STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP948-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SEAN N. JONES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL A. SCHUMACHER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

INTRODUCTION 2

STATEMENT OF THE CASE AND FACTS 3

STANDARD OF REVIEW 6

ARGUMENT 7

I. The evidence at trial was sufficient for the jury to find Jones guilty of armed robbery as party to the crime. 7

A. Applicable legal principles. 7

B. There was sufficient evidence at trial for the jury to find Jones guilty of armed robbery as party to the crime. 8

II. Jones is not entitled to a new trial in the interest of justice. 14

A. Applicable legal principles. 14

B. This Court should decline to order a new trial on the ground that the jury was not instructed on robbery as a lesser included offense, or on armed robbery being a natural and probable consequence of robbery. 15

C. Jones has not shown that the real controversy was not fully tried because references were made to his nickname, and officers testified that they knew him from past professional contacts. 18

Page

III. The circuit court properly exercised its discretion in imposing Jones' sentence. 22

A. Applicable legal principles. 22

B. The sentencing court properly explained the sentence it imposed. 22

IV. The circuit court properly denied Jones request for 204 days of sentence credit..... 24

A. Applicable legal principles. 24

B. Jones is not entitled to sentence credit from the time after he was given and signed a signature bond. 24

CONCLUSION..... 28

TABLE OF AUTHORITIES

Cases

Bergeron v. State,
85 Wis. 2d 595, 271 N.W.2d 386 (1978) 15, 16

Graff v. Roop,
7 Wis. 2d 603, 97 N.W.2d 393 (1959) 14

State v. Avery,
2013 WI 13, 345 Wis. 2d 407, 826 N.W.2d 60..... 6, 15

State v. Beamon,
2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681..... 6, 7

State v. Beiersdorf,
208 Wis. 2d 492, 561 N.W.2d 749
(Ct. App. 1997)..... 26, 27

State v. Bergeron,
162 Wis. 2d 521, 470 N.W.2d 322 (Ct. App. 1991)..... 20

State v. Clutter,
230 Wis. 2d 472, 602 N.W.2d 324 (Ct. App. 1999)..... 16

Page

State v. Evers,
139 Wis. 2d 424, 407 N.W.2d 256 (1987) 22

State v. Gallion,
2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197..... 6, 22, 23

State v. Hayes,
2004 WI 80, 273 Wis. 2d 1, 681 N.W.2d 203..... 7

State v. Hintz,
2007 WI App 113, 300 Wis. 2d 583,
731 N.W.2d 646 ..... 6, 24, 25, 26

State v. Ivy,
119 Wis. 2d 591, 350 N.W.2d 622 (1984) 13

State v. Johnson,
2007 WI 107, 304 Wis. 2d 318,
735 N.W.2d 505 ..... 24, 27

State v. Johnson,
2009 WI 57, 318 Wis. 2d 21, 767 N.W.2d 207..... 26, 27

State v. Long,
2009 WI 36, 317 Wis. 2d 92, 765 N.W.2d 557..... 6

State v. Poellinger,
153 Wis. 2d 493, 451 N.W.2d 752 (1990) 7

State v. Smith,
207 Wis. 2d 258, 558 N.W.2d 379 (1997) 22

State v. Spears,
227 Wis. 2d 495, 596 N.W.2d 375 (1999) 22

State v. Toy,
125 Wis. 2d 216, 371 N.W.2d 386 (Ct. App. 1985)..... 7

State v. Watkins,
2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244..... 14

State v. Wery,
2007 WI App 169, 304 Wis. 2d 355, 737 N.W.2d 66..... 15

United States v. Mitchell,
256 F.3d 734 (7th Cir. 2001)..... 11

Page

United States v. Williams,
731 F.3d 678 (7th Cir. 2013) 11

Vollmer v. Luety,
156 Wis. 2d 1, 456 N.W.2d 797 (1990) 14, 16

Statutes

Wis. Stat. § 752.35 14

Wis. Stat. § 943.32(2) 8

Wis. Stat. § 973.155 ..... 1, 24

Wis. Stat. § 973.155(1)(a) 24

Wis. Stat. § 973.155(1)(a)1. 24

Wis. Stat. § 973.155(1)(a)2. 24

Wis. Stat. § 973.155(1)(a)3. 24

Wis. Stat. § 973.155(1)(b) 25, 26

Other Authorities

Wis. JI–Criminal 112 (2000) 17, 18

Wis. JI–Criminal 400 (2005) 7, 8

Wis. JI–Criminal 406 (2005) 8, 15, 18

Wis. JI–Criminal 1479 (2009) 15

Wis. JI–Criminal 1480 (2016) 8

Wis. JI-Criminal SM–34 (1999) 22

ISSUES PRESENTED

1. Was the evidence at trial sufficient for the jury to find the defendant-appellant Sean N. Jones guilty of armed robbery as party to the crime?

The circuit court answered yes, and affirmed the judgment of conviction.

This Court should answer yes and affirm.

2. Is Jones entitled to a new trial in the interest of justice?

The circuit court answered no.

This Court should answer no and affirm.

3. Did the circuit court erroneously exercise its discretion in imposing sentence?

The circuit court answer no.

This Court should answer no and affirm.

4. Did Jones establish that he is entitled to 204 days of sentence credit under Wis. Stat. § 973.155?

The circuit court answered no.

This Court should answer no. However, if this Court determines that Jones is entitled to 73 days of sentence credit, it should modify the postconviction order to reflect that credit, and as modified, affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, does not request oral argument or publication.

INTRODUCTION

Jones and another man robbed a motel. The motel desk clerk testified that just before the two men left the motel, the other man showed her that he had a handgun in his waistband. Jones and the other man took money and a cell phone charger. A jury found Jones guilty of armed robbery as party to the crime.

