STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2024AP000561-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SOVEREIGNTY JOESEPH
HELMUELLER SOVEREIGN FREEMAN,

Defendant-Appellant.

On Appeal from a Judgment and an Order
Entered in the St. Croix County Circuit Court,
the Honorable Scott R. Needham, Presiding

BRIEF OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

Sovereignty Joeseph Helmueller Sovereign Freeman (hereinafter, Helmueller) was convicted and sentenced following a jury trial held 17-months after his arrest. Helmueller was confined in the jail throughout the proceedings and tested positive for COVID-19 shortly before trial. As a result, he was seated at a separate table, six to ten feet away from his attorney. The jury was never informed of the reason for these seating arrangements or that they should not be considered when determining guilt.

Further, on the first day of trial, Helmueller interrupted his attorney's questioning of a witness to object and then state that his attorney was fired. A loud disturbance ensued, Helmueller was removed from the courtroom, and was not present for the remainder of the four-day trial.

Helmueller's attorney did not seek to withdraw following trial and Helmueller objected to counsel's presence at the sentencing hearing. The circuit court did not inquire further, Helmueller was removed from the courtroom, and sentencing proceeded in his absence.

1. Was Helmueller's constitutional right to a speedy trial violated by the 17-month delay between his arrest and the jury trial in this case?

   The circuit court answered no.

   This court should reverse.

2. Did the state present sufficient evidence to prove that Helmueller committed first-degree reckless homicide as a party to the crime?

   The circuit court answered yes.

   This court should reverse.

3. Did Helmueller's physical separation from his attorney during his jury trial violate his constitutional rights to counsel and the presumption of innocence?

   The circuit court answered no.

   This court should reverse.

4. Was Helmueller's Sixth Amendment right to choose the objective of his defense violated when his attorney conceded his guilt to several charges at trial?

   The circuit court answered no.

   This court should reverse.

5. Was Helmueller denied the effective assistance of counsel?

   The circuit court answered no.

   This court should reverse.

6. Did Helmueller's conviction for bail jumping as alleged in Counts 4, 5, and 6, violate his rights under the double jeopardy and due process clauses?

   The circuit court answered no.

   This court should reverse.

7. Did the circuit court erroneously exercise its discretion when it denied Helmueller's request for new counsel at sentencing?

   The circuit court answered no.

   This court should reverse.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted under § 809.23(1)(a) as this case will require the court to apply law relating to the presumption of innocence and the right to consult with counsel to a new factual situation—the defendant's physical separation from his attorney at trial.

A decision in this case will also require the court to determine whether conviction for multiple bail jumping charges violates a defendant's double jeopardy rights when the charges are all based on the same act violating one condition of a single bond which covers multiple cases. Publication, therefore, may be

warranted as counsel is unaware of any Wisconsin case addressing this specific legal issue.

Helmueller does not request oral argument.

STATEMENT OF THE CASE AND FACTS

On August 24, 2020, Helmueller was charged with: first-degree reckless homicide, PTAC, use of a dangerous weapon; second-degree recklessly endangering safety; and three counts of felony bail jumping. (2:1-2). All of the counts arose from an incident on August 20, 2020, wherein Richard Rose was shot in the leg by Joshua Cameron and later died from the wound. (2:3-6). The complaint alleged that Cameron and Helmueller fled the scene of the shooting in Helmueller's van and that the van almost struck an individual as it sped down a walking path. (2:4-12). At the time of the incident, Helmueller had been released from custody in three separate felony cases after signing a single bond with a condition that he not commit any crimes. (2:2).

After a preliminary hearing, an information was filed. In addition to the original charges, the information charged Helmueller with possession of a firearm by felon and carrying a concealed weapon. (12).

Helmueller made several demands for a speedy trial. (58:5; 64:4-6; 82; 93; 146; 300:7; 304:6; 306:9,11; 312:4-6). The case, however, didn't proceed to trial until January 24-27, 2022.

