STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2022AP272-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMON D. TAYLOR,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION, ENTERED IN LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE RAMONA A. GONZALEZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

NICHOLAS S. DESANTIS
Assistant Attorney General
State Bar #1101447

Assisted by:
Leah Parks Kramer
Law Student Extern

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
desantisns@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES PRESENTED

Damon D. Taylor fired several gunshots at two people who had approached his cousin's apartment building for a drug transaction. Taylor and his cousin were both arrested; Taylor was identified as the shooter by his distinctive face tattoo and hairstyle. He entered *Alford*[1] pleas to second-degree recklessly endangering safety, possession of a firearm by a felon, and failure to comply with officer's attempt to take person into custody.

1. Is Taylor entitled to withdraw his pleas on the ground that the colloquy was defective?

The circuit court answered: "No."

This Court should affirm.

2. Is Taylor entitled to withdraw his pleas on the ground that his attorney was allegedly unprepared for trial?

The circuit court answered: "No."

This Court should affirm.

3. Is Taylor entitled to withdraw his pleas on the ground that there was not strong proof of guilt?

The circuit court answered: "No."

This court should affirm.

INTRODUCTION

Taylor fired multiple gunshots at two men who had approached his cousin's apartment for a drug transaction, hitting one of them in the leg. He was identified as the shooter based on his distinctive face tattoo and hairstyle and the fact that his cousin was upstairs at the time. Taylor was arrested after a six-hour standoff with police and charged with several crimes. He entered *Alford* pleas to second-degree recklessly

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

endangering safety, possession of a firearm by a felon, and failure to comply with officer's attempt to take person into custody and was sentenced to 16 years of initial confinement and 10 years of extended supervision.

Taylor filed a post-sentencing motion to withdraw his pleas for three reasons. First, he sought to withdraw his pleas under *Bangert*[2] because the circuit court did not inform him of the elements of the crimes to which he pleaded. Second, he sought to withdraw his pleas under *Bentley*[3] because he claimed to have reasonably believed his attorney was unprepared for trial. Third, he claimed that the facts in the record did not contain strong proof of his guilt as required under *Alford*. The circuit court denied Taylor's motion following an evidentiary hearing at which Taylor testified. Taylor now appeals.

Taylor is not entitled to any relief. Taylor's *Bangert* claim fails because the totality of the record shows that he understood the elements of the crimes to which he pleaded. His *Bentley* claim fails because he failed to prove that he reasonably believed his counsel was not prepared for trial. Finally, his *Alford* claim fails because there was strong proof of his guilt as to each offense to which he pleaded.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

---

[2] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

[3] *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

STATEMENT OF THE CASE

According to the criminal complaint, on April 5, 2017, Taylor was at the residence of his cousin, Ontario Lowery. (R. 1:4; 50:10.) Police were doing surveillance of the residence in order to prepare a search warrant for Taylor, "who was wanted on a probation warrant." (R. 1:4.) Police watched two men, later identified as JB and TM,[4] approach the residence. (R. 1:4.) Police then heard gunfire and saw JB and TM run away while being shot at by someone inside. (R. 1:4.) TM eventually turned back and shot toward the residence as he fled. (R. 1:4.) JB was shot in the leg and was taken to the hospital. (R. 1:4.) Police were able to apprehend Ontario Lowery, TM, and JB. (R. 1:4.)

JB told police that he and TM went to Lowery's residence because Lowery owed them money. (R. 1:4.) Lowery had told them to come to his home and get the money. (R. 1:4.) As they approached the house, they saw Lowery watching them from a second-story window. (R. 1:4.) They then knocked on the door and opened it, at which point they saw a gun pointed at them, so they turned around and ran. (R. 1:4.) They saw Lowery still watching them from the second-story window as they fled. (R. 1:4.)

Police also spoke with Lowery, who told them he and Taylor had both been inside the residence. (R. 1:4.) Lowery stated that "he heard a couple pops and jumped out the back exit" before police stopped him. (R. 1:4.)