In his motion for postconviction relief, Jones acknowledged that the evidence at trial was sufficient for the jury to find him guilty of robbery as party to the crime, but he asserted that it was insufficient for it to find him guilty of *armed* robbery as party to the crime. He also claimed that he is entitled to a new trial in the interest of justice for two reasons. First, because the jury was not instructed on robbery as a lesser included offense, or on when armed robbery is a natural and probable consequence of robbery. Second, because witnesses referred to him by his nickname, "Sneak," and police officers testified that they knew him from past professional contacts. Jones also asserted that he is entitled to resentencing because the court did not adequately explain the sentence it imposed. Finally, Jones argued that he was due sentence credit.

The circuit court rejected each of Jones' claims. It concluded that the evidence was sufficient for the jury to find Jones guilty of armed robbery as party to the crime. The court was correct because the jury could have inferred from SE's testimony and the surveillance videos that Jones and the other man planned the armed robbery, and that Jones knew his accomplice was armed and was going to use or threaten to use the weapon. The court was correct to reject Jones' request for a new trial in the interest of justice because Jones waived his right to challenge the lack of specific jury instructions, and he was not harmed by those instructions not being given. The court was also correct that it did not err in admitting evidence

of his nickname and that police knew him from past professional contacts. And even if that evidence was not properly admitted, it made no difference at trial.

The court was also correct in concluding that it properly explained why it imposed the sentence that it imposed, and in denying Jones' motion for 204 days of sentence credit. Once he signed a signature bond in his armed robbery case, any connection between that case and his custody was severed. He is therefore not entitled to sentence credit for the entire time he spent in custody on the probation hold. However, Jones might be entitled to 73 days of sentence credit for the time he spent in custody after his arrest on May 29, 2016, until he was given the signature bond on August 10, 2016. If this Court agrees, it should amend the postconviction order to award 73 days of sentence credit, and as modified, affirm.

STATEMENT OF THE CASE AND FACTS

On May 29, 2016, at around 2:30 a.m., Jones and an accomplice robbed a Rodeway Inn in Eau Claire. (R. 94:143, 150–51, 177–78, 245.) Shortly before the robbery, the motel's front desk clerk, SE, saw a man she knew as "Sneak" drive slowly through the motel parking lot early in the morning. Jones' nickname is "Sneak." (R. 94:144–45.) A short time later, two masked men entered the motel while SE was behind the front desk. (R. 94:149–50.) The taller man approached SE. He stood in front of the desk and told her not to move. (R. 94:151–52.) The shorter man[1] went behind the front desk and found a bag, had SE take items out of the cash register drawer, and put them into the bag. (R. 94:153.) The shorter man then took additional items out of the register drawer. (R. 94:159–60.)

[1] At trial, the State alleged that the shorter man was Jones. (R. 94:186; 96:65–66; Jones' Br. 7).

The shorter man then walked away from SE and the desk, toward the door. (R. 94:166–67.) SE testified that the taller man lifted his shirt to reveal the handle of a handgun that was in his waistband. (R. 94:167.) The taller man then followed the shorter man out the door. (R. 94:167.) SE called the police to report the armed robbery. (R. 94:168–69.) She told them about seeing "Sneak" shortly before the men entered the motel. (R. 169.)

Police, who were familiar with "Sneak," found him driving about half an hour after the armed robbery. (R. 94:203–07.) Police searched Jones and his car, and found $286. (R. 94:209, 214, 234–35, 255, 260–62.) They did not find a gun, masks, or the clothing worn by the two men. (R. 94:214.) Jones denied being involved in the crime. (R. 94:211–13.)

The police arrested Jones. (R. 94:211.) Later that day, SE told police that a phone charger had also been taken from the motel. (R. 94:162–66.) She said that the charger belonged to the desk clerk who had worked the shift before SE's shift. (R. 94:164; 95:196.) SE said the other desk clerk had left the charger in the motel, so SE wrote the other clerk's name on a piece of paper and attached the paper to the charger. (R. 94:164.) A photograph of the interior of Jones' car that police took when they searched the car appeared to reveal a phone charger in the car. (R. 32.) Jones' estranged wife, who had taken the car after Jones was arrested, found the paper with the clerk's name on it in the car, and gave it to the police. (R. 95:41–44.)

A probation hold was placed on Jones on two prior cases for which he was on probation. (R. 87:3.) On August 2, 2016, the State charged Jones with armed robbery as party to the crime. (R. 5.) At Jones' initial appearance, the circuit court ordered a signature bond on the armed robbery case. (R. 87:3.) The signature bond was filed on August 10, 2016. (R. 7.)

Before trial, the State informed the court that some of its police witnesses knew Jones from past professional contacts, and that Jones' nickname is "Sneak." (R. 93:36–38.) Jones' defense counsel moved to preclude witnesses from (1) mentioning that police knew Jones from past professional contacts, and (2) referring to him as "Sneak." (R. 93:37.) The circuit court denied the motion. (R. 93:38.) Jones' counsel renewed the motion at trial, but the court again denied it. (R. 94:147–49.)

At trial, the jury heard testimony from witnesses including SE, Jones' ex-wife, and various police officers. The jury also viewed surveillance videos of the front desk area and the parking lot, which showed two men approaching the motel, robbing it, and then leaving the scene.

After the first day of trial, Jones asked the court to allow him to represent himself. (R. 95:5.) The court conducted a colloquy with Jones, and then granted Jones' request. (R. 95:5–19.) At the close of the evidentiary portion of the trial, the court instructed the jury on armed robbery as party to the crime. (R. 96:45–59.) Neither party requested an instruction on robbery as a lesser included offense, so the court did not give that instruction.

