STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2019AP000270-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KIEUTA Z. PERRY, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable T. Christopher Dee Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov
Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

CASES CITED

STATUTES CITED

OTHER AUTHORITIES

ISSUE PRESENTED

During Mr. Perry's trial on charges of recklessly endangering safety, armed robbery, and felon in possession of a firearm, a witness told the jury that Mr. Perry had shot someone in the head on a prior occasion. (70:63)

The trial court denied Mr. Perry's motion for a mistrial, asserting that this "stray" comment did not warrant that remedy. (71:7); (App. 103).

Did the trial court erroneously exercise its discretion when it denied Mr. Perry's motion for a mistrial?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Perry takes no position on publication.

While Mr. Perry does not request oral argument, he welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

The State charged Mr. Perry with three counts:

- Armed robbery as a party to the crime contrary to Wis. Stat. §§ 943.32(2) and 939.05;

- First-degree recklessly endangering safety as a party to the crime and with the use of a dangerous weapon contrary to Wis. Stat. §§ 941.30(1), 939.05 and 939.63(1)(b);

- Possession of a firearm by a felon contrary to Wis. Stat. § 941.29(1m)(a).

(5:1).

Following a trial in Milwaukee County Circuit Court, the Honorable T. Christopher Dee presiding, the jury entered the following verdict:

- Guilty of armed robbery as a party to the crime;

- Guilty of first-degree recklessly endangering safety without the dangerous weapon enhancer;

- Not guilty of possession of a firearm by a felon.

(74:4-5).

The court then sentenced Mr. Perry as follows:

- On Count One, 72 months of initial confinement followed by 72 months of extended supervision, consecutive;

- On Count Two, 60 months of initial confinement followed by 60 months of extended supervision, consecutive.

(54:1); (App. 101).

Mr. Perry filed a timely notice of intent to pursue postconviction relief and, ultimately, a notice of appeal. (53; 61).

STATEMENT OF RELEVANT FACTS

Trial Testimony

Eyewitnesses

On the evening of May 25, 2016, M.R. testified that she left her residence to "get some ice cream and some other grocery." (71:25). She was accompanied by two friends as well as an eight-year old child.[1] (71:25-26). When she returned to her neighborhood and got out of her car, a stranger approached her, pointing a gun. (71:26). In addition to the gunman, there was another person "backing them up." (71:27). At trial, M.R. could not remember the gunman's face or physical appearance. (71:26-27).

According to M.R., the gunman demanded her keys and grabbed at her purse. (71:27). After a brief struggle, M.R. handed the purse over to the man with

[1] The child's relationship to the other parties is unclear from this record.

the gun, who "took off" running. (71:28-29). One of M.R.'s friends spotted M.R.'s son, I.G., outside and yelled for his help. (71:29). M.R. told the jury that her son approached the fleeing robbers and asked them "what are you doing." (71:30). It was at this point that she heard, but did not see, gunshots. (71:30).

On cross-examination, defense counsel pointed out that M.R. had been inconsistent in prior statements as to which of the two suspects actually took her purse. (71:33). His cross-examination also revealed that the shooter was wearing a hood during the robbery. (71:33). Further, M.R. previously told police that the robbers had hoods which covered their faces, although she recanted this detail in her trial testimony. (71:34).

A.R. was with M.R. during the robbery. (71:37). She witnessed one of the men, who she spontaneously identified as Mr. Perry in court, put a gun to M.R.'s head. (71:39-40). On cross-examination, A.R. conceded that she initially told police that the robbers wore hoods that covered their faces during the robbery. (71:44). She was unable to describe any distinguishing marks or facial features that enabled her to make an identification of Mr. Perry. (71:46).

I.G. testified that he was "[a]bout five houses away" when he heard his mother (and not his mother's friend) scream out for help. (70:43). He started running towards M.R. (70:43). It was at this point that he saw two men, one of whom he identified as Mr. Perry. (70:44). According to I.G., Mr. Perry

was in possession of a gun and shot in I.G.'s direction from roughly 20 to 25 feet away. (70:44-46). I.G. ducked behind some nearby cars while the shooter fired "five, six times." (70:46). The shots missed I.G. (70:47). However, I.G. thought that "one house was hit" by the gunfire. (70:47).

