). Thus, the connection between the defendant's custody and the pending new charges is severed on the date he is sentenced after revocation. ***Beets***, 124 Wis. 2d at 379.

Jones's custody from May 29 to December 19, 2016, satisfies the criteria for dual credit:

• *First*, Jones was in custody starting on May 29 due both to the new charges in this case and the probation holds in Case Nos. 15-CF-396 and 15-CF-455. After his probation was revoked he was returned to court for sentencing after revocation. When he was sentenced after revocation on December 19, 2016, the connection between his custody and the charges in this case was severed, and his entitlement to credit in this case ended. Thus, the period Jones was in custody between his arrest (May 29) and his sentencing after revocation (December 19) is factually connected to both cases.

• *Second*, while the custody was credited toward the sentences imposed after revocation in Case Nos. 15-CF-396 and 15-CF-455, the sentence imposed in this case was ordered to run concurrent to the sentences imposed after revocation, which were concurrent to each other and which Jones was still serving at the time of sentencing in this case. (69:1; 97:54-55; App. 183-84).[6]

At sentencing the state questioned whether Jones was entitled to credit at the time of sentencing. (97:55-56; App. 184-85). The state initially took no position on Jones's postconviction request for credit, but when the circuit court specifically asked for the state's position the state indicated it did not object to the request for credit. (76:4; 79:5; 80; 81). Nonetheless, the circuit court denied Jones's request, concluding that because Jones was on a signature bond and

[6] Given the length of the sentences imposed after revocation and the amount of credit awarded, the confinement portion of the sentences would have expired on or about November 19, 2017, and the maximum discharge date is approximately May 19, 2019.

received the credit toward the probation revocation sentences "he was not 'in custody' on the armed robbery charge." (82:5; App. 203). The circuit court's conclusion is incorrect.

Jones was given and then signed a signature bond in this case. (5; 7)[7] But that does not mean he was no longer in custody in connection with this case for sentence credit purposes. What matters under Wis. Stat. § 973.155(1)(a) is that a defendant is "in custody in connection with the *course of conduct* for which sentence was imposed." If the conduct on which a new criminal charge is based is also the conduct on which a supervision hold is based, signing a bond on the new charge does not alter the fact that, because of the supervision hold, the defendant remains in custody due to the conduct underlying the new charge. *See* ***Hintz***, 300 Wis. 2d 583, ¶¶3, 7-8, 11 (where a defendant is on a supervision hold based in part on new charges for which he was given a signature bond, he is still in custody in connection with *both* the new charges *and* the supervision case). Because the conduct charged in this case was *also* the conduct for which Jones remained in custody on the probation hold, Jones's signing of the signature bond in this case did not change the fact that he remained in custody on the probation hold because of the alleged robbery. Therefore, Jones was "in custody in connection with the *conduct* for which sentence [in this case] was imposed."

For the same reason, the fact Jones received credit on the sentences imposed after revocation of probation does not mean he was not in custody in connection with this case up until the point he was sentenced after revocation. Again, the course of conduct that was one basis for his custody between

[7] Jones's postconviction motion mistakenly stated Jones had *not* signed the bond. (75:26 n.2).

May 29 and December 19 was the armed robbery charged in this case. The connection between his custody and the course of conduct in this case was severed only when he was sentenced after revocation in the previous cases. ***Beets***, 124 Wis. 2d at 379. Up until that date, he was in custody in connection with this case, too, and he is entitled to credit toward the concurrent sentence imposed in this case for his days in custody before he was sentenced after revocation.

In short, Jones was in custody between May 29 and December 19, 2016, in connection with both this case and the probation hold in Case Nos. 15-CF-396 and 15-CF-455. He should be granted credit in this case for that period of time because the sentence in this case is concurrent with the sentences imposed after revocation. This court should reverse the circuit court's order denying Jones's request for 204 days of credit toward the bifurcated sentence imposed in this case.

CONCLUSION

Because the evidence was insufficient to convict Jones of being party to the crime of armed robbery, this court should reverse the order denying postconviction relief, vacate the judgment of conviction, and remand the case with directions that it be dismissed.

If this court concludes the evidence was sufficient, it should reverse the order a new trial in the interest of justice, vacate the judgment of conviction, and remand the case for a new trial.

If this court does not agree Jones is entitled to a new trial, it should reverse the order denying a sentence modification and remand the case for the circuit court to consider modifying Jones's sentence.

Finally, this court should reverse the order denying sentence credit and remand the case with instructions that the circuit court issue an amended judgment of conviction granting Jones 204 days of sentence credit.

Dated this 23rd day of July, 2018.

Respectfully submitted,

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,616 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 23rd day of July, 2018.

Signed:

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

Record has been so reproduced
to preserve confidentiality

I N D E X
T O
A P P E N D I X

CERTIFICATION AS TO APPENDIX

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 § 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 s. 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 decisions showing the circuit court's reasoning regarding those issues.

I further 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, 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 this 23rd day of July, 2018.

Signed:

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Defendant-Appellant