The jury found Jones guilty of armed robbery as party to the crime. (R. 96:110.) The circuit court imposed a sentence of 13 years and 6 months, including 9 years and 6 months of initial confinement. (R. 97:53.) The court made the sentence concurrent to Jones' sentences after revocation of his probation. (R. 97:53.) The court granted no sentence credit on the armed robbery sentence. (R. 69:2.)

Jones, while represented by counsel, moved for postconviction relief. (R. 75.) He acknowledged that the evidence at trial was sufficient for the jury to find him guilty of robbery as party to the crime, but asserted that it was insufficient for it to find him guilty of *armed* robbery as party

to the crime. (R. 75:4–10.) He also sought a new trial in the interest of justice (R. 75:10–16), resentencing (R. 75:16–19), and 204 days of sentence credit. (R. 75:23–27.) The circuit court denied each claim. (R. 82.) Jones now appeals.

STANDARD OF REVIEW

When a defendant challenges a verdict based on sufficiency of the evidence, a reviewing court will "give deference to the jury's determination and view the evidence in the light most favorable to the State." *State v. Long*, 2009 WI 36, ¶ 19, 317 Wis. 2d 92, 765 N.W.2d 557. A reviewing court will not overturn the jury's verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt" based on the statutory requirements of the offense. *State v. Beamon*, 2013 WI 47, ¶ 20, 347 Wis. 2d 559, 830 N.W.2d 681 (citation omitted).

Whether a defendant is entitled to a new trial in the interest of justice is a matter of discretion for this Court. *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60.

Appeal of a circuit court's sentencing decision "is limited to determining if discretion was erroneously exercised." *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

In reviewing a sentence credit determination, this Court upholds the circuit court's factual determination unless they are clearly erroneous, but independently determines whether the defendant is entitled to sentence credit. *State v. Hintz*, 2007 WI App 113, ¶ 5, 300 Wis. 2d 583, 731 N.W.2d 646.

ARGUMENT

I. The evidence at trial was sufficient for the jury to find Jones guilty of armed robbery as party to the crime.

A. Applicable legal principles.

"A defendant challenging the sufficiency of the evidence bears a heavy burden to show the evidence could not reasonably have supported a finding of guilt." *Beamon*, 347 Wis. 2d 559, ¶ 21. An appellate court's review is "very narrow," and the court must "give great deference to the determination of the trier of fact." *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). It is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes the trier of fact should not have found guilt based on the evidence. *Poellinger*, 153 Wis. 2d at 507. If multiple inferences can be drawn from the evidence, this court must follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." *Id.*

The State charged Jones with armed robbery as party to the crime. To prove that Jones was party to the crime, the State was required to prove either that he directly committed the crime, or that he intentionally aided the armed robbery. Wis. JI–Criminal 400 (2005). To prove Jones guilty of armed robbery as party to the crime, the State was required to prove that a person possessed property; that Jones or the person with him took the property, with intent to steal, by threatening the imminent use of force; and that Jones or the

other person used or threatened to use a dangerous weapon. Wis. Stat. § 943.32(2); Wis. JI–Criminal 1480 (2016); (R. 96:49–50.) To prove that Jones intentionally aided in the commission of armed robbery, the State was required to prove that he knew that the other person was committing or intended to commit armed robbery, and that he had the purpose to assist in the commission of that offense. Wis. JI–Criminal 400. A defendant is guilty of aiding an armed robbery, even if he or she only intended a robbery, if armed robbery is "a natural and probable consequence" of the robbery. Wis. JI–Criminal 406 (2005.) "If the defendant knew, or if a reasonable person in the defendant's position would have known, that the crime of armed robbery was likely to result from the commission of robbery," a jury can find the person guilty of armed robbery. *Id.*

B. There was sufficient evidence at trial for the jury to find Jones guilty of armed robbery as party to the crime.

The jury found Jones guilty of armed robbery as party to the crime. It therefore found that Jones or the other man with whom he robbed the Rodeway Inn took property from the presence of SE with intent to steal, by threatening the imminent use of force, and with the use or threat of use of a dangerous weapon. Three is no dispute that the evidence at trial was sufficient to prove that Jones and the other man took property from the presence of SE, with intent to steal, by threatening the imminent use of force. The issue on appeal concerns the dangerous weapon. Jones argues that there was no evidence at trial that he knew that the other man had a dangerous weapon and was going to use or threaten to use it, or that he had the purpose of aiding and abetting the other man in committing an armed robbery. (Jones' Br. 5–14.)

Evidence regarding the dangerous weapon—a handgun—was presented in the testimony of SE. She testified

that the taller of the two robbers—who the parties agree was not Jones—showed her a gun that was in his waistband. (R. 94:167.) SE testified that shortly before the two men left the Rodeway Inn, the taller man "stood there still and raised his shirt," and she observed that the man had "the handle of a handgun in his pants or waistline." (R. 94:167.) SE said that the man "kind of watched me for a minute and turned around and walked to the door and turned around and looked at me and he left also." (R. 94:167.)

Jones argues that the surveillance video that shows the armed robbery, along with SE's testimony, is insufficient for the jury to find that he knew that his accomplice was armed and that he intended to aid and abet an armed robbery. (Jones' Br. 9.)

But the jury could reasonably have viewed the surveillance videos and heard SE's testimony and found Jones guilty of armed robbery as party to the crime. The two men appeared on a surveillance video of the parking lot. (R. 41:3:34AM at 0:30.)[2] They walked through the parking lot, toward the door to the motel lobby, for over a minute. (R. 41:3:34AM at 0:30–1:45.) They then stood next to the motel for more than ten minutes. (R. 41:3:34AM at 1:45–13:30.)

