STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2018-AP-2305-CR

vs.

Trial No. 17-CF-227

MISTER N.P. BRATCHETT,

Defendant-Appellant.

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Appeal from an amended judgment of conviction entered
August 15, 2017 in the Circuit Court of Milwaukee County,
Honorable Jeffrey A. Conen, Judge, presiding

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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## ARGUMENT

### The evidence is insufficient to support the charge of mutilating a corpse because the State failed to proffer evidence that Mr. Bratchett acted with intent to conceal a crime or avoid apprehension, prosecution or conviction for a crime

Mr. Bratchett asserts that the charge of mutilating a corpse is unsupported by sufficient evidence that he acted with the specific intent to conceal a crime or avoid apprehension, prosecution or conviction for crime. The prosecutor at trial was unable to articulate a particular crime or crimes that the evidence suggested Mr. Bratchett intended to conceal; therefore, the prosecutor pointed to all evidence suggesting criminal activity and argued the jury should "connect those dots." 120: 77.

The State's response is essentially threefold. The State first reiterates the prosecutor's litany of evidence suggesting or supporting criminal activity in an effort to connect the dots. Second, in apparent recognition of the weakness of that attempt, the State seeks to shift the burden to Mr. Bratchett to show an innocent motive. Finally, the State seeks to refute Mr. Bratchett's Due

Process concerns. Mr. Bratchett now replies to these responses.

*Crimes Mr. Bratchett supposedly sought to conceal*

After the State recounts the facts (State's br. 6-8), the State devotes a paragraph to each of four crimes Mr. Bratchett supposedly sought to conceal. State's br. 9.

First the state notes that "*If* Bratchett gave Blunt the lethal dose of Oxycodone," he could be charged with homicide. State's br. 9 (emphasis added). However, the State points to no evidence from which the jury could conclude that Mr. Bratchett gave Mr. Blunt any drugs, or even that Mr. Bratchett had any drugs. The prosecutor emphasized in both opening and closing statement that there is no homicide charge and that he did not know who, if anyone, is responsible for Mr. Blunt's death. 116: 27; 120: 77. The State's use of the subjunctive "if" (emphasized above) concedes as much.

Second, the State suggests that "if" Mr. Bratchett gave any drugs to Mr. Blunt, he is liable for delivery of controlled substances. State's br. 9. Although pointing to no evidence of any drug delivery, State suggests that Mr. Bratchett might have given Mr. Blunt from his Oxycodone prescription. This, however, is simply not possible. Police

searched the 5873 North 38th Street house/studio on January 6, 2017, about 2 weeks *after* Mr. Blunt's death. 119: 67. Police did find a prescription issued to Mr. Bratchett for 90 10-milligram Oxycodone tablets; however, it had a "prescription start date" of January 8, 2017. 119: 71. The State presented no testimony that Mr. Bratchett's prescription was illegally or improperly obtained. Since this prescription could not have been filled on December 25, 2016, the day Mr. Blunt died, the State's speculation is refuted by the record. Furthermore, the only direct testimony of drug delivery in the record was from Sarah Manning, who testified that Brandon Blunt sold drugs to her, and apparently also to some other person at a gas station. 119: 13, 21. Mr. Bratchett was not involved in or present for these drug sales.

Third, the State suggests that Mr. Bratchett "likely knew" that even if he were not liable, his friends were: for keeping a drug house and possessing controlled substances with intent to deliver. State's brief 9. The State presumably makes this covering-for-friends argument because the jury heard that while Christopher Shoular and Alex Jones were charged for the drugs in the house/studio, Mr. Bratchett was not. 119: 72-74. However, this theory was never

suggested or argued at trial. The State presents it for the first time on appeal. This highlights the Due Process concerns Mr. Bratchett cited in his brief: how was he to defend himself if he does know what crime or crimes the State asserts he was trying to conceal? Br. 20-21.

Fourth, the State suggests Mr. Bratchett sought to conceal the theft of Mr. Lawson's gun and shoes. State's br. 9. Even if one assumes Mr. Bratchett stole Mr. Lawson's gun and shoes, how burning Mr. Blunt's body would serve to conceal that theft is not readily apparent. The State thus offers another new theory:

> If Bratchett stole the gun and shoes from Lawson's house, proof that Blunt died of an overdose would have led directly back to the drug house, revealing that Bratchett and Blunt were both there when Blunt overdosed, and they were together earlier throughout the evening. Blunt's girlfriend, Manning, would then have tied Blunt and Bratchett to Lawson's house, where he and Blunt went at Manning's request to fix the broken pipe, and stole the Air Jordan shoes and the Derringer while there before returning to the drug house.

