STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2018AP1476-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OCTAVIA W. DODSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable M. Joseph Donald, Presiding, and an Order Denying Defendant's Postconviction Motion, the Honorable Carolina Stark, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The sentencing court improperly relied on Mr. Dodson's status as a lawful gun owner in violation of his Second Amendment right, and resentencing is warranted.

A. Legal standard.

In order to determine whether the circuit court erroneously exercised its discretion based on an improper factor, this court must first decide whether the factor was improper and then decide whether the sentencing court actually relied on it. *State v. Alexander*, 2015 WI 6, ¶¶ 17–18, 360 Wis. 2d 292, 858 N.W.2d 662. If the defendant meets this burden, then the burden shifts to the State to prove that the error was harmless. *Alexander*, 360 Wis. 2d 292, ¶ 18.

B. The court's reliance on Mr. Dodson's status as a concealed carry permit-holder and licensed gun owner was improper.

The improper factor—that the court improperly relied on Mr. Dodson's status as a concealed carry permit-holder and licensed gun owner to impute improper motives on his actions—is found in the following passage:

> In reviewing this case, I have to say I am completely baffled as to why this happened. And I don't think that there is any rational way of trying to explain it. I can tell you this, Mr.

> Dodson, that in my experience as a judge, *I have seen over time how individuals when they are possessing a firearm, how that in some way changes them. It changes how they view the world. It changes how they react and respond to people*. I know that this is only speculation on my part, but *I do strongly feel that the day that you applied for that concealed carry permit and went out and purchased that firearm*, and that extended magazine whether your rational beliefs for possessing it, whether you felt the need to somehow arm yourself and protect yourself from essentially the crime that is going on in this *community I think on that day set in motion this circumstance*.
>
> It is clear to me, Mr. Dodson, that for whatever reason, and *it appears that it is a distorted, misguided belief of the world* that somehow Mr. Freeman was a threat that required you, in essence, to terminate his life. Makes no sense.

(73:30-31)(emphasis added).

The sentencing court admits it is "baffled as to why this happened," yet it attempts to square the circle by suggesting that the firearm made Mr. Dodson see the world differently. The court posits that firearms change people—they change the way people see the world and they change the way people react and respond to other people. The court says it "strongly feel[s]" that the day Mr. Dodson "applied for that concealed carry permit and went out and purchased that firearm" is the day he "set in motion this circumstance." (Id.). The court implies that Mr. Dodson put himself on a path to homicide by

purchasing a firearm and applying for a concealed carry permit. It is this animus toward gun ownership that is the improper factor.

C. The court actually relied on the improper factor in passing its sentence.

The sentencing court gave explicit attention to Mr. Dodson's status as a permit-wielding gun owner and attributed malice to him on that basis, thereby actually relying on that improper factor in forming its sentence. Unnecessary defensive force in the context of second degree intentional homicide applies to cases in which a person intentionally caused the death of another but "did so because [he] had an actual belief that [he] was in imminent danger of death or great bodily harm and an actual belief that the deadly force [he] used was necessary to defend [him] against his danger, if either of those beliefs was not reasonable." *State v. Head*, 2002 WI 99, ¶ 69, 255 Wis. 2d 194, 648 N.W.2d 413.

Mr. Dodson called 911 within minutes of the shooting.[1] He turned himself in to the police, turned

[1] If you shoot your attacker, you should first "decide whether it is safe to approach before rendering first aid" and then decide whether your best course of action is "to summon law enforcement to stabilize the scene so medical professionals can begin to attend to the suspect." *Firearm Safety Course: A Training Guide for Concealed Carry Licenses*, WISCONSIN DEPARTMENT OF JUSTICE, January 2017 at 34 (available at https://www.doj.state.wi.us/sites/default/files/dles/ccw/student-manual.pdf) (last viewed July 9, 2019).

over his weapon, and during the course of the next thirty-six hours, he voluntarily spoke to three different sets of detectives—without counsel—during three different interviews totaling nearly eight hours of interrogation. (38:1-2). Mr. Dodson's version of what happened was succinctly summarized in the complaint:

> The defendant states that a male subject exited the car in front of him and ran toward the defendant. The defendant stated that he could not see this subject's hands because they were either in his jacket pockets or underneath his shirt. The defendant states that he thought that this subject was pulling something out. The defendant states that this male subject yelled: "Fuck nigga!" or words to that effect.

