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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No 2019AP2065 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD MICHAEL ARRINGTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Brown County Circuit Court, the Honorable Timothy A. Hinkfuss, Presiding

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Because Mr. Arrington's guilt on the felon in possession charge was not in dispute at trial and, in fact, was conceded, reversal is not warranted on that count, but reversal is necessary and should be granted on the conviction for first-degree intentional homicide.

Richard Michael Arrington is submitting this brief pursuant to the court of appeals' order of February 11, 2021, which directed the parties to file supplemental briefs. The court directed the parties to address the "scope of the remedy" that would be appropriate were the court to conclude that Arrington's arguments warrant a reversal. Specifically, the court wrote:

> In particular, a question would arise as to whether the entire judgment, including the conviction of being a felon in possession of a firearm, must be reversed and remanded for a new trial, or whether only the judgment of conviction regarding the first-degree intentional homicide charge must be reversed and remanded for a new trial.

The court specified that the supplemental briefs should address only that question. As developed below, Arrington's response to the court's question is that reversal must be granted on the homicide conviction but reversal is not warranted on the felon

in possession conviction because that crime was factually undisputed and conceded by the defense at trial. Therefore, there is no prejudice as to that conviction.

Following a lengthy jury trial, Arrington was convicted of two crimes as follows:

> Count 1: first-degree intentional homicide with enhancers for use of a dangerous weapon and being a repeat offender. The court imposed a mandatory life sentence with parole eligibility after 35 years. (201:1)
>
> Count 2: possession of a firearm by felon, as a repeater. The court imposed a six-year sentence of imprisonment, consisting of three years' confinement and three years' extended supervision, concurrent with Count 1. (201:3).

On appeal, Arrington is arguing that the state violated his Sixth Amendment right to counsel by outfitting a jail inmate with a recording device and authorizing him to secretly record conversations with Arrington, who had been charged with the homicide. Because at trial the state presented the informant's testimony and the recordings without objection, Arrington is seeking a new trial due to plain error or ineffective assistance of counsel.

In the Conclusion section of his brief-in-chief, Arrington's statement of the relief sought asked the court to:

> reverse the judgments of conviction and order denying his postconviction motion. Further, the court should remand with directions that the statements obtained and recordings made by the state's informant be suppressed and that Mr. Arrington receive a new trial.

(Brief-in-chief, pp. 45-46). His reply brief contained a similar request for relief.

Upon consideration of the court's question, Arrington believes that his statement of the relief sought was overbroad. Arrington argued at length in his brief-in-chief and reply brief that he was prejudiced by the state's use of the recordings and informant's testimony. Those arguments fully support reversal of the homicide conviction. (See, brief-in-chief, pp. 33-38, 42-45; reply brief, pp. 12-14). But reversal of the felon in possession conviction is not warranted because, in truth, that charge was not contested at trial.

Under either doctrine – plain error or ineffective assistance of counsel – relief is not warranted unless the error prejudiced the defendant. Under the first, a plain error is harmless if the state can prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *State v. Jorgensen*, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77. Under the second,

the defendant must show a reasonable probability that, but for the error, the result of the proceeding would have been different. *State v. Thiel*, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305. While prejudice exists with respect to the homicide, it does not with respect to the felon in possession, which was factually undisputed and conceded by the defense.

The state charged Arrington with felon in possession of a firearm in violation of Wis. Stat. § 941.29(1m)(b), which applies where the "person has been convicted of a crime elsewhere that would be a felony if committed in this state." The crime has two elements: (1) the defendant possessed a firearm; and (2) the defendant had been convicted of a crime that would be a felony if committed in this state. Wis JI Criminal 1343, pp. 1-2, 4 (2020).

Arrington stipulated to the second element before trial. Arrington's attorney filed a stipulation signed by Arrington and counsel stating, "Before April 2, 2016 [the date of the charged homicide], Richard Arrington had been convicted of a crime elsewhere that would be a felony if committed in this state." (77). At the final pretrial hearing, Arrington's attorney put the stipulation on the record, and the court engaged in a colloquy with Arrington establishing that he agreed with the stipulation and understood that the jury would be told it must accept the stipulated facts as conclusively proven. (269:6-11). The court so instructed the jury. (276:30). Thus, the second element was established by the stipulation.

The first element – that Arrington possessed a firearm – was also not in dispute because Arrington testified that he grabbed his gun and fired three shots out the car window. (275:95). In addition, a detective, Bradley Linzmeier, testified in the state's case-in-chief that Arrington told him that he had fired three shots at the house. (274:106).

Knowing that his client had admitted firing his gun and that they had stipulated to his status as a felon, trial counsel told the jury in opening statement and closing argument that Arrington was guilty of the felon in possession charge, stating, "I'm going to ask that you find him guilty because that's the fair, appropriate and legal result." (270:161-62; 276:73).

On this record, Arrington cannot reasonably contend that there was prejudice with respect to the jury's guilty verdict on the felon in possession. However, the state's use at trial of statements recorded by its informant in violation of Arrington's Sixth Amendment rights was highly prejudicial with respect to the jury's guilty verdict on the first-degree intentional homicide. On that charge, the recordings and the informant's testimony were so damning because the jury heard – much of it from Arrington's own mouth – a version of the shooting that undermined his claim of self-defense. And the jury learned that Arrington did not tell the informant, contrary to his testimony, it was another man – Shorty – who shot Mr. Gomez. Thus, while reversal of the felon in possession conviction is not warranted, reversal of the first-degree homicide conviction is

required under either the plain error or ineffective assistance standard.

CONCLUSION

Mr. Arrington revises his earlier request for relief and asks that the court reverse only the conviction for first-degree intentional homicide and remand with directions that the statements obtained and recordings made by the state's informant be suppressed and that Arrington receive a new trial on the homicide charge.

Dated this 23rd day of February, 2021.

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, and the order of the court of appeals dated February 11, 2021. The length of this brief is 6 pages.

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 23rd day of February, 2021.

Signed:

SUZANNE L. HAGOPIAN
Assistant State Public Defender