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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Evidence Was Insufficient To Find Sean Jones Knew His Accomplice Was Armed.

The state acknowledges (brief at 8-9) the robber who displayed the handgun was not Jones. It makes three arguments about why the evidence is sufficient to prove Jones knew the other man was armed.

First, the state argues the jury could have inferred Jones knew the other man was armed because the other man kept his hands in his pockets during the robbery, citing ***United States v. Williams***, 731 F.3d 678, 698 (7th Cir. 2013) (Ripple, J., concurring and dissenting). (State's brief at 10-11). The cite is to a dissent and the case is inapt. ***Williams*** involved reasonable suspicion to conduct a frisk for weapons, not the sufficiency of evidence to prove knowledge of a weapon beyond a reasonable doubt.

Moreover, contrary to the state's claim (at 10), the surveillance video from the parking lot is not clear enough to conclude the man with the weapon never took his hands out of his pockets. (41:3:34AM at 1:45-13:30). Further, during most of the surveillance video from the lobby, the armed man is obscured from view of the camera *and* Jones, who kept his back to the clerk and had a hood over his head. (41:4:03-5:20). The jury could not see whether

the second man kept his hands in his pockets or, if he did, whether Jones could have seen that.

The facts also show the armed man's keeping his hands in his pockets is not enough to infer knowledge of a weapon. After Jones opened the lobby door, *both* men appear to have their hands in their pockets. (41:3:50-4:03). Jones, who was not armed, also kept his hands in his pockets much of the time. Far from "odd" (state's brief at 11), in this context that posture is intimidating behavior consistent with a plan for *unarmed* robbery, which requires a threat of imminent use of force. This is true even when the robbery involves two people—one collecting and securing the property, the other conveying the threat of force by standing in a threatening manner and telling the victim what to do.

Second, the state argues (at 11-13) the jury could have found from the surveillance video that Jones saw the display of the gun. The state concedes (at 12) the video does not show the display of the weapon. The only way to determine when that happened is from S.E.'s testimony.

S.E. testified the armed man briefly lifted his shirt to quickly reveal the gun after Jones had finished collecting property and was moving away from her and back around the desk. (94:167, 187-88, 197-98; A-Ap. 130, 150-51, 160-61). This refutes the state's claim Jones could have seen the gun because, according the S.E., the weapon was shown *after* S.E. closed the cash drawer and turned back toward the

armed man before sitting down—a period of four seconds, not the nine suggested by the state (at 12). (41:5:14 to 5:18; 94:166-67; A-Ap. 129-30). During those moments, Jones had his back to both S.E. *and* the taller man: He was walking away from S.E. and around the end of the desk to the door, which he immediately opened and exited. Contrary to the state (at 12), Jones was not facing the second man while walking toward the door; the door was to the right, close to Jones's point of exit from behind the desk, not near the second man. Further, Jones's view was blocked by desk cabinets and his hood. (41:5:10 to 5:20). That is why S.E. said she thought the shorter man was not looking at the taller one "because I think he was exiting from the desk at that time." (94:198; A-Ap. 161). True, she "thinks" that is the case because she was looking away from Jones. But the video bears out her conclusion. No reasonable jury could find otherwise.

Third, the state argues (at 13-14) that the jury could have concluded the use of a firearm was a natural and probable consequence of the robbery because, based on the facts in this case, it was a result to be expected, not an extraordinary or surprising result. ***State v. Ivy***, 119 Wis. 2d 591, 600, 350 N.W.2d 622 (1984). The facts and circumstances must be such that a defendant acting as a party to a crime should be on notice a weapon would be used in the commission of the crime, even if the defendant did not have actual knowledge that would happen. ***Id.*** at 600, 602. As examples, ***Ivy*** cited robbery of an

armored car or a business guarded by armed security. ***Id.*** at 600-01.

The state (at 13) acknowledges this case is not like the examples in ***Ivy***, but points out that S.E. is a gun owner. (94:187; A-Ap. 150). The fact many citizens own guns cannot substitute for the standard established in ***Ivy***, which requires a basis in the facts of the specific case to justify the conclusion that a defendant should have known an accomplice would use a gun. There is no evidence here the robbers knew S.E. owned a gun; nor is there evidence S.E. had a gun with her at the time of the robbery or, if so, that the robbers knew or suspected that.

Likewise, the nearby room of the owners of the motel does not suffice. (State's brief at 13). Again, there is no evidence the robbers knew about that; if they did, the time of the robbery and the absence of any evidence the owners were armed show that use of a weapon is unexpected. As for the second man's standing near the clerk, for the reasons given above, that conduct is consistent with the threat of force required for unarmed robbery; thus, the conduct is not so singular that Jones should expect it means the other person is armed.

