STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1476-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OCTAVIA W. DODSON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I, Affirming 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-PETITIONER

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TABLE OF CONTENTS

CASES CITED

Page

ARGUMENT

I. The sentencing court prejudicially and improperly relied on Mr. Dodson's decisions to carry a concealed firearm in violation of his Second Amendment right, and resentencing is warranted.

A. Legal principles and standard of review.

"[S]entencing is a discretionary judicial act and is reviewable by this court in the same manner that all discretionary acts are to be reviewed." *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). There should be "evidence in the record that discretion was in fact exercised," and that the trial judge "has undertaken a reasonable inquiry and examination of the facts as the basis of his decision." *Id.* at 277-78. In the wake of truth-in-sentencing legislation, this Court directed appellate courts "to more closely scrutinize the record to ensure that discretion was in fact exercised and the basis of that exercise of discretion [was] set forth." *State v. Gallion*, 2004 WI 42, ¶ 5, 270 Wis. 2d 535, 678 N.W.2d 197 (2004). Sentencing courts are to "identify the general objectives of greatest importance" and "describe the facts relevant to these objectives." Id., ¶ 41-42. Courts must also "identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision." *Id.*, ¶ 43. In order to "produce sentences that can be more easily reviewed for a proper exercise of discretion," sentencing courts must, "by reference to the relevant facts and factors, explain how the sentence's

component parts promote the sentencing objectives." *Id.*, ¶ 46.

"A sentencing court misuses its discretion, as a matter of law, when it sentences in contravention of a defendant's due process rights." *State v. Tiepelman*, 2006 WI 66, ¶ 41, 291 Wis. 2d 179, 717 NW 2d 1 (2006). A sentence may not be based on the violation of a constitutional right. *Id.*, ¶ 42 (internal citation omitted). Moreover, a sentencing court cannot rely on improper factors at sentencing. *Id.*, ¶ 19 (*citing State v. (Landray) Harris*, 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409) (recognizing a defendant's due process right not to be sentenced on the basis of race and gender). 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. *Alexander*, 360 Wis. 2d 292, ¶¶ 17–18.

In the context of inaccurate information, when the defendant meets his burden of proving actual reliance, then the burden shifts to the State to prove that the error was harmless. *Id.*, ¶ 18 (*citing Tiepelman*, 291 Wis. 2d 179, ¶¶ 26-27). As the state pointed out, "this Court has not decided whether a circuit court's actual reliance on an improper factor constitutes structural error or is subject to harmless error analysis." (State's Br. at 11) (*citing (Landray) Harris*, 326 Wis. 2d 685, ¶ 33; *State v. Salas Gayton*, 2016 WI 58, ¶¶ 18, 38, 370 Wis. 2d 264, 882 N.W.2d 459). Whether an error is structural or subject to a "harmless error" review is a question of law, which this Court decides de novo. *State v. Nelson*, 2014 WI 70, ¶

18, 355 Wis. 2d 722, 849 N.W.2d 317. If this Court opts for a "harmless error" review, then it will conduct that analysis de novo. *Id*. If the error is structural, the Court does not perform a harmless error analysis. *State v. Travis*, 2013 WI 38, ¶ 9, 347 Wis. 2d 142, 832 N.W.2d 491.

B. The improper factor: rather than considering the circumstances surrounding the shooting, the court blamed Mr. Dodson's decision to go armed for the death of Mr. Freeman.

In passing sentence, the court explained Octavia's subjective fear by opining that he was changed because he possessed a firearm. According to the court, possession of a firearm "changes" a person. (73:30). "It changes how they view the world" and "how they react and respond to people." (73:30). The court continued, "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," you "set in motion this circumstance." (73:30-31). And then, "It is clear to me, Octavia, 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." (73:31).

The court specifically tied the decisions to purchase the firearm, to apply for a concealed carry license, and to purchase an extended magazine to Octavia's subjective fear during the confrontation. Regardless of the circumstances surrounding the shooting, the court saw the firearm as the underlying cause of Octavia's subjective fear. The court

acknowledged that there was a concerning level of "crime … going on in this community" and that Octavia may have felt the need to "protect [him]self" from it, but still found that his decision to purchase a firearm and apply for a concealed carry permit doomed him to this fate— "set in motion this circumstance." (73:31).