Police spent over five hours trying to get Taylor to leave the residence. (R. 1:4.) They used wood baton rounds and video devices, shut off the gas and power, issued warnings, and even deployed chemical munitions, but Taylor refused to come out. (R. 1:4.) Police eventually entered and found Taylor

---

[4] The State refers to victims by initials or pseudonyms. Wis. Stat. § (Rule) 809.86(4).

hiding in a bathtub. (R. 1:5.) They found methamphetamine inside a red straw in Taylor's sweatshirt. (R. 1:5.) Taylor was taken into custody. (R. 1:5.)

After Taylor was taken into custody, police found a loaded Taurus PT 111 9mm handgun "wrapped in a towel[,] stuffed behind the broiler drawer of the oven." (R. 1:5.) A citizen, DG, had reported a Taurus PT 111 9mm handgun stolen from her vehicle in La Crosse on March 8, 2017; police ran the serial number and learned that the stolen Taurus 9mm was the gun found behind the oven when Taylor was arrested. (R. 1:4–5.) Police observed a Facebook picture of Taylor on March 28, 2017 that showed him with a gun that appeared to be the Taurus PT 111 9mm handgun. (R. 1:5.)

While he was incarcerated, Taylor placed several calls to DG, the person whose gun he had stolen. (R. 12:5.) He got upset with DG for reporting the gun stolen, asked her to get the charges dropped, and asked her several times whether she had gotten the gun charge "taken care of." (R. 12:5–6.)

Taylor was charged with nine crimes, including attempted first-degree intentional homicide, as a result of these incidents. (R. 12:1–3.) The charges were later amended to five counts: second-degree recklessly endangering safety with use of a dangerous weapon, possession of a firearm by a felon, possession of methamphetamine, possession of drug paraphernalia, and failure to comply with officer's attempt to take person into custody, all as a repeater. (R. 36:1–2.) Taylor agreed to enter an *Alford* plea to second-degree recklessly endangering safety, possession of a firearm by a felon, and failure to comply with officer's attempt to take person into custody; the remaining charges were dismissed. (R. 39:5–6; 57:63.)

At the plea hearing, the circuit court relied on the plea questionnaire rather than reading the elements of each offense to Taylor. (R. 57:66–67.) The circuit court also listed all of the offenses with which Taylor was charged and asked whether Taylor "know[s] what each of those crimes is." (R. 57:67.) Taylor responded, "Yes, ma'am." (R. 57:67.) The circuit court then asked Taylor whether he reviewed the elements of the crimes with his attorney, and Taylor again responded, "Yes, ma'am." (R. 57:67.)

The circuit court then asked the prosecutor to recite into the record the facts that supported the charges. (R. 57:67.) The prosecutor explained that TM walked up to the door and saw a man he did not know with dreadlocks and a distinctive face tattoo (Taylor) with a gun, then saw the gun fire at them, (R. 57:68); that police saw Ontario Lowery in the upstairs window seconds after the shooting, indicating that he could not have been the shooter, (R. 57:68); that ballistics showed that the gun found behind the oven was the one that caused JB's injury, (R. 57:69); that Taylor was a convicted felon and was seen in a Facebook photo holding the gun in the same apartment one month prior, (R. 57:70); that methamphetamine was found in Taylor's clothing after his arrest, (R. 57:70); and that Taylor refused to comply with the police's attempts to detain him for approximately six hours, (R. 57:70–71).

The circuit court found that the pleas were entered knowingly, intelligently, and voluntarily and with a sufficient factual basis. (R. 57:77.) Taylor was sentenced to a total of 16 years of initial confinement and 10 years of extended supervision. (R. 48:1.)

After sentencing, Taylor moved to withdraw his pleas for three reasons. (R. 112.) He argued that the plea colloquy was defective under *Bangert* because the circuit court did not explain to him the elements of each offense; under *Bentley* because his attorney was allegedly unprepared for trial; and

under *Alford* because there was not "strong proof" of his guilt. (R. 112:9, 11, 14.) The circuit court rejected all of Taylor's claims following an evidentiary hearing at which Taylor testified. (R. 119; 128.)

Taylor now appeals. (R. 121.)

STANDARD OF REVIEW

A *Banger*t claim presents a mixed question of law and fact: this Court accepts "the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous," but independently determines whether those facts demonstrate a deficiency in the plea colloquy and whether the defendant's plea was unknowingly entered. *State v. Trochinski*, 2002 WI 56, ¶ 16, 253 Wis. 2d 38, 644 N.W.2d 891 (citation omitted).