After the shots were fired, the two suspects ran to a "brown truck" and "just took off." (70:45). I.G. tried and failed to catch the robbers. (70:47). I.G. also told the jury that he witnessed the second suspect—a black male—holding onto M.R.'s purse. (70:45). While I.G.'s initial account began with the purse already in the robber's hands, his later testimony suggested that he had also witnessed the robbery itself, with the robbers being dropped off, pointing a gun, demanding property, and making threats. (70:47). However, from his testimony, it was unclear to what extent these were his personal observations, as I.G. also stated, "I don't know, you know." (70:47).

I.G. initially testified that he identified Mr. Perry as the shooter in a photo array procedure conducted three to five days after the robbery. (70:49). However, he ultimately conceded that the photo array actually occurred "several months" after the shooting. (70:50). On cross-examination, defense counsel questioned I.G. about the accuracy of his identification. In response, I.G. stated: "Didn't he

shoot somebody in the head before he shot me? That's what I heard." (70:63).[2]

Motion for Mistrial

In response to a motion by defense counsel, the trial court ordered the answer stricken and directed the jury "to disregard that comment." (70:63). After returning from the lunch hour break, defense counsel revisited the issue outside the presence of the jury and moved for a mistrial. (71:3). He argued as follows:

> Your Honor, after having a little time to think about it, I'm moving for a mistrial based on the blurted out statement by [I.G.], the fact that he stated he heard that the defendant had shot somebody in the head previously.
>
> I don't believe that there's any way that I can remedy the jury hearing that, even though we told the jury to disregard it. They heard it. You cannot disregard something you hear, even though the court says to. And there's no way I can remedy it without going into many issues that would be improper.
>
> Therefore, I'm moving for a mistrial.

(71:3-4). The State agreed "that was certainly something the witness should not have said." (71:4).

---

[2] The State conceded in its closing argument that I.G. had reacted emotionally—he was "mad"—during defense counsel's cross-examination. (73:30).

The State conceded that the development was unfortunate, but not fatal to the integrity of the trial. (71:4). And, although the State conceded that it was "unavoidable" the jury would be reminded of the statement by a curative instruction, the State still asserted that such an instruction could sufficiently remedy the situation. (71:4). In reply, defense counsel argued that "there is no way to reasonably remedy the matter" short of a mistrial. (71:5). The State then defended I.G., claiming that he was under emotional stress when he "blurt[ed]" out the inappropriate information. (71:6). The State cautioned that "a mistrial would call into question whether or not this case could be retried." (71:6).

The trial court ruled as follows:

> At this point, it's one stray comment by one witness, very brief, didn't go into any details or long winded narrative.
>
> I will give an instruction, and jurors will be commanded to put that out of their minds.
>
> Even now, I may change my mind if something like that happens again, I realize the state did not elicit that response, no one elicited that response, he just blurted it out on his own.
>
> With the one stray, short comment from one witness, I think we're fine for now.
>
> I will give an instruction, we'll talk about a proper instruction, when the time comes, for now we'll continue on.

(71:7); (App. 103). The trial court ultimately read Wis. JI-Criminal 150, "Stricken Testimony," at the conclusion of the trial. (73:6).[3]

Professional Witnesses

Detective Thomas Obregon testified that four bullet casings were recovered from the scene. (70:28). Firearm examiner Xai Xiong confirmed that all four casings were fired from the same Ruger firearm. (71:55).

Detective Kenton Burtch testified that the Ruger firearm matching the casings was recovered during a consent search conducted at a residence on North 28th Street. (72:10). The basis for the search was not disclosed to the jury during direct examination. However, Detective Burtch stated during cross-examination that "someone" other than Mr. Perry had told police where the gun was located. (72:22-23).[4] No fingerprints or DNA were recovered from the Ruger. (72:22). The serial number was also "obliterated." (72:17).

---

[3] Specifically, the jury was told: "During the trial the court ordered certain testimony to be stricken. Disregard all stricken testimony. It is not to be considered in your deliberations." (73:12).