On the day trial began, Helmueller was seated at a separate table, six feet away from his attorney. (364:18,54)(App.156,192). He was wearing a facemask, as well as a stun belt. (364:18,54-55)(App.156,192-193). The court and attorneys had apparently discussed this prior to trial, but no record of that discussion was made. (364:49-50)(App.187-188). Rather, the record contains only the following comments regarding the seating arrangements:

> Helmueller, I'm going to explain your distancing from your attorney, for purposes of social distancing. I think it makes sense you're wearing a mask. I know that there have been positive cases in the jail, and so I think for everyone's protection, but certainly anytime you need to talk to [counsel], we're going to have enough breaks you'll be able to do that either here or back in the holding cells. All right?

(327:16-17)(App.41-42). Despite its stated intention, the court never informed the jury of the reason for Helmueller's separation from his attorney and the trial proceeded with Helmueller distanced from counsel.

The parties gave opening statements. Trial counsel's comments included admissions that the jury would see a video in which "[i]t looks like [Helmueller] pulls a gun out of the back of his waistband" and then leaves, explaining why they will hear that Helmueller's DNA was on the gun linked to the shooting. (327:186-187,189-190)(App.60-61,63-64). Further, counsel told the jury that Helmueller had a felony conviction and had three open cases pending

when this incident happened, before concluding his statements with the following: "I think that when we're done with this case, you will find that Mr. Helmueller has committed a crime here, maybe more than one, but he's not guilty of the homicide, reckless or otherwise." (327:191-192)(App.65-66).

The state called 24 witnesses. None of those witnesses testified that they were present in the apartment when Rose was shot, nor could any witness explain why the shooting occurred.

The state's first witness, Tammy Osborne, explained that she had been at Rose's apartment that day to use methamphetamine and rekindle their relationship. (327:197-198)(App.71-72). While she was there, Emma Boladeres-Alcina, Gary Gores, and Ben Carlson were present at various times and partying with them. (327:198-199)(App.72-73). Rose left the apartment on two occasions, once with Emma around 8:30 p.m., and a second time around 9:30. (327:201,204,223,225-226)(App.75,78). The second time he left, Rose came back about 10 minutes later, holding his leg and yelling that he had been shot. (327:204)(App.78). "He kept saying, 'I've been shot. Josh shot me.'" (327:204)(App.78). Rose didn't say anything about Helmueller. (327:227).

During trial counsel's cross-examination of Tammy, Helmueller objected and stated that counsel was "fired." (327:206-207)(App.80-81). The jury was eventually excused and, after additional conversation, the court denied Helmueller's request to fire his

attorney. (327:206-211)(App.80-85). The court questioned whether Helmueller would behave appropriately, Helmueller then made threatening comments, and was removed from the courtroom with the court finding that he had for forfeited his right to be present. (327:211-212)(App.85-86).

After Helmueller's removal, the parties discussed how to instruct the jury and trial counsel expressed concern that the jury may have heard some of the swearing and disruption that had occurred:

> For the last probably four or five minutes in the holding hallway, there's been very loud, I assume scuffling of some kind, very loud yelling and screaming by Helmueller, and threats that he's made in the hallway to the officers, all of that. And it seems to me, standing here in the courtroom, it's loud enough that it could emanate back in the hallway. And if the jury has heard that, I'm not sure what I want to ask the Court to do about it, but I guess maybe we should somehow try to figure out if we can determine whether or not they know any of that information.

(327:212-214)(App.86-88).

Upon the jury's return, the court noted that Helmueller had "expressed some emotions," and explained that it had denied his request to fire his attorney and determined that he was "not going to participate at least for the balance of the day." (327:217-218)(App.91-92). In response to questioning, the jury admitted that they "could hear the yelling, but [] could not make out the words." (327:218)(App.92).

The trial then continued without Helmueller's presence (though he had opportunities to return).

Emma Boladeres-Alcina testified after Tammy. She arrived at Rose's apartment with Justin Delaria around 9:00 p.m. that night and there were several people outside the apartment complex. (327:235-236,246-247). Around 9:30, she left Rose's apartment to give some friends a ride, and while she was outside talking to them, she saw a white van back into the driveway. (327:237-238,249). Cameron was driving and Helmueller was in the passenger seat. (327:238,249). Cameron approached her and asked where Justin was, arguing with her when she responded that she didn't know. (327:238-241,249-250).