Whether a defendant has shown that a plea was not knowing, intelligent, and voluntary under *Bentley* is similarly a question of constitutional fact. *State v. Brown*, 2006 WI 100, ¶¶ 19, 42, 293 Wis. 2d 594, 716 N.W.2d 906.

Whether a sufficient factual basis exists to support an *Alford* plea "lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous." *State v. Smith*, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996).

ARGUMENT

I. Taylor's *Bangert* claim fails because the record shows that he understood the elements of the crimes.

A. A defendant faces a heavy burden when seeking to withdraw a plea after sentencing.

Before sentencing, circuit courts "should 'freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced.'" *State v. Jenkins*, 2007 WI 96, ¶ 2,

303 Wis. 2d 157, 736 N.W.2d 24 (alteration in original) (citation omitted). After sentencing, however, plea withdrawal becomes significantly disfavored. "When a defendant seeks to withdraw [his] guilty plea after sentencing, he must prove, by clear and convincing evidence that" plea withdrawal is necessary to avoid a manifest injustice. *Brown*, 293 Wis. 2d 594, ¶ 18. "One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea." *Id.*

"[T]here are two methods by which courts typically review motions to withdraw guilty or no contest pleas after judgment and sentence." *State v. Negrete*, 2012 WI 92, ¶ 16, 343 Wis. 2d 1, 819 N.W.2d 749. One method is based on *Bangert* and applies when the defendant alleges defects in the plea colloquy. *See State v. Hoppe*, 2009 WI 41, ¶ 3, 317 Wis. 2d 161, 765 N.W.2d 794. The second method is based on *Bentley* and applies when the defendant claims "that some factor extrinsic to the plea colloquy, [such as] ineffective assistance of counsel . . . , renders a plea infirm." *State v. Howell*, 2007 WI 75, ¶ 74, 301 Wis. 2d 350, 734 N.W.2d 48.

A defendant seeking plea withdrawal under *Bangert* has two initial burdens. *See Brown*, 293 Wis. 2d 594, ¶¶ 39–40. First, he must "make a prima facie showing of a violation of Wis. Stat. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript." *Id.* ¶ 39. Second, he must "allege that [he] did not know or understand the information that should have been provided at the plea hearing." *Id.* If the defendant meets both of these requirements, the burden shifts to the State to show that the defendant entered the plea knowingly, intelligently, and voluntarily despite the alleged defect in the plea colloquy. *Negrete*, 343 Wis. 2d 1, ¶ 19. Courts use the "entirety of the record" to determine whether the defendant understood the information that should have been provided at the plea hearing. *Id.* ¶ 13.

B. The record shows that Taylor understood the elements of the crimes with which he was charged.

Here, Taylor argues that the plea colloquy was defective because the circuit court failed to explain to him the elements of the crimes to which he entered *Alford* pleas. (Taylor's Br. 20–23[5].) He raises no other challenge to the plea colloquy. However, the totality of the record shows Taylor in fact understood the elements of the crimes with which he was charged.

The circuit court's finding that Taylor understood the elements of the crimes to which he pleaded was based primarily on Taylor's own representations to the court. The circuit court listed each crime with which Taylor was charged and asked Taylor whether he "know[s] what each of those crime is." (R. 57:67.) Taylor responded, "Yes, ma'am." (R. 57:67.) The circuit court went on to ask Taylor, "Each crime would require that the State prove certain things with evidence beyond a reasonable doubt to convict you of those crimes. *Did you review those with Mr. Longacre?*" (R. 57:67 (emphasis added).) Taylor responded, "Yes." (R. 57:67.)

This exchange unequivocally shows that Taylor reviewed the elements of each of the crimes with his attorney—a "very practiced attorney," (R. 128:37),—prior to entering his plea, and therefore understood the information that should have been presented at the plea hearing. *See Negrete*, 343 Wis. 2d 1, ¶ 19. And all this was in addition to completing and signing the plea questionnaire.