[4] The testimony on this point is somewhat confusing and it was revealed during a sidebar that the lawyers came to an agreement "to basically give a cliff note version of what happened" rather than getting into other, presumably prejudicial or irrelevant material. (72:29).

Detective Burtch told the jury that the residence where the gun was found belonged to "friends" of Mr. Perry. (72:20). A car parked outside the residence corresponded to a key fob that was in Mr. Perry's possession at the time of his arrest, which occurred in the vicinity of that residence. (72:36).

Detective Tony Castro was questioned about another investigation in which he was involved regarding "reckless use of a weapon" where a "firearm was recovered at a location other than that which the defendant occupies." (71:8). That appears to have been the same firearm referenced in this case—the Ruger. (71:9). Defense counsel repeatedly asked questions, over the objections of the State, that the person who had apparently possessed that weapon admitted to some other criminality involving the gun. (71:11).[5] The State responded to this line of cross-examination by pointing out, on redirect, that Mr. Perry had admitted to being at the residence where the firearm was recovered. (71:15).

Testimony of Mr. Perry

Mr. Perry also testified and acknowledged being at the address where the firearm was found. (72:47-49). According to Mr. Perry, he had been outside playing basketball earlier in the day. (72:49). He denied ever handling the gun, however. (72:50). He also denied being present during the robbery.

[5] Again, the questioning is somewhat vague as to what specific information counsel hoped to elicit.

(72:51). With respect to the key fob that linked him to the car at the residence where the gun was recovered, Mr. Perry told the jury that he had been holding onto the fob for another basketball player. (72:54). He denied ever going inside the residence. (72:55).

Closing Arguments

The State argued in closing that M.R.'s testimony established that Mr. Perry had pointed a gun at her head during the robbery. (73:29). The State also relied on the testimony of I.G., who claimed to identify Mr. Perry as the person who fired the shots underlying the recklessly endangering safety charge. (73:31). The State also pointed to the circumstantial evidence connecting Mr. Perry to the residence on North 28th Street, where the gun involved in the robbery had been recovered. (73:34). The prosecutor characterized Mr. Perry's testimony as nonsensical and openly accused him of lying to the jury. (73:36).

Defense counsel's closing argument focused on numerous inconsistencies in the trial testimony. (73:38-40). Counsel also questioned the integrity of A.R.'s in-court identification, pointing out that it occurred under very suggestive circumstances. (73:42). Defense counsel also argued that the lineup used with I.G. was suggestive, as Mr. Perry's face shape differed from all other fillers. (73:46).

Verdict

During deliberations, the jury explicitly asked whether it was necessary to conclude that Mr. Perry was the gunman in order to find him guilty of recklessly endangering safety. (74:2). This question foreshadowed the jury's eventual verdict, in which they found Mr. Perry guilty of participating in the armed robbery and recklessly endangering safety as a party to the crime but found him not guilty of the weapons enhancer and possessing a weapon. (74:4-5).

Post-Verdict Proceedings

Post-verdict, a juror wrote to the trial court in order to express several concerns regarding the integrity of the trial proceedings. (83:2). The anonymous juror confessed, "it wasn't even obvious to me at the time what we were doing." (83:2). The juror further informed the court that the verdict had been a reluctant compromise. (83:2). The juror was concerned that the verdict may have been motivated by "implicit bias" and specifically addressed the impact of I.G.'s remark indicating Mr. Perry had previously shot someone, advising the court that this had been discussed, albeit briefly, during deliberations. (83:2-3). Even though the juror was aware that this information was supposed to be disregarded, the juror expressed skepticism that it could truly be "erased from biases one may unknowingly hold." (83:3).

The trial court shared the juror's letter with the prosecutor and defense counsel. (76:2). In response,

defense counsel filed a motion for a mistrial, asserting that the verdicts were inconsistent. (49). The State opposed the motion. (48). At Mr. Perry's sentencing hearing, the trial court denied the motion, concluding that it lacked a legal basis to declare a mistrial. (77:15).

Sentence

At sentencing, the State requested a global sentence of 20 years initial confinement. (77:18). The State left the extended supervision to the trial court's discretion. (77:18). The State emphasized that Mr. Perry had refused to accept responsibility and had instead proceeded to trial. (77:18). The State also discussed the gravity of the offense at length, calling the incident "terrifying." (77:18).