Emma told the jury that while speaking with Cameron, she saw Helmueller look around the building for Justin and then go into Gores' apartment. (327:238-241,249-251). A couple minutes later, Cameron also went into the apartment. (327:241,251). Shortly after that, Rose came downstairs to see what the commotion was about and she told him that Helmueller and Cameron had just arrived. (327:241,252). In response, Rose said that he was "going to find out what's going on" and went into Gores' apartment. (327:241,252).

Emma continued, testifying that "it wasn't even a minute or two, and he comes back up, call 911, I got shot. Josh just shot me. And I was on the phone right away. And that's when Josh came out. First went in

the driver's side and Andrew came out holding something, like, he came out holding something like this. They both were, like, in a hurry, went inside the van, got in the passenger side of the van, and they just took off." (327:241). She clarified that she saw Helmueller exit the apartment carrying a box on his shoulder before getting in the passenger seat. (327:243,254).

Aside from Cameron, two other witnesses in the area at the time of the shooting testified. A neighbor that lived next to the apartment complex told the jury that he was outside and heard five gunshots coming from Gores' apartment before seeing Rose run out yelling that he'd been shot. (327:261-266). He also saw another individual run from behind the building and jump into the passenger side of a white van. (327:264-266). The resident of the apartment next to Gores' also testified. He told the jury that he had been in his residence when he heard a loud noise followed by Rose yelling that he had been shot. (327:275-277). He hadn't heard anything out of the ordinary prior to the shooting. (327:285).

Cameron informed the jury that he had previously seen Helmueller with the firearm suspected to be used in the shooting. (332:271-272). He also described events from the date of the offense but stated nothing about the shooting itself. (332:274-280).

Cameron testified that he and Helmueller were drinking at his apartment, Justin and Emma came over and then left, and then he and Helmueller went

to Gores' apartment to get cat litter. (332:274-277). The two were at Gores' apartment for about 10 minutes before they left and drove separately to Fletch's house to see if Fletch wanted to buy Helmueller's firearm. (332:278-279).

On cross-examination, Cameron testified that the two went back to the apartment complex where he stayed in the van while Helmueller went in Gores' apartment before running out, pulling a gun on him, and telling him to drive. (332:280-282,284-290).

The state also presented evidence from several law enforcement and other citizen witnesses. Sergeant Cramlet testified that he responded to the shooting and while giving aid to Rose, Rose stated that Cameron had shot him. (327:301,311). Further, he informed the jury that he "was not able to determine why or how [the shooting] took place." (332:30). Everyone had reported that Cameron was the shooter, and he didn't receive any information that Helmueller had anything to do with it, other than possibly being in the apartment at the time. (332:31).

The jury also heard from Jennifer Burke, who testified that Cameron was a friend of her fiancé, Brandon Fletch, and had come to her house with Helmueller around 9:24 p.m. the night of the shooting. (332:50-54). The two asked for Fletch and offered her a beer before leaving together. (332:55). Burke explained that Cameron came back a second time, around 9:42, and went into the garage to look at Fletch's rock collection. (332:56,116). A video from

Burke's home camera shows that before Burke answered the door the second time, Helmueller was at the door with Cameron and removed a firearm from his waistband, placing it into the beer box Cameron took inside. (Ex.42). Fletch found the firearm in a bucket of rocks in his garage the next morning. (332:60,78).

Rochelle Fox, an employee with the clerk of courts office, testified that Helmueller had been on bond for three felony cases when the shooting occurred and a copy of a single bond form was introduced into evidence. (332:251-254).

Other testimony from various law enforcement officers and experts established that: 1) Helmueller's DNA, and that of two other individuals, was on the firearm found in Fletch's garage; 2) bullets recovered from Cameron's apartment matched those found in the neighbor's apartment and Rose's leg; and, 3) they couldn't determine whether the bullets were fired from the firearm located in Fletch's garage. (335:62,107,147-150).