Taylor attempts to analogize this case to *Brown*, 293 Wis. 2d 594. However, *Brown* is inapposite for at least two

---

[5] For all citations to the Appellant's Brief, the State cites to the electronic page numbers and not the page numbers listed at the bottom of the brief.

reasons. The first reason is that in *Brown*, the issue was whether the defendant was entitled to an evidentiary hearing on his *Bangert* claim. *Brown*, 293 Wis. 2d 594, ¶ 6. The Wisconsin Supreme Court held that Brown's allegation was sufficient to entitle him to a hearing. *Id.* Here, in contrast, Taylor received an evidentiary hearing—the circuit court simply did not find him to be credible, and instead found that he understood the elements of the crimes with which he was charged.

The second reason *Brown* is inapposite is that in *Brown*, there was no plea questionnaire at all. *Brown*, 293 Wis. 2d 594, ¶ 11. This was because the defendant was illiterate, so any advisement of rights would have had to be done orally if at all. *Id.* That was not the case here, as a completed and signed plea questionnaire was filed. (R. 39:3–6.) Because the State proved that Taylor in fact understood the elements of the crimes with which he was charged, Taylor is not entitled to withdraw his plea under *Bangert*.

II. Taylor's *Bentley* claim fails because he did not show that his attorney was unprepared for trial.

A. A defendant faces a heavy burden when seeking to withdraw a plea after sentencing.

As discussed above, a *Bentley* plea withdrawal claim means the defendant asserts that "some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." *State v. Sulla*, 2016 WI 46, ¶ 25, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted). "The defendant must prove by clear and convincing evidence that withdrawal of the guilty plea is necessary to avoid a manifest injustice." *Hoppe*, 317 Wis. 2d 161, ¶ 60.

Because a *Nelson*/*Bentley* motion concerns an error extrinsic to the on-the-record colloquy, a defendant has a much more onerous burden to warrant an evidentiary hearing on such a claim. *See Sulla*, 369 Wis. 2d 225, ¶ 26 (discussing

the *Nelson*/*Bentley* burden). He must allege sufficient facts that, if true, show he is due relief. *Id.* If he raises only conclusory assertions towards such a claim, the circuit court has discretion to "deny the motion without a hearing." *Id.* ¶ 27 (citation omitted). Where a defendant's *Nelson*/*Bentley* claim concerns ineffective assistance of counsel, to show prejudice, the defendant's motion must plead sufficient facts to show that, but for counsel's alleged error, "he would not have pleaded guilty and would have insisted on going to trial." *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted).

If a defendant does allege sufficient facts to entitle him to an evidentiary hearing, "the defendant maintains the burden of proof in a *Bentley*-type hearing and the facts adduced must show manifest injustice by clear and convincing evidence before the defendant may withdraw his plea." *Brown*, 293 Wis. 2d 594, ¶ 42.

B. Taylor has failed to prove that his attorney was unprepared for trial.

Here, Taylor does not even claim that his attorney performed deficiently in any way. (Taylor's Br. 23.) Instead, he argues only that he feared his attorney was not prepared for trial. (Taylor's Br. 24–25.) That speculative fear does not come close to meeting his burden of proving ineffective assistance. *See State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) ("A showing of prejudice requires more than speculation.").

At the hearing, Taylor claimed that he believed counsel was unprepared because he urged him to take a plea instead of going to trial. (R. 128:33–34.) Taylor claimed he understood this legal advice to mean that counsel was unprepared, even though counsel did not say he was unprepared. (R. 128:33–34.) Taylor also claimed that he wanted counsel to file a "motion to suppress evidence" because he had heard about it

from someone in jail. (R. 128:9.) He claimed counsel told him he was not going to file a motion to suppress evidence simply because he did not want to "piss anybody off." (R. 128:9–10.) Taylor did not explain what basis there would have been, if any, for a suppression motion. (R. 128:27.) He also claimed he assumed counsel was not competent to represent him properly because counsel was "87 years old probably" and had a hearing aid. (R. 128:35.)

Taylor admitted, however, that he had stated on the record that he was satisfied with counsel's performance, and that he never voiced any of his supposed concerns to the judge until after sentencing. (R. 128:35.)

Taylor's claims were simply not credible. The circuit court disbelieved Taylor and found that counsel was diligent and prepared for trial. (R. 128:36–37.) The mere fact that counsel advised his client to accept a plea offer does not remotely suggest that counsel was unprepared for trial. If Taylor truly did believe his attorney was unprepared—and the State maintains that he did not—such belief was not reasonable based on the information Taylor had.