State's br. 9-10. The intricacy of this theory causes it to collapse under its own weight. When Mr. Lawson discovered his gun was missing, he thought Ms. Manning had taken it. 118: 97. When police spoke to Ms. Manning,

she said she thought that Mr. Blunt had taken the gun when she left Mr. Blunt and Mr. Bratchett alone in the Lawson house to go to Walgreens. 119: 32. Ms. Manning had been with Mr. Blunt and Mr. Bratchett at the house/studio earlier on Christmas Eve. All this would lead police back to the house/studio with or without any car fire.

The State has failed to present sufficient evidence to allow a jury reasonably to conclude beyond a reasonable doubt that Mr. Bratchett had the specific intent to conceal a crime. Mr. Bratchett recognizes that this Court will view the evidence in a light most favorable to the State and the conviction. However, even under this standard, the State must still produce *some* evidence:

> A . . . [trier of fact] may draw reasonable inferences from facts established by circumstantial evidence, but it may not indulge in inferences wholly unsupported by any evidence. The inferences must be supported by facts, and the defendant cannot be convicted on mere suspicion or conjecture.

*Gilbertson v. State*, 69 Wis.2d 587, 599, 230 N.W.2d 874 (1975) quoting *State ex rel. Kanieski v. Gagnon*, 54 Wis.2d 108, 117, 194 N.W. 808 (1972) (ellipsis and brackets by the court).

The four crimes the State asserts Mr. Bratchett

intended to conceal are based on nothing more than suspicion and conjecture. The first two are described in the language of conjecture: "*If* Bratchett gave . . . ." The third and fourth are based on not merely conjecture, but conjecture articulated for the first time on appeal.

*Shifting the burden*

The burden of proof in a criminal trial is proof beyond a reasonable guilt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The prosecution must bear this burden; "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." *Speiser v, Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

The State in this appeal subverts its burden, inviting this Court to hold the jury could reasonably have found Mr. Bratchett acted to conceal a crime by asking: "What other reason, after all, would Bratchett have to burn Blunt's body . . . ?" State's br. 3. The State faults Mr. Bratchett for failing to offer, either on appeal or at trial, an alternative motivation for burning Mr. Blunt's body. State's br. 5. The State posits and dismisses possible alternative motives: that Mr. Bratchett was a "'fire bug'"

or bore ill will towards Mr. Blunt. State's br. 8.

Mr. Bratchett has no burden to show why Mr. Blunt's body was burned; that burden rests with the State. He suggests no motive for burning Mr. Blunt's body because no such motive is established by the evidence. As the prosecutor argued, while the proof of actions may be clear, proof of intent or motive, and in particular the specific intent to conceal a crime, is absent:

> I think that the State's evidence proves beyond any reasonable doubt that the defendant, Mister Bratchett, *for whatever reason*, decided to destroy the Honda Civic by burning it . . . with the dead body . . . inside . . . ."

120: 66. Thus, when later addressing the elements of the offenses, as Mr. Bratchett recounts in his brief-in-chief, the prosecutor was unable to explain which crime or crimes Mr. Bratchett supposedly acted to conceal. 120: 72-73; Brief 19-20.

*Due Process/unanimous verdict*

The State cites *State v. Hammer*, 216 Wis.2d 214, 576 N.W.2d 285 (Ct. App. 1997) for the proposition that a jury need not agree unanimously on the *means* by which an element of a crime is proven, so long as all jurors agree that the element was proven beyond a reasonable doubt.

State's br. 13. Mr. Bratchett acknowledged this principle. Brief 22.

The Court in *Hammer* properly applies this principle under circumstances where the jury was given a finite number of alternative means, each properly defined in the instructions. Mr. Hammer was accused of participating in a home invasion in which occupants were robbed, sexually assaulted and beaten. He was thus charged with burglary-intent to commit felony, sexual assault and armed robbery (but not battery). The jury was instructed that the fourth element of burglary "requires that the defendant entered the building with the intent to commit a felony." *Hammer* at 217. The options for intended felonies in the burglary instruction were specified: sexual assault, armed robbery and substantial battery. Since Mr. Hammer was charged with armed robbery and sexual assault (and thus elements for these presumably were provided separately), the burglary instruction set forth elements only for substantial battery. *Hammer* at 217-218 (quoting jury instruction). The trial court denied Mr. Hammer's request for an instruction that the jury must be unanimous as to which felony he intended to commit. The Court in *Hammer* affirmed this decision,

finding that Mr. Hammer was not entitled to a unanimity instruction regarding the felonies that formed the basis of his intent to enter the dwelling.