In the court's view, once Octavia chose to protect himself by going armed, the events had been set in motion. He chose to protect himself by becoming a person who carries a concealed firearm, and therefore, he changed the way he viewed the world and how he reacted and responded to people. (73:30). The court disregarded the fact that Octavia was rear-ended at night-time while driving alone or that when he exited his car, the driver of the other car reversed a long way before speeding past Octavia.[1] (63). This happened in the context of the "crime … going on in this community," but the court did not factor that into its analysis of Octavia's subjective fear. Anyone would be shaken up after that kind of encounter. Not five minutes later, Octavia happened upon the car that he believed struck him. (1:2). The car pulled over abruptly in a strange manner, and its occupant charged at Octavia yelling. (17:7). We will never know why Deshun Freeman reacted the way he did. We do not know if he confused Octavia with someone else or

[1] The relevant portion of the video begins at timestamp 10:42:45 PM and continues until 10:43:32 PM. The video can be found on the CD attached to defendant's postconviction motion. It is referred to as "CD – Defendant's Exhibit F-Citgo Video Attached to Defendant's Postconviction Motion." (38; 63).

thought he was being pursued by the same people that shot his sister "mere weeks … prior to this incident." (73:8). The court disregarded the circumstances that led Octavia to this moment and, instead, relied on its own view of gunowners and concealed carry permit holders as people that are fundamentally changed by the presence of the firearm: "I have seen over time how individuals when they are possessing a firearm, how that in some way changes them." (73:30).

1. The improper factor does not bear a reasonable nexus to proper sentencing factors.

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 11 (*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 Octavia 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.*). Despite these positive characteristics, although Octavia called 911 within minutes of the shooting, turned himself in voluntarily, and likely would not have been discovered otherwise, the court is skeptical of Octavia's motives. It faults him for the initial decision that "set in motion this circumstance." (73:30-31). That is, Octavia'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 Octavia in derogatory terms. It did not call him a "cowboy" or a "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 rely on the prohibition against hard and fast rules 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 14 (*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.

The state claims that the court did not suggest that "gun owners are categorically suspect," but the

court did more than suggest that possession of a firearm, especially when combined with a concealed carry permit, changes the way a person looks at the world and gives one a misguided view of the world. (State's Br. at 15). The court's negative view of gun ownership and possession of a firearm is what led the court to disregard the circumstances surrounding the shooting and instead focus on the effect the firearm had on Octavia. The court may not have imposed a rigid rule for fashioning a sentence, but that does not mean its bias against gun ownership was a proper factor for sentencing.

C. The circuit court actually relied on the improper factor at sentencing.

Whether the circuit court actually relied on the improper factor turns on whether the circuit court gave explicit attention or specific consideration to the inaccurate information, so that the inaccurate information "formed part of the basis for the sentence." *Alexander*, 360 Wis. 2d 292, ¶ 29; *see also Travis*, 347 Wis. 2d 142, ¶ 28.

The sentencing court explicitly relied on Octavia's decision to purchase a firearm and obtain a concealed carry permit when it said, "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," you "set in motion this circumstance." (73:30-31). The court's belief that Octavia's decision to go armed was fated to lead to the death of Mr. Freeman is at the heart of the improper factor. It was the decision to go armed that labeled Octavia the kind of person with a "distorted,

misguided belief of the world" that sees danger around every corner. (73:31). The court referred to the same "misguided" view of the world when it said, "it is clear to me that you were operating under some misguided belief, some distorted view of the world." (73:30-31). Considering the brevity of the comments the court made at sentencing and the fact that it returned to its idea that a firearm causes one to have a misguided view of the world, it is clear that the court gave explicit attention and specific consideration to the improper factor.

D. Even if the Court conducts harmless error analysis, it should vacate Mr. Dodson's sentence and remand for resentencing.

1. The Court should order a new sentencing because the circuit court's error was structural.

"Structural errors" are not amenable to harmless error analysis because "'they affect the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (*quoting Arizona v. Fulminante*, 499 U.S. 279, 307-308 (1991)). Although courts often discuss structural errors in the context of trial errors, the structural error doctrine is applicable to sentencing errors as well. *Travis*, 347 Wis. 2d 142, ¶ 57. Notably, "the deprivation of an impartial and unbiased tribunal" constitutes structural error. *Id.*, ¶ 9. Because the improper factor in this case—and arguably any improper factor case—is so closely related to bias, this court should vacate

his sentence and remand the case for a new sentencing hearing.

2. In the alternative, even if the Court conducts a harmless error review, it should order a new sentencing because the circuit court's error was harmful.

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 24) (*citing Travis*, 347 Wis. 2d 142, ¶ 73). In *Travis*, the Court found that the sentencing court's error was not harmless because it "gave explicit attention to the inaccurate information." *Travis*, ¶ 73. In the present case, the sentencing court mentioned the attorney's arguments, the presentence investigation report, victim impact statements, and statements made on Octavia'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 Octavia's character was otherwise perfectly fine. (Id.). And it said that the day Octavia purchased a firearm and obtained a concealed carry permit, he adopted a misguided view of the world in which he perceived threats where there were no threats. (73:30-31). The improper factor "permeated the entire sentencing procedure" and cannot be considered harmless. *Travis*, ¶ 85. Therefore, Octavia must be granted a resentencing.

CONCLUSION

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

Dated this 28th day of April of 2021.

Respectfully submitted,

Electronically signed by Jorge R. Fragoso

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CERTIFICATION AS TO FORM/LENGTH

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 2,593 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 28th day of April of 2021.

Signed:

Electronically signed by Jorge R. Fragoso
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