A surveillance video of the front desk area shows the two men approaching and entering the motel. (R. 41:4:57AM at 3:35–55.)[3] Jones immediately walked around the desk, while the other man stayed in front of the desk and walked

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[2] The surveillance video of the parking lot before the armed robbery is the video dated 5/29/16 at 3:34 a.m. Citations to the surveillance videos are to record number, the time on of the video clip, and the time stamp in minutes and seconds. For instance, (R. 41:3:34AM at 0:30) is to record number 41, the video clip marked as 3:34AM, at the 30 second point.

[3] The surveillance video of the front desk area is the video dated 5/29/16 at 4:57 AM.

over to the motel clerk and the cash register. (R. 41:4:57AM at 3:55–4:05.) The roles of the two men seemed clear from the video. Jones found a bag, filled it with money and items from the register, including the phone charger, while the other man dealt with the clerk. (R. 41:4:57AM at 3:55–5:10.) The other man simply stood in front of the clerk, with his hands in his pockets, and directed the clerk to give them money. Then, after Jones took the bag of money from the clerk, the tall man—who was still standing in front of the clerk—showed her the gun in his waistband. (R. 41:4:57AM at 5:14–5:19.) The two men did not talk to each other during the armed robbery. Jones did not talk at all. Their planning was obviously done before they entered the motel.

The circuit court concluded that the jury could have found that Jones knew the other man was armed because the two men stood outside the motel and planned the crime before they entered and committed it. (R. 82:2.) Jones argues that the court erred, because the video shows that the parties planned a robbery, but not necessarily an armed robbery. (Jones' Br. 10.)

But the jury could have inferred that Jones knew that the man he was robbing the motel with was armed. The other man's actions, as shown on the surveillance videos, were consistent with a person who had a handgun in his pocket or waistband. As the surveillance videos show, Jones and the other man walked across the parking lot with their hands in their pockets. They waited near the motel entrance, and the man kept his hands in his pockets. When they entered, Jones opened the door, and the other man followed, still with his hands in his pockets. The other man then walked up to the desk, and the motel clerk, still with his hands in his pockets. The man showed the clerk the gun in his waistband, but it does not appear that he took his hands out of his pockets to do so. After the armed robbery, when the two men left, Jones again led, and opened the door, and the other man used his

elbow to keep the door open while he exited. He still did not take his hands out of his pockets. It does not appear that the man took his hands out of his pockets at any time.

It would be odd that two men would plan to rob a motel, and plan that one man, who was unarmed, would simply stand stood around, with his hands in his pockets, while the other man robbed the motel. It makes sense that the other man in this case stood in front of the desk and the clerk, with his hands in his pockets, because he had a gun in his waistband.

It also makes sense that Jones would know why his accomplice was simply standing in front of the desk with his hands in pockets. "[T]he placement of a suspect's hands in his pockets or at his waistband is a legitimate consideration in assessing whether an officer is justified in believing that an individual is armed." *United States v. Williams*, 731 F.3d 678, 698 (7th Cir. 2013) (citing *United States v. Mitchell*, 256 F.3d 734, 736 (7th Cir. 2001). The same is true here. The jury could infer that Jones had to know that his accomplice was armed by his accomplice's actions, or more accurately, lack of actions. Jones was behind the desk, finding a bag, and taking money from the clerk, all the while trying to avoid contact with the clerk so that she could not identify him. His accomplice stood in front of the desk, with his hands in his pockets, because he had the gun.

The jury also could have found from the surveillance video that Jones saw the gun. SE testified that the other man showed her the handle of the gun in his waistband while he and Jones were in the motel lobby. (R. 94:167.) The surveillance video shows that Jones took the bag that the clerk had filled and then walked away from the clerk. (R. 41:4:57AM at 5:11.) He reached the end of the desk four seconds later. (R. 41:4:57AM at 5:15.) During these four seconds, while Jones was walking away from the clerk, the clerk pushed the cash register drawer back into the register,

while looking down. She looked up about one second before Jones reached the end of the desk, and two seconds before Jones turned to his left, toward the clerk and the other man. (R. 41:4:57AM at 5:14–17.) The clerk immediately walked away from the man and sat down. (R. 41:4:57AM at 5:18.) Once Jones had cleared the desk, about a second later, he walked directly to the door, and reached it about four seconds later. (R. 41:4:57AM at 5:16–20.) The other man turned toward the clerk, then turned and saw Jones leaving, and he followed. (R. 41:4:57AM at 5:19–20.)

It is not entirely clear from the video exactly when the other man showed SE the gun in his waistband. But the video does not show that Jones could not and did not see the gun when the other man showed it to SE. It seems clear that the other man showed the gun to SE during the nine seconds after Jones took the bag of money. And for approximately five of those seconds, Jones was not behind the desk, facing away from SE and the other man. He was walking toward the door. The jury could have found that during that period, when Jones was walking towards the door, the gun was visible and he saw it.

Jones argues that SE testified that she did not think that Jones could see the gun. (Jones' Br. 9.) But when defense counsel asked SE if Jones would have known that the other man had a gun, she testified "I can't say." (R. 94:198.) When counsel asked if Jones was looking at the other man when the other man pulled up his shirt to show the gun, she testified, "I can't answer that question." (R. 94:198.) SE added, "I would think he would - - he wasn't because I think he was exiting from behind the desk at the time." (R. 94:198.) The clerk then added, "But I - - I don't know what he saw or who saw what, but I can only speak for what I saw." (R. 94:198.)

SE's testimony does not mean that Jones did not see the gun. Instead, SE's testimony, along with the surveillance

videos, were sufficient for the jury to find that Jones did see the gun.

The jury also could properly have found Jones guilty of armed robbery as party to the crime, even if it did not find that he had actual knowledge that the other man had a gun, because it could have concluded that the threat of use of a firearm was a natural and probable consequence of the robbery.