Defense counsel argued that, considering the jury's verdicts, Mr. Perry could not have been the actor with the firearm. (77:29). Counsel pointed out that Mr. Perry was a very young man who made bad choices. (77:30). Counsel asked the court to consider probation and, if that option was rejected, to impose three to five years of initial confinement. (77:32).

The trial court declined to place Mr. Perry on probation, primarily because he was already on probation at the time of this offense. (77:34). The court did find, however, that Mr. Perry was an accomplice and not the actual shooter. (77:36). The trial court sentenced Mr. Perry to 11 years of initial confinement followed by 11 years of extended supervision. (77:38).

This appeal follows. (61).

ARGUMENT

I. The trial court erred in denying Mr. Perry's motion for a mistrial.

A. Legal principles and standard of review.

The decision whether to grant or deny a motion for a mistrial is committed to the "sound discretion" of the circuit court. *State v. Seefeldt*, 2003 WI 47, ¶ 13, 261 Wis. 2d 383, 661 N.W.2d 822. "The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial." *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 932 (Ct. App. 1995).

While the trial court's ruling on a defense motion for a mistrial is accorded great deference on appeal, the defendant may still prevail by making "a clear showing of an erroneous exercise of discretion." *Id.* "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." *Id.*

B. The trial court erroneously exercised its discretion when it denied a mistrial request in response to highly inflammatory, otherwise inadmissible, character evidence.

1. An examination of the trial court ruling in light of the whole proceeding proves that there was "sufficient prejudice" to Mr. Perry's defense necessitating a mistrial.

This Court is required to evaluate the trial court's denial of a mistrial "in light of the whole proceeding." *Bunch*, 191 Wis. 2d at 506. Here, there were several relevant considerations ignored by the trial court in its ruling on the defense motion that clearly demonstrate that a mistrial was necessary and appropriate. Because the trial court neglected these relevant considerations in its ruling, this Court should therefore conclude that an erroneous exercise of discretion occurred and reverse and remand for a new trial.

First, the trial court failed to consider the nature of the underlying allegations for which Mr. Perry was on trial, which involved a violent firearms offense. (2). In this context, testimony from the State's witness, who told the jury that the defendant had previously shot someone in the head is extremely prejudicial character or propensity evidence under Wis. Stat. § 904.04(2) and *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

The dangers of propensity evidence are well-known and include:

> (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated, and (4) the confusion of issues which might result from bringing in evidence of other crimes.

Whitty v. State, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967). Such evidence is categorically inadmissible not because it is irrelevant; rather, it is forbidden because it has "too much" probative value. *Id.*

Here, I.G.'s statement is pure and undiluted propensity evidence. When challenged on cross-examination as to the believability of his identification of Mr. Perry as the shooter, I.G. became defensive. In order to deflect probing questions about his own inconsistencies, I.G. deliberately cited a prior bad act of Mr. Perry's. The propensity inference is plainly apparent: You can believe what I am telling you now because I know he did something similar before.

In a case where identification was the central disputed issue, it makes sense that a jury would be tempted to use that statement just as I.G. intended—to find Mr. Perry guilty because of a propensity inference, regardless of any weaknesses in the State's

case which might otherwise give a reasonable juror pause, including the inconsistencies of witnesses or the suggestiveness of eyewitness identification procedures.

I.G.'s utterance therefore invited a number of unacceptable risks, including the well-recognized possibility that a jury (perhaps sympathetic to I.G.'s anger and defensiveness) "would be likely to convict the defendant because the other acts evidence showed him to be a bad man." *Sullivan*, 216 Wis. 2d at 790. Moreover, bluntly stated testimony that the defendant had shot someone "in the head" would also invite deliberations based on other impermissible considerations—such a graphic description of prior criminality "arouses [the jury's] sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." *Id*. Thus, this testimony—in the context of these specific allegations—was greatly prejudicial to Mr. Perry's ability to have his case fairly tried by this jury. Here, the trial court failed to recognize these issues. This incomplete reasoning process is evidence of an erroneous exercise of discretion.