(1:3).

That statement is substantially similar to the statement Mr. Dodson gave after entering his guilty plea. He told the writer of the presentence investigation report that he headed to his father's house after he was rear-ended, and on his way there, he saw the vehicle that struck him. The two cars pulled over to the side of the road:

> Mr. Dodson stated that he carefully checked his surroundings and saw that the man from the other car was running abruptly towards him and screaming, "I'm tired of you fuck niggers!" He had his hand near his waistband emulating that he was in possession of something. Mr. Dodson stated that he, being a permit-wielding concealed carry holder, pulled out his gun and fired it, as

> he feared for his personal safety. He recollected seeing the victim fall to the ground.

(17:7).

By pleading guilty, Mr. Dodson conceded that one of those beliefs was not reasonable. At sentencing, trial counsel claimed the "imminent danger of death or great bodily harm" prong was lacking. (73:25). Mr. Dodson seemed to concede as much when he told the PSI writer that he feels "very foolish for his behavior." (17:7). Nevertheless, he maintains that he was in danger, that he was scared, and that he felt at the time that he acted reasonably.

Even though the state called this case "a true second-degree intentional homicide," its comments at sentencing treated the matter like an unmitigated murder. (73:15). The state accused Mr. Dodson of going on a "search mission to find [the] vehicle" that struck him and of "hunting" it down. (73:13-14). The state accused him of making "demonstratively false statements to the police" and said that the reason he made those statements was that "he knew in his heart that what he did was completely out of bounds and totally over the top." (73:16-17).

The "false statements" cited by the state—that Mr. Dodson was standing up rather than sitting down when he fired his weapon or that he fired six shots instead of three shots—tell us nothing about what Mr. Dodson "knew in his heart." (Id.). The statements were made during three interviews that spanned nearly eight hours and took place while he

was still processing the events during the day and a half following the shooting. (38:1-2). Mr. Dodson agreed to these interviews of his own volition and without counsel. (Id.). The state also incorrectly claims that the fact that Mr. Freeman's "hands and arms in a position well away from his waistband and his pockets" proves that he was not moving his hands toward his waistband when he charged at Mr. Dodson. (State's Br. at 15). Without more information, his positioning does not prove what the state says it proves, especially if Mr. Freeman was charging at Mr. Dodson at the time he was shot.

Further, the state makes hay out of the fact that Mr. Dodson's description of the Buick that struck him did not perfectly match Mr. Freeman's Buick. (73:17-18). The incident took place at approximately 10:45 p.m., and even in the dim light, Mr. Dodson's description of the Buick that struck him was not entirely incorrect. (1:3). Mr. Dodson observed what he called a "blue" Buick when in reality, Mr. Freeman's Buick was "green." (1:2-3). He claimed he was unable "to see a rear plate when the Buick drove past him," and Mr. Freeman's car did not have the rear plate affixed to the rear bumper. (1:2). He was wrong about the window tint, but that discrepancy can be attributed to the time of night he observed the vehicle. (1:2). The state failed to consider that Mr. Dodson's description of the Buick that struck him might be partially incorrect. Instead, the state conferred his description of the Buick with a degree of infallibility, arguing that any dissimilarity between that description and Mr. Freeman's Buick meant that

Mr. Freeman was not the person who crashed into him minutes earlier. (73:17).