In *State v. Ivy*, 119 Wis. 2d 591, 600, 350 N.W.2d 622 (1984), the Supreme Court of Wisconsin concluded that "depending on the facts and circumstances of a given case, armed robbery could be a natural and probable consequence of robbery." Therefore, a person could be guilty of aiding and abetting an armed robbery "even though he or she did not actually know that the person or persons who directly committed the armed robbery were armed with a dangerous weapon." *Id.* The court noted that "there are myriad factual situations in which it would be reasonable to find that an armed robbery that occurred was a natural and probable cause of robbery." *Id.* at 600.

As Jones points out, the "myriad factual situations" that the court in *Ivy* mentioned included a person intending to rob an armored car, or a bank, or a business guarded by armed security guards. (Jones' Br. 11–12.)

This was a motel, not a place guarded by armed guards. But this was a motel staffed by a single person, a female, at 2:30 in the morning, next to a bar. And the clerk, like so many citizens in modern times, was a gun owner. (R. 94:187.) It would hardly be surprising for a person who intended to rob the motel to believe—and to fear—that the clerk would be armed, or at least have access to a gun. And Jones seemingly knew the workings of the motel, so he likely knew that the owners were present, and in a room just down the hall. (R. 94:168.) A natural consequence of having a person help rob

the motel—by doing little other than standing near the clerk—is that the person will be armed.

As the circuit court concluded, the jury could have inferred that Jones and his accomplice intended and planned an armed robbery. (R. 82:2.) The jury also could have found, based on the surveillance videos and SE's testimony, that Jones saw that his accomplice had the gun and showed it to SE. Finally, the jury could have found Jones guilty because armed robbery is a natural and probable consequence of a robbery of a motel, early in the morning, when the person on duty in the motel may well be armed or have access to a weapon. The circuit court correctly concluded that sufficient evidence supported the jury's finding, and this Court should affirm.

II. Jones is not entitled to a new trial in the interest of justice.

A. Applicable legal principles.

The power of discretionary reversal allows this Court to "reverse the judgment or order appealed from" "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Wis. Stat. § 752.35. The purpose of discretionary reversal is to allow for review of an otherwise waived error in the interest of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17–19, 456 N.W.2d 797 (1990).

To grant a new trial because the real controversy was not fully tried, "it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial." *Vollmer*, 156 Wis. 2d at 19. Accordingly, the power of discretionary reversal is to be used "sparingly and with great caution." *State v. Watkins*, 2002 WI 101, ¶ 79, 255 Wis. 2d 265, 647 N.W.2d 244 (citing *Graff v. Roop*, 7 Wis. 2d 603, 606, 97 N.W.2d 393 (1959)).

The power of discretionary reversal is a "formidable" statutory power. *State v. Wery*, 2007 WI App 169, ¶ 21, 304 Wis. 2d 355, 737 N.W.2d 66. The Wisconsin Supreme Court has charged this Court with exercising that formidable power only in exceptional cases—infrequently, judiciously, and with great caution and reluctance. *Avery*, 345 Wis. 2d 407, ¶ 38.

B. This Court should decline to order a new trial on the ground that the jury was not instructed on robbery as a lesser included offense, or on armed robbery being a natural and probable consequence of robbery.

Jones argues that the real controversy was not fully tried in this case for two reasons. First, because the jury was not given two instructions, Wis. JI–Criminal 406 regarding the natural and probable consequences of robbery, and Wis. JI–Criminal 1479 (2009), robbery, as a lesser included offense. Jones asserts that without those instructions, 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." (Jones' Br. 16.)

The circuit court rejected Jones' arguments, noting that Jones did not request either instruction. (R. 82:3.) The court further noted that the failure to request an instruction waives the right to review. (R. 82:3.) It concluded that Jones either waived the right to argue that the instructions should have been given, or made a strategic decision not to request them. (R. 82:3.)

On appeal, Jones argues that the jury should been given both instructions. (Jones' Br. 15–19.) The State acknowledges that had Jones requested these instructions, the court likely would have given them. But the court was not required to sua sponte give either instruction. "This court will not find error in the failure of a trial court to give a particular instruction in

the absence of a timely and specific request before the jury convenes." *Bergeron v. State*, 85 Wis. 2d 595, 604, 271 N.W.2d 386 (1978).

Jones did not request either instruction. "The failure to request an instruction or to object effectively waives any right to review." *Bergeron*, 85 Wis. 2d. at 605.

Jones acknowledges that he did not request either instruction, and therefore forfeited his claim. (Jones' Br. 18.) But he asserts that his claim is a ground for a new trial in the interest of justice because "instructional errors may be grounds for a new trial in the interests of justice even when there was no objection to the instructions as given." (Jones' Br. 18 (citing *Vollmer*, 156 Wis. 2d at 20).)

However, in this case, there was no instructional error. The court was not asked to give either instruction and did not err by not giving them.

Here, the issue is whether Jones should be relieved of his own error in not requesting the instructions. As Jones acknowledges, this Court is generally not inclined to grant a new trial in the interest of justice because of the error of a defendant who elects to represent himself. (Jones' Br. 19). As this Court has stated, "To rescue this 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). This Court added that "ordering a new trial would encourage defendants to proceed pro se believing that they would have an opportunity to have a second trial with counsel if they were dissatisfied with the first verdict." *Id.*

The Court's assessment of the risk a defendant assumes by proceeding pro se applies to the circumstances in this case. When Jones asked to represent himself after the first day of trial, the circuit court explained why it believed that

proceeding pro se was unwise. The court warned Jones about what an attorney would do for him, asking if he understood that a lawyer could help him "ask questions as provided by the rules of evidence," and "make a presentation to the jury in closing argument." (R. 95:12–13.) The court then explicitly told Jones that a lawyer could assist him "in preparing jury instructions that are applicable to your case." (R. 95:13.) Jones said that he understood what he had to do, and the difficulties he faced. (R. 95:13.)