Finally, Taylor's numerous admissions during the plea hearing also contradict his self-serving, after-the-fact claim that he believed his counsel was unprepared. At his plea hearing, Taylor told the court that he was not threatened, forced, or coerced "in any fashion" to enter a plea, (R. 57:64); that he believed he had sufficient time to consult with counsel, as well as with family members, to discuss the case, (R. 57:64–65); that he reviewed the elements of all the charged crimes with counsel, (R. 57:67); and most importantly, that he was satisfied with counsel's representation, (R. 57:63). All these contemporaneous admissions hold far more weight than Taylor's later self-serving statements after receiving a lengthier sentence than he hoped for. For all these reasons, Taylor failed to prove that he reasonably believed his attorney was unprepared for trial. *See Brown*, 293 Wis. 2d 594, ¶ 42.

III. Taylor's *Alford* plea was supported by strong proof of guilt as to each offense.

Before accepting a plea, the circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b). This factual basis requirement protects "a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *State v. Thomas*, 2000 WI 13, ¶ 14, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted).

In the *Alford* context, a defendant agrees to plea no contest "while either maintaining his innocence or not admitting having committed the crime." *State v. Garcia*, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). In such a situation, the circuit court must determine whether "the evidence the state would offer at trial is strong proof of guilt." *State v. Johnson*, 105 Wis. 2d 657, 663, 314 N.W.2d 897 (Ct. App. 1981); *see also North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (no constitutional error where "the record before the judge contains strong evidence of actual guilt"). Strong proof is required "as to each element of the crime" charged. *Smith*, 202 Wis. 2d at 28. But this is not the equivalent of proof beyond a reasonable doubt; rather, the factual basis need only be sufficient "to substantially negate [the] defendant's [protestations] of innocence." *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 645, 579 N.W.2d 698 (1998) (first alteration in original) (citation omitted).

Here, Taylor entered *Alford* pleas to second-degree recklessly endangering safety, possession of firearm by a felon, and failure to comply with an officer's attempt to take him into custody. (R. 48:1.) The record before the circuit court contained strong proof of Taylor's guilt as to each of these offenses.

A. Second-degree Recklessly Endangering Safety

Second-degree recklessly endangering safety requires the State to prove (1) "[t]he defendant endangered the safety of another human being" (2) by "criminally reckless conduct." Wis. Stat. § 941.30(2); Wis. JI-Criminal 1347 (2015). The facts in the record constitute strong proof of Taylor's guilt as to this charge.

First, the evidence shows that Taylor endangered the safety of another human being. As the prosecutor explained at the plea hearing, the State would have "presented a number of witnesses that were doing surveillance at the house when the shooting happened." (R. 57:67.) They would have testified as to what was alleged in the complaint: that TM and JB walked up to the door and then ran away while being shot at. (R. 57:67–68.) Additionally, TM would have testified that he opened the door, saw Taylor, and ran away while Taylor fired at him. (R. 57:68.) Taylor was identified as the shooter due to his distinctive face tattoo and his distinctive hairstyle. (R. 57:68.)

Second, Taylor's conduct was criminally reckless. Recklessness requires that the defendant created "an unreasonable and substantial risk of death or great bodily harm," and was "aware of that risk." Wis. Stat. § 939.24(1). The evidence showed that Taylor intentionally fired gunshots at two people, (R. 57:68), so he created an unreasonable and substantial risk of death or great bodily harm and was aware of that risk. For these reasons, there was strong evidence that Taylor was guilty of second-degree recklessly endangering safety. *See Johnson*, 105 Wis. 2d at 663.

Taylor claims there was not strong proof of guilt because a mystery third person, as opposed to Taylor, could have been the shooter. (Taylor's Br. 27.) But as discussed above, the shooter was identified as having dreadlocks and a

distinctive face tattoo, which described Taylor. (R. 57:68.) Additionally, Taylor has still not identified the alleged third person he claims was in the apartment with himself and Lowery, nor has he explained how this alleged mystery person could have somehow escaped the apartment unnoticed while it was surrounded by police.