Second, the trial court should have also considered the legal elements at issue—including a requirement that the State prove Mr. Perry acted with "utter disregard for human life." (73:24); Wis. Stat. § 941.30(1). Inadmissible evidence of prior cold-heartedness, violence, or brutality—in the form of testimony about Mr. Perry shooting someone in the

head on a prior occasion—inevitably colors the jury's assessment of this important, often circumstantially established, legal element. In other words, the inadmissible other act biases the jury's ability to fairly consider the State's case based solely on properly admitted evidence of "utter disregard" in relation to these allegations. That biasing influence matters given that Mr. Perry had a valid defense to that element. As counsel argued in closing, there was scant proof that the fired shots posed any concrete risk to victims or bystanders. (73:39-40). Once again, because the trial court failed to consider the relationship between the specific elements of this case and the improper testimony regarding Mr. Perry's prior conduct, it erroneously exercised its discretion.

Third, the trial court also failed to consider that this case would necessarily involve direct evidence that Mr. Perry was already a convicted criminal given the felon in possession of a firearm charge. (5:1). Thus, the jury was already on notice—from the very start of this case—that Mr. Perry had previously committed some prior "bad act," i.e., a prior felony. This greatly inflates the risk of undue prejudice, as it gives additional salience and significance to I.G's inadmissible testimony.[6] It also invites the risk of juror speculation, and, as a result, juror confusion: A

[6] In other words, the jury's preexisting knowledge of prior criminality on Mr. Perry's part "primed" them to attach more significance to this utterance.

reasonable juror could infer that the prior felony referenced in the information was the very same act now being referenced in I.G.'s testimony.

I.G.'s testimony—in light of the felon in possession of firearm charge—thereby short-circuited any attempt to disarm the prejudicial impact of the felon in possession charge by stipulating to the existence of a prior felony, as Mr. Perry ultimately did. (72:3). Here, leaving the felony unstated may have only fueled further speculation that Mr. Perry committed the act described by I.G., and that that act was the prior felony. Thus, the trial court should have considered the dilemma this evidence created for Mr. Perry's defense. Its failure to do so was an erroneous exercise of discretion.

Finally, the trial court should have also considered the evidentiary picture at the time the impermissible utterance occurred. In so doing, it makes sense to presume that the weaker the State's case, the greater the potential prejudice to Mr. Perry, as the risk is necessarily increased that impermissible evidence will tempt the jury to convict. That is, propensity evidence can be most damaging when it is allowed to work as the "tiebreaker" in an otherwise "close" case. Here, the State was clear in its opening statement that its case was reliant on eyewitness testimony. (70:22-23). They did not claim to possess strong forensic evidence, like fingerprints or DNA. There was also no suggestion that any confession evidence—or even strong circumstantial evidence of guilt like a connection to the getaway car

or the recovery of stolen property—would factor into its case. Accordingly, the prejudicial impact of this "one stray, short comment" needed to be placed in proper context.

These considerations were totally omitted from the court's reasoning. When these omitted considerations are fully explored, it becomes clear that this comment from I.G. greatly prejudiced Mr. Perry. Mr. Perry's ability to have a fair trial was thoroughly handicapped by inadmissible evidence tending to bias and distort the jury's "search for the truth." Wis. JI-Criminal 140. Accordingly, the trial court erred in not declaring a mistrial.

2. The curative instruction was insufficient.

In *State v. Pankow,* this Court summarily rejected the defendant's claim that a mistrial motion had been erroneously denied by asserting that "any prejudicial effect that might have flowed from the testimony was cured by the court's immediate instruction to the jury to disregard the testimony in its entirety." *State v. Pankow*, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). This Court felt duty-bound to assume that the jurors had followed that instruction and was therefore skeptical of the defendant "incorrectly assum[ing]" a contrary position. *Id*.

The Wisconsin Supreme Court has stated that "the curative effect of the court's admonition to the jury to disregard the evidence *may be* considered" in

determining whether a mistrial is warranted. *Harris v. State*, 52 Wis. 2d 703, 705–06, 191 N.W.2d 198, 199 (1971) (emphasis added). Here, while the existence of a curative instruction needs to be acknowledged, that instruction should not insulate this claim from meaningful review.