Jones is now asking this Court to give him a second trial because he did not adequately request jury instructions—exactly what the court told him a lawyer would be able to do for him.

Jones argues that the circuit court was wrong to suggest that Jones did not request these instructions as a matter of strategy. (Jones' Br. 19.) But even if Jones is correct, and his failure to request the instructions was not a conscious strategy, his not requesting the instructions gave him a better, not worse, chance of acquittal.

Because the jury was not instructed on robbery, Jones would have been acquitted had the jury not found that his accomplice was armed, and that Jones intended to aid and abet an armed robbery. Had the jury also been instructed on robbery, it would have found him guilty of that offense even if it had not found that he knew his accomplice was armed, and that he intended to aid and abet an armed robbery.

Even if the jury had been instructed on the lesser included offense, it would have had no reason to consider it. If the jury had been instructed with robbery as a lesser included offense of armed robbery, it also would have been instructed with Wis. JI–Criminal 112 (2000), for a lesser included offense. The jury would have been told to consider armed robbery, and if it found him guilty of that offense, it should not consider robbery. Only "if after full and complete

consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of armed robbery, you should consider robbery." Wis. JI–Criminal 112. The jury found Jones guilty of armed robbery. It therefore would have had no reason to even consider robbery.

Instructing the jury with Wis. JI–Criminal 406, for armed robbery being a natural and probable result of robbery, also seemingly would have harmed the defense. Without that instruction, the jury was told that it could find Jones guilty of armed robbery as party to the crime if it found that he intentionally aided and abetted the crime of armed robbery. With Wis. JI–Criminal 406, the jury would have been explicitly told that it could find Jones guilty of armed robbery even if it found that he only intended to aid and abet a robbery. This would have given the jury a means to find Jones guilty of armed robbery even if did not unanimously agree that he knew that his accomplice was armed and was going to use or threaten to use a gun. This is not a case in which Jones' failure to request instructions harmed him.

For all these reasons, this Court should decline Jones' request for a new trial.

C. Jones has not shown that the real controversy was not fully tried because references were made to his nickname, and officers testified that they knew him from past professional contacts.

Jones also argues that he is entitled to a new trial in the interest of justice because at trial, witnesses referred to him by his nickname "Sneak," and two officers mentioned being familiar with Jones from prior "professional contacts." (Jones' Br. 19–23.)

In a pretrial hearing, the prosecutor mentioned that some witnesses knew Jones by his nickname "Sneak," and

that police officers who would be testifying knew him from prior police contacts. (R. 93:36.) Jones moved to preclude the State or witnesses from referring to him as "Sneak." (R. 93:37.) The circuit court concluded that the State could use Jones' nickname, but that it could not elicit testimony that police officers knew Jones from prior arrests or convictions. (R. 93:38.)

At trial, SE testified that she saw a man she knew as "Sneak" driving through the parking lot. (R. 94:144–45.) She said she did not know "Sneak's" real name at that point. (R. 94:144.) Jones' defense counsel objected to the use of the nickname. (R. 94:147.) The circuit court concluded that if SE testified that she knew Jones as Jones, the State should refer to Jones by his surname. But if she only knew Jones as "Sneak," the State could refer to him as "Sneak." (R. 94:149.)

SE referred to Jones as "Sneak" multiple times during her testimony. Two police officers also referred to Jones as "Sneak." Officer Benjamin Wutschke testified that he responded to the armed robbery, and went to look for a person who had been identified as a suspect. (R. 94:203.) He said the person was identified as "Sneak." Officer Wutschke testified that he knew that "Sneak" was Sean Jones. (R. 94:204.) Officer Wutschke testified that he knew "Sneak" from past professional contacts. (R. 94:204.) Office Andy Wise testified that he also responded to the report of an armed robbery, and he learned that the suspect was known as "Sneak." (R. 94:269.) Officer Wise said that he did not know the suspect, but that other officers knew him as "Sneak." (R. 94:269.) He said that he went to the location where Officer Wutschke had stopped the suspect's vehicle, whose street name or nickname was "Sneak." (R. 94:271.) Detective Ryan Prock later testified that he was familiar with Jones from past professional contacts. (R. 95:107.)

Jones argues that the references to his nickname were unfairly prejudicial and entitle him to a new trial. (Jones' Br. 19–23.)

But evidence of a person's alias or nickname "is admissible when it forms part of the background of the case." *State v. Bergeron*, 162 Wis. 2d 521, 530, 470 N.W.2d 322 (Ct. App. 1991). In *Bergeron*, this Court noted that the defendant, who was named Matthew, introduced himself to the victim and her friend as "Brice." *Id.* at 531. This Court concluded that if the victim and her friend had testified that the defendant introduced himself as Matthew, "they would have been altering the facts of the case." *Id.* This Court concluded that the defendant's alias was properly admitted for the background of the case, and that any prejudice was not unfair and did not substantially outweigh the prejudicial value of the evidence. *Id.* at 531–32.

The same is true here. SE testified that at the time she observed Jones driving through the motel parking lot, she knew him only as "Sneak." And the officers referred to looking for "Sneak" because SE told police that "Sneak" had driven through the parking lot. The officers suspected that the man SE identified as "Sneak" was involved in the armed robbery. Jones was known to both SE and the police officers as "Sneak." Testimony that Jones is known as "Sneak" was necessary for the background of the case.

In addition, the name "Sneak" is not overly prejudicial. Jones was not being sneaky when he committed the armed robbery. He drove his own car through the motel parking lot and robbed the motel when a person he knew was working there. The only thing arguably sneaky that he did was wear something partially over his face.