The circuit court denied trial counsel's motion for a directed verdict and the parties gave closing arguments. (335:189,192-194). Trial counsel began by reminding the jury of his opening statement. (336:89)(App.95). He went on to discuss Count 1 and the various scenarios that could lead to reasonable doubt on that charge, before raising questions about the number of bonds and whether Helmueller had sped down the trail. (336:89-106)(App.95-112).

Counsel again conceded that Helmueller could be seen on video with "the gun in the back of the pants," saying the jury could "deal with that evidence," although he didn't have an explanation for it. (336:106-107)(App.112-113). He then repeated that the gun was Helmueller's and that Helmueller was not supposed to have a gun. (336:108). Counsel concluded, stating:

> [O]n the important charges, at least, I think you can reconcile the evidence with a theory that is consistent with Mr. Helmueller's innocence on the charges of the homicide first and second degree. The other ones I'll let you consider those, read the instructions, consider them in that context, and then if the evidence is out there.

(336:110)(App.116).

The jury returned guilty verdicts on all counts. (168-174). A presentence investigation report was ordered. (184).

Sentencing was held on April 1, 2022. Trial counsel hadn't spoken to Helmueller prior to the hearing. (364:26-28)(App.164-166). Helmueller initially refused to be transported, so the court and attorneys went to the jail where a colloquy was conducted. (330:3-6)(App.118-121). Helmueller later changed his mind and was brought to court for the hearing. (330:18)(App.133). During the state's argument, Helmueller objected, stating that he had "fired" trial counsel. (330:21)(App.136). Rather than make an inquiry into the matter, the circuit court reminded Helmueller not to interrupt. (330:21)(App.136). After Helmueller's renewed

objection was again ignored, he had an outburst and was removed from the courtroom. (330:22-23)(App.137-138). Sentencing then continued without Helmueller and the court imposed a total of 45 years. (276; 298)(App.3-22).

Helmueller subsequently filed a postconviction motion raising numerous claims related to his trial and sentencing. (349).

After an evidentiary hearing and additional briefing, the circuit court issued two orders denying Helmueller's claims. (370; 379)(App.23-40). The court held that Helmueller's constitutional right to a speedy trial had not been violated as Helmueller engaged in conduct that was incompatible with the assertion of his right to a speedy trial, the delay in the case was attributable to him, and he wasn't prejudiced by the delay. (370:4-7)(App.26-29). Further, it ruled that: 1) there was "ample evidence" to support Helmueller's conviction in Count 1; 2) the seating arrangements were "reasonable and necessary;" 3) trial counsel didn't perform deficiently; 4) the convictions for Counts 4-6 "were not multiplicitous based on the evidence of multiple bonds in effect;" 5) because it found Helmueller in contempt, it wasn't required to inquire into his request for new counsel at sentencing; and, 6) counsel's concession of guilt didn't violate Helmeuller's constitutional rights. (370:8-13; 379)(App.30-40).

This appeal follows.

ARGUMENT

The 17-month delay between Helmueller's arrest and the jury trial in this case violated Helmueller's constitutional right to a speedy trial. Therefore, the convictions must be vacated and the case dismissed with prejudice.

In the event the court denies that relief, Helmueller is entitled to a judgment of acquittal on Count 1, as the evidence was insufficient to support a finding of guilt. Further, Helmueller is entitled to a new trial on all counts due to the denial of his constitutional rights to the presumption of innocence, to consult with counsel, and to the effective assistance of counsel.

Finally, should that relief be denied, the convictions on Counts 5 and 6 must be vacated as multiplicitous. Helmueller is also entitled to resentencing based on the circuit court's erroneous exercise of discretion in refusing to appoint new counsel.