Nevertheless, the state accused Mr. Dodson of "spoiling for a fight" and going out "looking for it." (73:19). With no basis in the facts of the case, the state characterized Mr. Dodson dangerous person who "think[s] this is some sort of a game, or that this is not real, or that this is a movie or a video." (73:18).

The state also pointed out the dangers of people who "carry around these pieces of technology, which are capable of taking away a human life in a nanosecond." (73:18). This notion is what the sentencing court latched onto when it said that Mr. Dodson adopted a misguided view of the world the day he "went out and purchased his firearm." (73:30). While the court admitted it is unclear on why this happened, it nonetheless disregarded Mr. Dodson's version of events as not grounded in fact. What was clear to the court, however, was that Mr. Dodson was operating under a misguided and distorted view of the world.

> I, too, like the State, look at certain factors that are surrounding the night that this occurred, certain statements that are attributed to you that in my opinion really don't make any sense, because *factually it's not supported*. But it is clear to me that you were operating under some *misguided belief, some distorted view of the world* that somehow Deshon Freeman was a threat to you when in reality it was nothing further from the truth.

(73:32)(emphasis added).

According to the state, in the paragraph above, the lack of factual support for Mr. Dodson's version of events underpins the court's idea that Mr. Dodson had a misguided view of the world. (State's Br. at 13, 15, 17). That's not what the court said. The court did not blame Mr. Dodson's "misguided" view of the world on the lack of factual support in his version of events. The word "but" is used to introduce a clause contrasting with what has already been mentioned. The phrase "it is clear to me" following "but" is intended to contrast with the preceding phrase, which means that the paragraph should be understood as meaning something along the lines of "What happened that night is not clear to me because your version of events is not supported by the facts, but what is clear to me is that you were operating under a distorted and misguided view of the world." The court might disregard Mr. Dodson's version of events, but it doesn't blame his "misguided belief" on the lack of factual support in the story. The court blames the "misguided belief" on Mr. Dodson's possession of a firearm.

Earlier in its remarks, the sentencing court said that "a distorted, misguided belief of the world" led Mr. Dodson to see Mr. Freeman as a threat. (73:30-31).The court also said that the day Mr. Dodson "applied for that concealed carry permit and went out and purchased that firearm" is the day Mr. Dodson "set in motion this circumstance. (Id.). These comments cannot be divorced from each other, and

taken together, they imply that Mr. Dodson put himself on a path to homicide by purchasing a firearm and applying for a concealed carry permit. The court relied on this hostility toward gun ownership in its view of the underlying facts and improperly considered it Mr. Dodson's motive.

D. The arguments the state made in its Reply Brief do not cure the defects of the sentence.

1. Unlike *Harris*, the improper factor in this case does not bear a reasonable nexus to proper sentencing factors.

The state makes a number of additional arguments in its brief. The state argues that actual reliance does not occur when improper factors "bear a reasonable nexus to proper sentencing factors." (State's Br. at 8 (*quoting State v. Harris*, 2010 WI 79, ¶ 4, 326 Wis. 2d 685, 786 N.W.2d 409)). In *Harris*, the defendant alleged that the sentencing court made "sarcastic and inappropriate comments based on stereotypes during the sentencing proceeding." *Harris*, 326 Wis. 2d 685, ¶ 21. After consulting Urban Dictionary and examining the term in context, the Court determined that "[l]ooking at the hearing transcript as a whole, we do not believe that the circuit court's use of the phrase 'baby mama' makes it highly probable or reasonably certain that the circuit court actually relied on race when imposing its sentence." *Id.*, ¶ 56.

Harris is easily distinguishable from this case. The sentencing court in *Harris* was accused of using derogatory terms in reference to Harris, but when read in context, the court found that the terms were not motivated by improper considerations.

> The court clearly found that Harris was acting irresponsibly, and appears to have used this phrase to chide Harris for his poor choices. These observations bear a reasonable nexus to relevant factors, including Harris's character, education, employment, and need for close rehabilitative control. The court's comments bear on relevant factors and do not, in context or as a whole, implicate race.