In an attempt to fit within *Hammer*, the State posits a scenario under which three jurors could each have found Mr. Bratchett intended to conceal one of four crimes:

> Bratchett could, therefore, properly be found guilty if three jurors believed he intended to conceal his or his friends' liability for reckless homicide, three others believed he intended to conceal his or his friends' liability for maintaining a drug house, three others believed he intended to conceal his or his friends' liability for delivering a prescription drug or various controlled substances, and the remaining three believed he intended to conceal his own lability [sic] for the theft of Lawson's Derringer and Air Jordan shoes.

State's br. 13. The principle that jurors need not agree unanimously on a single crime is correct. Nonetheless, this argument fails for several reasons.

First, the selection of *four* crimes rather than two or seven is entirely arbitrary. The jury in *Hammer* was given three choices in the instruction of crimes the State asserted Mr. Hammer intended when entering the premises. Mr. Bratchett's jury was given no limit on the number of crimes. As Mr. Bratchett noted in his brief, the prosecutor

suggested Mr. Bratchett may have acted to conceal other "crimes," including "trying to disguise the drugs in Brandon's system" and "fooling the medical examiner." 120: 86-87; Brief 24-25.

Second, but closely related, no crimes were defined for Mr. Bratchett's jury. The State cites reckless homicide and maintaining a drug house, delivery of controlled substances and theft, but the elements of these offenses were never given to the jury.

Third, many of the theories not proffered by the State were never presented or argued to the jury. Neither the prosecutor nor anyone else suggested Mr. Bratchett intended to conceal the keeping of a drug house. The prosecutor expressly rejected concealing a homicide, conceding to the jury: "I don't know who, if anybody, is criminally responsible for the death of Brandon Blunt, and there's no homicide charge here." 120: 77. No one ever suggested to the jury that Mr. Bratchett acting to conceal drug deliveries made by other persons.

Fourth, and most importantly, Mr. Bratchett challenges the sufficiency of the evidence to support an inference that he acted with the specific intent to conceal a crime. The defendant in *Hammer* did not challenge

sufficiency of the evidence. Thus, if the jury acted in accordance with the State's scenario, the evidence must be sufficient as to *all theories*. If, as the prosecutor conceded, evidence is insufficient to prove a homicide, but three jurors convicted on the basis Mr. Bratchett acted to conceal a homicide, then three jurors voted to convict based on a theory for which the evidence is insufficient.

Of course, the record does not reveal what crime or crimes the jury concluded Mr. Bratchett acted to conceal. This is why Mr. Bratchett addresses Due Process in the course of a challenge to the sufficiency of the evidence. Had the defendant in *Hammer* asserted that the evidence was insufficient to support the element that at the moment he entered the premises, he intended to commit a crime, this Court could have reviewed the evidence supporting a finite list: armed robbery, sexual assault and substantial battery, the three crimes for which the jury was provided the elements. The court could presume that each juror, following the instructions, found proof of intent to commit at least one of the three specified offenses. *State v. Truax*, 151 Wis.2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) ("We presume that the jury follows the instructions given to it.")

In Mr. Bratchett's case, no finite list exists. Mr. Bratchett's jury was instructed on the elements of mutilating a corpse only as follows: "First, that the defendant mutilated a corpse, and second, that the defendant mutilated a corpse with the intent to conceal a crime." 120: 59. While the trial court provided further instruction on the definition of "intent," it provided no guidance, limitation or definition for the word "crime." Mr. Bratchett was left to defendant himself against a claim he acted to conceal a crime, without knowing which crime or crimes he was acting to conceal. And now this Court must determine if the evidence is sufficient to allow a jury reasonably to have concluded Mr. Bratchett acted to conceal a crime without knowing which crime or crimes the jury found he acted to conceal.

## CONCLUSION

Mister N. P. Bratchett prays that this court vacate his conviction and sentence for mutilating a corpse and remand the case and with an order to dismiss that charge.

Respectfully submitted,

_____

John T. Wasielewski
Attorney for
Mister N.P. Bratchett

## FORM AND LENGTH CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2758 words.

_____

John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this reply brief, identical to the printed form of the brief as required by Wis. Stat. §809.19(12).

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John T. Wasielewski