II. Alternatively, Jones Is Entitled To A New Trial In The Interest Of Justice.

A. The jury should have been instructed with ***Wis. J.I.—Criminal*** 406 and on the lesser included offense of robbery.

The state (brief at 15-17) emphasizes two points that Jones conceded (brief-in-chief at 18-19): He forfeited his jury instruction claims by not requesting ***Wis. J.I.—Criminal*** 406 and the lesser-included of robbery; and interest of justice claims are not favored for *pro se* defendants. While the circuit court's colloquy with Jones regarding the waiver of the right to counsel noted he would not have a lawyer to assist in preparing jury instructions (95:13), Jones and the circuit court relied on standby counsel's input about the instructions, which Jones first saw at the instruction conference. (96:31-32, 35; A-Ap. 167-68, 171). That standby counsel was consulted and relied on regarding the instructions militates against holding Jones solely responsible for the omissions. So, too, does the evidence standby counsel did not think about or consult with Jones regarding the lesser or ***Wis. J.I.—Criminal*** 406. (96:29, 34; A-Ap. 165, 170).

The state also argues (brief at 17-18) that *not* asking for the instructions gave Jones a better chance of acquittal. But complete acquittal is not necessarily the goal of a trial. By the end of Jones's trial it was clear there was sufficient evidence to find he was involved in the robbery, making complete acquittal unlikely. It was also clear the evidence there was

scant evidence that Jones knew his accomplice had a weapon. Thus, it was crucial to instruct the jury on how to assess Jones's level of culpability. Without the lesser-included instruction and ***Wis. J.I.—Criminal*** 406, Jones could not argue for conviction on the lesser crime he now admits he committed (65:7-8; 97:30-32, 43; A-Ap. 172) and the jury could not consider whether Jones was guilty of *robbery* rather than *armed* robbery. Thus, the real controversy was not tried and a new trial in the interest of justice is warranted.

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

Citing ***State v. Bergeron***, 162 Wis. 2d 521, 530, 470 N.W.2d 233 (Ct. App. 1991), the state (brief at 20) argues the evidence of Jones's nickname was admissible as "background" evidence. In ***Bergeron***, the defendant used an alias to cover up his participation in the crime, making the alias an admissible "other act" under Wis. Stat. § 904.04(2). ***Id.*** at 530-31. Here, S.E. knew Jones *before* the crime through a co-worker (94:144; A-Ap. 107) and his nickname was not provided to cover up his identity, so it was not an "other act" and ***Bergeron*** is inapplicable.

Instead, as Jones conceded (brief-in-chief at 20-21), it was permissible to elicit Jones's nickname from S.E. to lay a foundation for her identification. Likewise, that police knew Jones as "Sneak" was

relevant to establish that S.E. and police were referring to the same person. But if S.E. now knows the defendant as Sean Jones, the nickname is irrelevant. S.E. *did* identify Jones as Jones (94:145; A-Ap. 108), confirming she knew him and could refer to him as Jones rather than "Sneak." Thus, repeated uses of the nickname had no tendency to make S.E.'s identification of Jones more probable, making the nickname irrelevant under Wis. Stat. § 904.01. And, given the vanishing probative value of the nickname once "Sneak" is identified as Jones, the references are needlessly cumulative and inadmissible under Wis. Stat. § 904.03.

As for the impact of the cumulative references to "Sneak," the state asserts (at 20) it was not overly prejudicial because Jones was not being "sneaky" in this case. That is irrelevant. As the state admitted in the circuit court, the nickname implies "stealing" and "a sentiment of deception." (93:37-38; A-Ap. 102-03). In the context of a charge of armed robbery, the cumulative references to Jones as "Sneak" were highly inflammatory. The nickname carries connotations of thievery and dishonesty, suggesting Jones has a propensity to steal and leading the jury away from an assessment of the evidence.

Regarding the officers' testimony about knowing Jones from past "professional" experience or contacts (94:204, 205; 95:107), the state (at 21) argues that does not imply Jones was the object of police scrutiny. But the first and primary reference was in testimony that also referred to Jones as

"Sneak," the use of the plural noun—"contacts"—means there were more than one, and police knew the vehicle Jones drove from those contacts (94:204-05)—taken together, this conveys that Jones has been the object of police scrutiny. A simple statement that an officer knows Jones was all that was necessary because the officers were not eyewitnesses and their identification is not in issue; any reference to how they know Jones had no probative value.

Finally, while one or two unnecessary references to "Sneak" and his prior police contacts would not cloud the central issue at trial, the cumulative impact of multiple references did. The state (at 22) argues the references "made no difference" given the other evidence, but the interest-of-justice test does not depend on whether a retrial would probably have a different result. Thus, a new trial in the interest of justice is warranted.

III. The Court Erroneously Exercised Its Discretion At Sentencing.

As the state recognizes (brief at 23), Jones's challenge to the circuit court's sentencing discretion is narrowly focused on the explanation regarding the duration of the components of the sentence in light of the relevant sentencing factors and goals. Both parties cite to ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. The question is what ***Gallion*** demands and whether the circuit court satisfied those demands in this instance.