As the Fifth Circuit has stated, with respect to a mistrial request stemming from improper argument:

> Trials are rarely, if ever, perfect, but gross imperfections should not go unnoticed. In every case involving improper argument of counsel, we are confronted with relativity and the degree to which such conduct may have affected the substantial rights of the defendant. It is better to follow the rules than to try to undo what has been done. Otherwise stated, one "cannot unring a bell"; "after the thrust of the saber it is difficult to say forget the wound"; and finally, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it".

Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962). Given the egregiousness of the error at issue in this case, it cannot be presumed that the jury simply disregarded this evidence. Respectfully, to do otherwise contravenes commonsense. One cannot presume, once the jury has been told the defendant shot someone in the head once before, that this evidence will magically vanish once the jury begins deliberating on similar allegations that involve a gun. That is especially true given the State's concession during argument that the jury would be

"unavoidabl[y]" reminded of the impermissible and "unfortunate" comment by a closing instruction regarding the utterance. (71:4).

Thus, while "the law prefers less drastic alternatives, if available and practical", *Bunch*, 191 Wis. 2d at 512, here the mistrial was the only remedy capable of fully curing any prejudice. A jury instruction—either the contemporaneous direction to disregard or the commandment regarding stricken testimony at the close of the evidence—was simply insufficient to protect Mr. Perry's right to a fair trial in the face of the arguments developed above.

Moreover, this Court can look past the issuance of a curative instruction when "the record supports the conclusion that the jury disregarded the trial court's admonition." *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 N.W.2d 234, 674 N.W.2d 894. Here, the letter of the juror is suggestive evidence that the chosen remedy came short of assuring Mr. Perry's right to a fair trial:

> I also wonder how much implicit bias played in our decision making. Since Mr. Perry had a prior felony conviction, the gaps in the information we were given with which to determine his fate, led many to assume he was just a "bad dude" so while the evidence was not all that strong, It was "good enough" to find a young, black male who had been in previous trouble, guilty once again. Ismael's comment at the end of his testimony that he heard Mr. Perry had previously tried to shoot someone in the head may also have had an impact on some. Though we only briefly

> discussed it and knew it was to be disregarded, once such a statement is planted, can it truly be erased from biases one may unknowingly hold?

(83:3). Rather than merely delineating the deliberative processes of the jurors, *see* Wis. Stat. § 906.06(2), here the letter makes clear that information not properly a part of the "record"—because it was stricken—was still invoked in the jury room. In other words, the trial court's efforts failed to ensure that otherwise extraneous and highly prejudicial information having nothing to do with this case did not filter into, and possibly infect, the deliberations.

Second, the verdicts themselves suggest a degree of arbitrariness. Here, the State's theory at trial was that Mr. Perry was the gunman. (73:29-31). To that end, the State presented no testimony whatsoever to support a conclusion that Mr. Perry was the otherwise unnamed, unidentified, and otherwise scantly discussed aider and abettor. Puzzlingly, the jury acquitted Mr. Perry of being the shooter—the evidentiary conclusion the State wished them to draw—and convicted him of being a mere party to the crime despite there being no evidence to support that conclusion.

While the jury is certainly entitled to reach compromises in the course of its deliberations, here the verdict is superficially contradictory to what was plainly presented at trial. If the jury did not believe the State's evidence of Mr. Perry being the gunman, an acquittal would have been the logical choice. That

is not what transpired. Thus, one reasonable supposition is that the propensity evidence in this case distorted their verdict, leading to an otherwise nonsensical outcome in order to satisfy general-purpose moral judgments stemming from I.G.'s highly prejudicial utterance.

Accordingly, deference to the court's decision in light of the jury instruction is unwarranted under these facts and circumstances.

CONCLUSION

Mr. Perry therefore respectfully requests that this Court reverse and remand for a new trial due to the trial court's erroneous denial of his motion for a mistrial.

Dated this 18th day of April, 2019.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

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 4,672 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 18th day of April, 2019.

Signed:

_____

Christopher P. August
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of April, 2019.

Signed:

Christopher P. August
Assistant State Public Defender

APPENDIX

INDEX
TO
APPENDIX

Page