I. Helmueller's constitutional right to a speedy trial was violated.

"The Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution both guarantee an accused the right to a speedy trial." *State v. Ramirez*, 2024 WI App 28, ¶17, -N.W.3d-. Whether this right has been violated is a question of law this court reviews independently while

accepting the circuit court's factual findings unless clearly erroneous. *Id.*

This court applies a four-part balancing test to determine whether a defendant's constitutional right to a speedy trial has been violated. *Id.*, ¶18. "[T]hat test considers: (1) the total length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the speedy trial rights; and (4) the prejudice to the defendant as a result of the delay." *Id.* These four factors are "related and must be considered together." *State v. Borhegyi*, 222 Wis.2d 506, 518, 588 N.W.2d 89 (Ct. App. 1998).

Applying the four-part test to the totality of the circumstances reveals that Helmueller's constitutional right to a speedy trial was violated.

A. Length of delay.

The first factor, the length of delay, "functions as a triggering mechanism. Until there is some delay which is presumptively prejudicial it is unnecessary to inquire into the other *Barker* factors." *Id.* at 510. A delay approaching one year is presumptively prejudicial. *See Id.* Further, "[t]he presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett v. United States*, 505 U.S. 647, 652 (1992).

A defendant's speedy trial right attaches at the time of arrest and encompasses the time from his arrest until the time of trial. *Borhegyi*, 222 Wis.2d at 511. Here, the time between Helmueller's arrest on

August 20, 2020 and trial on January 24, 2022 was 17 months. (2:10). This delay is presumptively prejudicial and demands consideration of the remaining factors.

B. Reasons for delay.

The next factor to be considered is the reason given for the delay. *Borhegyi*, 222 Wis.2d at 512. When considering this factor, the court should separate delays "chargeable completely to the state," from those which are intrinsic to the case, or for which the defendant is responsible. *State v. Ziegenhagen*, 73 Wis.2d 656, 666-668, 245 N.W.2d 656 (1976). Differing weights are assigned to reasons that may be given for the delay, with deliberate attempts to delay the trial weighed more heavily against the state than neutral reasons, such as overcrowded courts. *Borhegyi*, 222 Wis.2d at 511. "It is the State's burden to advance a reason for the delay—if it does not, the delay will be attributed to the State, and its silence on the topic is weighed heavily against the State." *Ramirez*, 2024 WI App 28, ¶24 (internal citations omitted).

When it denied Helmueller's postconviction motion, the circuit court failed to identify any specific periods of time for which any particular party was responsible and, instead, found that any delay attributable to the state shouldn't be weighed heavily, and that "all of these delays" were attributable to Helmueller. (370:3-6)(App.25-28). The court stated that Helmueller's "behavior at almost every hearing

presented obstructions and obstacles to overcome, all of which took up substantial time and effort." (370:3)(App.25). The court also found that Helmueller's conduct caused it to take longer than normal to find counsel and attributed some delay to trial counsel's request for time to prepare for trial. (370:4,6-7)(App.26,28-29). These findings are clearly erroneous.

The time between Helmueller's arrest on August 20, and arraignment on September 25, 2020, wasn't significant and is likely due to the orderly administration of criminal justice. It cannot be attributed to the state.

However, most of the time between arraignment on September 25, 2020 (speedy trial demand made) and the hearing on April 5, 2021 (when counsel withdrew), must be weighed heavily against the state. With the exception of 43 days between an order for competency evaluation entered on February 1, 2021, and the competency hearing on March 16, 2021, neither the state nor the court offered any reason for the delay during this 192-day period. (56; 306). To the extent the court found that this delay was caused by Helmueller's conduct, the record doesn't support that finding. There were no occasions on which Helmueller's conduct actually caused any delay. No hearings were adjourned or rescheduled due to Helmueller's behavior or refusal to appear for court. Rather, most hearings were conducted in his absence.

The next period, the 116 days from the time Helmueller's first counsel withdrew to the first hearing at which trial counsel appeared (April 5 to July 30, 2021) must also be weighed against the state—though not heavily. As an indigent defendant, it wasn't Helmueller's responsibility to find himself an attorney and bring himself to trial. Further, the record doesn't support the court's finding that Helmueller's conduct caused this delay.