Jones argues that testimony that officers knew him from professional contacts was "the functional equivalent of saying Jones has committed other bad acts." (Jones' Br. 22.)

But the references to "professional contacts" means only that the officers knew him in their role as officers, not because he was a friend, lived in their neighborhood, went to their church, or something like that. Jones argues that "professional contacts" with police means that "he had been the object of police scrutiny." (Jones' Br. 22.) But if the officers who investigated this case in the future are asked about SE—the victim in this case—they can properly say that they know her through a prior professional contact. Such a comment would not mean that SE had been the object of police scrutiny, or that she had committed a bad act.

In addition, it is unclear what else the officers could have said to explain the situation, or why it made any difference. SE told officers that she had seen "Sneak." Officer Wutschke testified that officers had preliminary information that the suspect was "Sneak." And he explained that he knew from past professional contacts that "Sneak" was Jones. Had he not testified that he knew that "Sneak" was Jones, he would have said that SE told police she saw "Sneak," so officers suspected Jones and looked for him. The jury obviously would have inferred that officers knew Jones and "Sneak" were the same person. And with no information that officers knew Jones in some other way, they likely would have inferred that the officers knew him from past professional contacts.

As Jones points out, admissible evidence may be excluded if its prejudicial value substantially outweighs its probative value. (Jones' Br. 21–22.) Here, for the above reasons, the evidence had no significant prejudicial value. It was therefore properly admitted.

Finally, the references to Jones as "Sneak," and the officers' references to knowing Jones or "Sneak" from past professional contacts, had no appreciable impact on the jury's verdict. The jury found Jones guilty because SE identified him as driving through the motel parking lot shortly before the

armed robbery, and because the phone charger and note that were taken during the armed robbery were found in his car. Jones' nickname, and any suggestion that he might have had prior contacts with police, made no difference in the jury finding him guilty.

III. The circuit court properly exercised its discretion in imposing Jones' sentence.

A. Applicable legal principles.

The primary factors the circuit court must consider at sentencing are the gravity of the offense, the character of the offender, and the need for protection of the public. *State v. Smith*, 207 Wis. 2d 258, 281 n.14, 558 N.W.2d 379 (1997). A court can base a sentence on any of the three primary factors so long as it considers all relevant factors. *State v. Spears*, 227 Wis. 2d 495, 507–08, 596 N.W.2d 375 (1999). The weight given to any particular factor is a determination within the wide discretion of the sentencing court. *See, e.g., State v. Evers*, 139 Wis. 2d 424, 452, 407 N.W.2d 256 (1987). Appropriate sentencing objectives "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." *Gallion*, 270 Wis. 2d 535, ¶ 40 (citing Wis. JI–Criminal SM-34 at 8–9 (1999)).

B. The sentencing court properly explained the sentence it imposed.

Jones acknowledges that the sentencing court addressed the primary sentencing factors, and that it explained that its main sentencing objectives were protection of the public and punishment. (Jones' Br. 24–25.) He acknowledges that the court made a lengthy statement explaining its rationale in imposing sentence. (Jones' Br. 25.) But he argues that the court's sentencing remarks "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." (Jones' Br. 25.) Specifically, Jones argues that the court's sentencing remarks "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." (Jones' Br. 26.)

Jones does not challenge the total length of imprisonment the court ordered. He challenges only the length of the term of initial confinement. He proposes that "[s]ix or seven years of confinement" and a longer term of extended supervision would meet the court's sentencing objectives. (Jones' Br. 26.)

But the court explained its rationale and why it was imposing nine years and six months of initial confinement. The court explained that Jones' crime was aggravated because his accomplice was armed with a gun, and Jones' identity was concealed. (R. 97:49.) The court noted that Jones was willing to exploit others, rob, and sell drugs. (R. 97:50.) The court imposed the 13 year and 6 month sentence, with nine years and six months of initial confinement, explaining that Jones would be on supervision until around age 50, and that "I think you need to be out of the community for a period of time." (R. 97:53.)

The court was not required to explain why it was not imposing seven years of initial confinement. "[T]he exercise of discretion does not lend itself to mathematical precision." *Gallion*, 270 Wis. 2d 535, ¶ 49. On the contrary, a court is required to exercise discretion in imposing sentence. "The exercise of discretion, by its very nature, is not amenable to" mathematical precision. *Id.* As the court noted in its order denying Jones' motion for postconviction relief, "There is no magic language." (R. 82:4.) And as the court stated, it "didn't pick numbers out of the air." (R. 82:4.) Instead, the court concluded that nine years out of the community was appropriate to accomplish its goals, which included

punishment. It was not required to say that seven years of confinement, rather than nine years and six months would not have been appropriate.

The court properly exercised its discretion, and the judgment of conviction and order denying postconviction relief should be affirmed.

IV. The circuit court properly denied Jones request for 204 days of sentence credit.

A. Applicable legal principles.

Wisconsin Stat. § 973.155 governs sentence credit. Under it, "[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." Wis. Stat. § 973.155(1)(a). In other words, to receive credit, "a defendant must establish (1) that [he] was in custody for the period of time at issue, and (2) that, during that time, [he] was in custody 'in connection with' the course of conduct that resulted in the new conviction." *Hintz,* 300 Wis. 2d 583, ¶ 6.

If a defendant satisfies those two requirements, then "[c]redit is given for custody while awaiting trial, while being tried, and while awaiting sentencing after trial." *State v. Johnson*, 2007 WI 107, ¶ 4 n.2, 304 Wis. 2d 318, 735 N.W.2d 505 (citing Wis. Stat. § 973.155(1)(a)1., 2., and 3.).