The state cites ***Gallion***'s statement that "the exercise of discretion does not lend itself to mathematical precision." ***Id.***, ¶49. But ***Gallion*** also insists that sentencing courts 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. ***Id.***, ¶¶40-46. It is here that the court's sentencing falters.

It does not require an exercise in mathematical precision or "magic language" (82:4; A-Ap. 202) to explain why the duration of the specific incarceration and supervision components of the bifurcated sentence advance the objectives of its sentence or why the sentence is the minimum amount of custody or confinement consistent with the primary sentencing factors. Instead, it requires the court state its thinking as to the appropriateness of the sentence components in light of the sentencing factors in the case and the goals of the sentence. The court recognized there must be a linkage between its canvassing of the relevant sentencing factors and goals and its ultimate sentence (97:52; A-Ap. 181), but it did not explain that linkage. While the amount of explanation necessary for the sentence imposed "will vary from case to case," ***Gallion***, 270 Wis. 2d 535, ¶39, this record shows that the circuit court did not fulfill its obligation to provide a statement explaining the reasons for selecting the particular sentence imposed. Thus, the sentence is the result of an erroneous exercise of discretion.

IV. Jones Is Entitled To 204 Days Of Sentence Credit.

The state (brief at 24-25) does not dispute the relevant facts regarding Jones's time in custody before sentencing in this case. Instead, the state disputes Jones is entitled to dual credit for the time he was in custody from his arrest until he was sentenced after revocation. It claims (brief at 25-27) Jones is entitled at most to 73 days of credit—from his arrest on May 29, 2016, to August 10, 2016, he signed a signature bond. This is incorrect.

To be eligible for sentence credit under Wis. Stat. § 973.155, a defendant must be in custody "in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a). This must be a *factual* connection rather than a procedural or tangential one. ***Wis. J.I.—Criminal*** SM-34A (2016), at 10. To illustrate: If a defendant is released on bail on charges arising from one course of conduct but is later arrested for bail jumping for a new course of conduct, the custody for the second course of conduct is not factually connected to the first course of conduct despite the bail jumping charge. ***Id.*** at 10 & n.26, *citing* ***State v. Beiersdorf***, 208 Wis. 2d 492, 498, 561 N.W.2d 749 (Ct. App. 1997). Similarly, being sentenced in two different cases at the same time does not create a factual connection. ***Id.*** at 10 & n.22, *citing* ***State v. Johnson***, 2009 WI 57, 318 Wis. 2d 21, 767 N.W.2d 207. The bail jumping charge and the simultaneous

sentencing proceeding create procedural, not factual, connections.

But when a person on supervision is arrested for a new offense *and* the new offense forms a basis for a supervision hold, the new course of conduct *is* plainly factually connected to both the new offense *and* the case for which the person is on supervision. ***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.

The state acknowledges that ***Hintz*** supports Jones's argument, but suggests ***Johnson*** "clarified" the distinction between "factual" and "procedural" connections in a way that shows Jones's custody was not factually connected to the armed robbery allegation. Citing ***Beiersdorf***, which ***Johnson*** discusses, the state argues that "Jones'[s] prior charges [in the two probation cases] and his armed robbery were procedurally connected but not factually connected." (State's brief at 26-27).

But the issue is not a factual connection between the armed robbery and the conduct in Jones's *probation cases*. The issue is the factual connection between the armed robbery and Jones's *custody* from May 29 to December 16, 2016. On that issue the law and the record are clear: He was in

custody during that time because he was arrested for and charged with armed robbery *and* because that arrest and charge resulted in a probation hold. He remained in custody because of the robbery allegations until he was sentenced after revocation, which severed the connection between his custody and the armed robbery charges. ***Beets***, 124 Wis. 2d at 379. Until that sentencing, his custody was based on and thus factually connected to the robbery charge.

The same facts and legal principles refute the state's claim (at 27) that the signature bond "severed" the connection between Jones's custody and the armed robbery. The armed robbery allegation provided the factual basis on which the probation hold was issued. Nothing about the signature bond in the armed robbery case altered that factual basis. Therefore, the signature bond did not alter the factual connection between the robbery allegation and Jones's continuing custody. Instead, the factual connection between Jones's custody and the robbery charge was severed only when Jones began serving sentences on the two prior cases. This court reached the same conclusion on indistinguishable facts in ***Hintz***, 300 Wis. 2d 583, ¶¶3, 7-8, 11. It must reach the same conclusion here.

CONCLUSION

For the reasons given above and in Jones's brief-in-chief, the evidence was insufficient to convict Jones of being party to the crime of armed robbery. This court should vacate the judgment of conviction

and remand with directions that the case be dismissed.

Alternatively, if the evidence was sufficient, the court should order a new trial in the interest of justice.

If this court does not order a new trial, it should remand for the circuit court to consider modifying Jones's sentence.

Finally, this court should order the circuit court to issue an amended judgment of conviction granting Jones 204 days of sentence credit.

Dated this 30th day of October, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,974 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 30th day of October, 2018.

Signed:

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