Harris, 326 Wis. 2d 685, ¶ 59.

The term "baby mama" was acceptable because it was emblematic of Harris's failures of character, rather than the court's prejudices. In the present case, the court calls Mr. Dodson a "model citizen." (73:32). It points out that he has no criminal record, that he works hard, provides for his family, and is loved and respected. (Id.). In spite of these positive characteristics, in spite of the fact that Mr. Dodson called 911 within minutes of the shooting, turned himself in voluntarily, and likely would not have been discovered otherwise, the court is skeptical of Mr. Dodson's motives. It faults him for the initial decision that "set in motion this circumstance." (73:30-31). That is, Mr. Dodson's decision to "appl[y] for that concealed carry permit and [to go] out and purchase[] that firearm." (Id.). The sentencing court

did not refer to Mr. Dodson in derogatory terms. It did not call him "cowboy" or "gunslinger." Instead, it determined that the gun made him lose sight of right and wrong, and the court punished him for his decision to become a licensed gun owner.

2. The defendant does not allege that the court imposed a hard and fast rule based on a general predisposition for a type of sentence as in *Ogden*.

The state also argued that sentencing courts "are not prohibited from entertaining general predispositions, based upon their criminal sentencing experience, when they exercise sentencing discretion." (State's Br. at 10 (*citing State v. Ogden*, 199 Wis. 2d 566, 573, 544 N.W.2d 574 (1996))(internal quotations omitted). In *Ogden*, the Court overturned a sentence, finding that it embodied the "very type of mechanistic sentencing approach disfavored by our case law." *Ogden*, 199 Wis. 2d at 572. The *Ogden* court focused on comments such as, "If I make an exception for her, then any person in the jail can also request that same exception," and "My reason has always been I do not allow [Huber privileges for] normal child care because, number one, it's all too often abused." *Id*. (internal quotations omitted).

The state's argument—that a court can entertain certain predispositions—relies on a paragraph from *Ogden* which says that sentencing

courts are not prohibited from entertaining general predispositions "regarding when a certain type of sentence is appropriate." *Ogden*, 199 Wis. 2d at 573. The Court's statement regarding "general predispositions" refers to the sentencing court's predisposition against a certain type of sentence (jail time without Huber release) rather than its predisposition toward a certain type of defendant (a licensed gun owner). *Id. Ogden* is not on point.

3. The sentencing court's actual reliance on an improper factor was not harmless.

The state argued that even if the sentencing court actually relied on an improper factor, "the error was harmless because the circuit court would have imposed the same sentence absent the error." (State's Br. at 16 (*citing State v. Travis*, 2013 WI 38, ¶ 73, 347 Wis. 2d 142, 832 N.W.2d 491)). In *Travis*, the Court found that the sentencing court's error was not harmless because it "gave explicit attention to the inaccurate information." *Travis*, 347 Wis. 2d 142, ¶ 73. In the present case, the sentencing court mentioned the attorney's arguments, the presentence investigation report, victim impact statements, and statements made on Mr. Dodson's behalf, but it did not articulate how these helped form the basis of the sentence. The court spoke to the fact that the death was tragic. (73:32-33). It said that Mr. Freeman's mother's pain made this a serious offense. (73:32). It said that Mr. Dodson's character was otherwise perfectly fine. (Id.). And it said that the day Mr.

Dodson purchased a firearm and obtained a concealed carry permit, he adopted a misguided view of the world in which he perceived threats were there were no threats. (73:30-31). The improper factor "permeated the entire sentencing procedure" and cannot be considered harmless. *Travis*, 347 Wis. 2d 142, ¶85. Therefore, Mr. Dodson must be granted a resentencing.

CONCLUSION

Mr. Dodson respectfully requests that this Court reverse and remand for resentencing.

Dated this 11th day of July, 2019.

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 2,999 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 11th day of July, 2019.

Signed:

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