Finally, Taylor argues that the facts introduced by the prosecutor "raise[ ] the specter of self-defense." (Taylor's Br. 28.) There are two problems with this argument. The first and most obvious problem is that Taylor has repeatedly and unequivocally denied, on the record and under oath, that he fired any shots. (R. 50:26–27; 128:8.) He instead claimed that a "friend of [Lowery]," who he chooses not to identify, fired the shots and then escaped unnoticed. (R. 50:26–27.) In order to raise self-defense, a defendant must proffer evidence that, viewed in a light most favorably to him, would allow a jury to conclude that his theory of self-defense was not disproved beyond a reasonable doubt. *State v. Head*, 2002 WI 99, ¶ 115, 255 Wis. 2d 194, 648 N.W.2d 413. Taylor has not advanced any evidence at all that he shot in self-defense—on the contrary, he denies that he was the shooter—so he cannot meet the standard to raise self-defense as an issue.

Relatedly, the second problem with Taylor's "specter of self-defense" argument is that regardless of Taylor's claim that a mystery third person fired the shots, there is no evidence supporting a claim of self-defense. Specifically, there is no evidence that TM did anything to cause Taylor to believe that it was necessary to defend himself. Taylor has not claimed that TM threatened to shoot him. The mere fact that TM had a gun with him, without more, is not enough to raise self-defense. *See Head*, 255 Wis. 2d 194, ¶ 115.

B. Possession of a Firearm by a Felon

Possession of a firearm by a felon has two elements: (1) "[t]he defendant possessed a firearm"; and (2) the defendant has been convicted of a felony prior to possessing the firearm. Wis. Stat. § 941.29(1m); Wis. JI-Criminal 1343 (2021). The facts in the record constitute strong proof of Taylor's guilt as to this charge.

First, Taylor possessed a firearm. As discussed above, the evidence showed that Taylor shot JB, which would not have been possible without a firearm. The prosecutor explained that Taylor's DNA was found on the magazine that was wrapped in a towel with the gun under the stove in the apartment, and Taylor was also not excluded from the DNA mixture found on the gun itself. (R. 57:69.) Finally, there was a picture of him on Facebook holding what appeared to be the Taurus PT 111 9mm handgun that was found in the apartment. (R. 1:5; 57:70.)

Second, Taylor was undisputedly a convicted felon—he was convicted of possession with intent to deliver heroin within the five-year period immediately preceding the commission of this offense. (R. 1:3; 57:70.) Therefore, there was strong proof of Taylor's guilt of possession of a firearm by a felon. *See Johnson*, 105 Wis. 2d at 663.

C. Failure to Comply with Officer's Attempt to Take Person into Custody

Failure to comply with an officer's attempt to take a person into custody has three elements. The state must prove that the defendant: (1) intentionally refused "to comply with an officer's lawful attempt to take him . . . into custody"; (2) retreated or remained in a building and, through action or threat, attempted to prevent an officer from taking him into custody; and (3) is armed "with a dangerous weapon or threatens to use a dangerous weapon." Wis. Stat. § 946.415(2);

Wis. JI-Criminal 1768 (2008). The facts in the record constitute strong proof of Taylor's guilt as to this charge.

First, the record showed that Taylor intentionally refused to comply with the police. Police communicated with Taylor for six hours "through phone call, text message, and PA system" in their effort to take him into custody, but Taylor refused to leave the house. (R. 57:70–71.)

Second, Taylor remained in the house and prevented officers from taking him into custody through action or threat. Taylor spent six hours inside the house while police repeatedly asked him to come out. (R. 57:71.) He actively hid in a bathtub and hid his gun behind the stove. (R. 57:71.) Police needed to resort to using "teargas and robots" to locate and detain him. (R. 57:71.)

Third, and finally, Taylor was armed with a dangerous weapon as discussed above. (R. 57:69.) Therefore, the record contains strong proof of Taylor's guilt of failure to comply with an officer's attempt to take a person into custody. *See Johnson*, 105 Wis. 2d at 663.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 1st day of August 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Nicholas S. DeSantis
NICHOLAS S. DESANTIS
Assistant Attorney General
State Bar #1101447

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 294-2907 (Fax)
desantisns@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,517 words.

Dated this 1st day of August 2022.

Electronically signed by:

Nicholas S. DeSantis
NICHOLAS S. DESANTIS
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 1st day of August 2022.

Electronically signed by:

Nicholas S. DeSantis
NICHOLAS S. DESANTIS
Assistant Attorney General