B. Jones is not entitled to sentence credit from the time after he was given and signed a signature bond.

When Jones committed the armed robbery in this case, he was on probation in two other cases, Eau Claire County case numbers 2015CF455 and 2015CF396. (R. 75:28–31.) In both cases, the circuit court had withheld sentence and placed Jones on probation. When he was arrested for the armed

robbery, a probation hold was placed on him on May 29, 2016. (R. 87:3.) The State charged Jones with armed robbery, and at his initial appearance on August 2, 2016, the circuit court ordered a signature bond, which was issued August 10, 2016. (R. 7; 87:3.)

Jones' probation was revoked in the two prior cases (R. 75:31–35), and on December 19, 2016, the court imposed concurrent sentences of three years of imprisonment in each case, including one year and six months of initial confinement, with 212 days of sentence credit. (R. 75:35–39.) After Jones was convicted in this case, the court imposed a sentence concurrent to the sentences Jones was serving after revocation. (R. 69.) It granted no sentence credit. (R. 69:2.)

In his motion for postconviction relief, Jones sought 204 days of sentence credit for the time he spent in custody from his arrest for armed robbery until he was sentenced after revocation in his two prior cases. (R. 75:23–27.) The prosecutor did not oppose the request for sentence credit. (R. 81.)

The circuit court denied the motion for sentence credit, reasoning that Jones "was on a signature bond in this case and did receive 204 days of credit in the cases that were revoked." (R. 82:5.) The court concluded that Jones "is not entitled to any credit here, as he was not 'in custody' on the armed robbery charge." (R. 82:5.)

On appeal, Jones argues that he is entitled to the 204 days of credit in this case because his custody on the probation hold was in connection with his current case. Specifically, he argues that his conduct in this case—armed robbery—was the basis for his probation hold in his prior cases, so he is entitled to credit for time served on the probation hold. (Jones' Br. 31.) Jones relies on *Hintz*, in which this Court concluded that it is "self-evident" that under section 973.155(1)(b), credit must be awarded "for time in custody on an extended supervision hold

if the hold was at least in part due to the conduct resulting in the new conviction." *Hintz*, 300 Wis. 2d 583, ¶ 8. Jones argues that under Hintz, his signing of a signature bond in his armed robbery case did not sever the connection between his custody and the armed robbery case, "Because the conduct charged in this case was *also* the conduct for which Jones remained in custody on the probation hold." (Jones' Br. 31.)

The State acknowledges that *Hintz's* interpretation of section 973.155(1)(b) supports Jones' position. However, in *State v. Johnson*, 2009 WI 57, 318 Wis. 2d 21, 767 N.W.2d 207, the Supreme Court of Wisconsin clarified the distinction between a factual connection and a procedural connection. The court concluded that for a defendant to be entitled to credit, "The presentence custody's 'connection with' the sentence imposed must be factual; a mere procedural connection will not suffice." *Id.* ¶ 33. "[A] factual connection fulfills the statutory requirement for sentence credit, and . . . a procedural or other tangential connection will not suffice." *Id.* (citation omitted).

The court in *Johnson* used *State v. Beiersdorf*, 208 Wis. 2d 492, 498, 561 N.W.2d 749 (Ct. App. 1997), as an example. In *Biersdorf*, "the defendant was arrested and charged with bail jumping after violating the conditions of his personal recognizance bond, which was in place as a result of his unresolved sexual assault case." *Johnson*, 318 Wis. 2d 21, ¶ 34 (citing *Biersdorf*, 208 Wis. 2d at 494–95). "After pleading guilty and being sentenced on both charges, he requested that his presentence custody resulting from the bail jumping charge, for which his sentence was stayed in favor of probation, be applied to the sentence imposed for his sexual assault charge." *Id.* (citing *Biersdorf*, 208 Wis. 2d at 494–95).

The supreme court noted that "Although a defendant may perceive that custody is at least partly in connection with another crime, that does not mean that the custody, for credit purposes, is related to the course of conduct for which

sentence was imposed." *Id.* ¶ 35 (quoting *Biersdorf*, 208 Wis. 2d at 498). The supreme court noted that in *Biersdorf* the court of appeals correctly concluded that there was "an obvious procedural connection between the bail jumping charge and the original sexual assault charge." *Id.* (citing *Biersdorf*, 208 Wis. 2d at 498). But there was no factual connection between the presentence custody and the sentence imposed. *Id.* (citing *Biersdorf*, 208 Wis. 2d at 498–99.) The same is true here. Jones' prior charges and his armed robbery were procedurally connected but not factually connected.

Jones was held in custody from May 29, 2016 until December 19, 2016. But at least some of that time was not due to the armed robbery case. As the circuit court noted, Jones was given a signature bond in the armed robbery case. (R. 82:3.) The signature bond severed any connection that his custody had with the armed robbery case. Once he was given the signature bond, he was eligible for pretrial release. *See Johnson*, 304 Wis. 2d 318, ¶ 78. Jones is not entitled to sentence credit from the time he was given the signature bond until he was sentenced on the prior cases after revocation.

But it appears that Jones is entitled to 73 days of sentence credit for the time he was in custody after his arrest on May 29, 2016, until he was given the signature bond on August 10, 2016. (R. 7.) During that period, he was being held on both the armed robbery and the cases for which he was on probation.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the judgment of conviction and the order denying Jones' postconviction motion for a new trial or resentencing. If this Court finds that Jones is entitled to 73 days of sentence credit, it should amend the postconviction order to reflect 73 days of sentence credit, and as modified, affirm.

Dated this 5th day of October, 2018.

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 8,537 words.

Dated this 5th day of October, 2018.

_____
MICHAEL C. SANDERS
Assistant Attorney General

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 5th day of October, 2018.

_____
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