Helmueller's first attorney withdrew "based on a conflict of interest, and ethical considerations," and Helmueller stated he understood the basis for the motion. (307:4). Thereafter, the Public Defender's Office gave the court updates on the status of reappointment of counsel. The agency indicated it had a conflict preventing staff attorneys from taking the case, and that the private attorneys contacted either didn't respond or declined due to their caseloads and travel. (308:4-6; 309:4; 310:4-7). The court then decided to appoint counsel itself, however, the first attorney appointed had to withdraw due to a conflict and trial counsel was then appointed. (90).

This almost four-month delay was the result of an overburdened court system, or a "systemic breakdown in the public defender system," and must be attributed to the state; it wasn't caused by Helmueller. *See State v. Provost*, 2020 WI App 21, ¶¶39-42, 392 Wis.2d 262, 944 N.W.2d 23; *State v. Ziegenhagen*, 73 Wis.2d 656, 666-667, 245 N.W. 2d 656 (1976)("the government as an institution is charged with the duty of assuring a defendant a speedy trial.").

The difficulty finding counsel for Helmueller was due to problems within the SPD that were "both institutional in origin and debilitating in scope." *See Provost*, 2020 WI App 21, ¶40. The crisis caused by the state-wide shortage of attorneys willing to accept SPD appointments in 2021 is widely known.[1] That shortage, and the impact of the COVID-19 pandemic, caused the delay in appointing counsel for Helmueller here. Because these problems were institutional in nature, the delay must be attributed to the state.

Finally, the last period of 178 days from July 30, 2021 until trial on January 24, 2022, cannot be attributed to Helmueller. Contrary to the court's finding, counsel didn't request time to prepare for the trial. Rather, counsel stated only: "As everyone is aware, I cannot try a case before the end of the year, so this one would have to be after, after the first of next year." (312:5). No further explanation or record was made, and although Helmueller was present at the hearing, he wasn't given the opportunity to weigh in, or asked whether he consented to the delay. (312).

Even if counsel had requested time to prepare, it couldn't be held against Helmueller. *See Hadley v. State*, 66 Wis.2d 350, 360, 225 N.W.2d 461 (1975)(a

[1] "Opening the case on Wisconsin's public defender problem," available at https://www.wmtv15news.com/2023/05/31/opening-case-wisconsins-public-defender-problem/; "Why Wisconsin courts need more prosecutors, public defenders," available at https://pbswisconsin.org/news-item/why-wisconsin-courts-need-more-prosecutors-public-defenders/

reasonable request for time to prepare for trial cannot be interpreted as a willful delay or used to circumvent the right to a speedy trial).

Under the circumstances, the circuit court's acceptance of counsel's statement without further record or inquiry, and without consulting Helmueller, must be weighed against the state.

While the delays in this case were not meant to hamper the defense, they appear to be the result of negligence or an overburdened court system and, therefore, must be weighed against the government. Counsel recognizes the burden that COVID put on the court system but, simply "[b]ecause delay under the circumstances is inevitable does not mean it is excusable in light of the constitutional demands of a speedy trial. It is within the power of the state to provide prosecutorial staffs and judicial staffs to afford the defendant and the public speedy trials, and it is the state's duty to do so." *Green v. State*, 75 Wis.2d at 636-637. Helmueller repeatedly expressed his desire for the case to move forward and his conduct didn't cause any delay. This factor must be weighed against the state.

C. Assertion of right.

The third *Barker* factor is whether the defendant asserted his speedy trial right. *Ramirez*, 2024 WI App 28 at ¶76. "[A] defendant's demand for a speedy trial is probative of the fact that the delay was not occasioned by the defendant and that the defendant was subjectively of the opinion that he was

being prejudiced by the lack of speedy trial." *Ziegenhagen*, 73 Wis.2d at 668. The demand "'is entitled to strong evidentiary weight'...as the assertion 'is in itself probative of prejudice.'" *Ramirez*, 2024 WI App 28 at ¶76 (internal citations omitted).

The circuit court correctly found that Helmueller had demanded a speedy trial. (370:3)(App.25). However, the court also discussed forfeiture and found that the "record strongly indicate[d] that [Helmueller] did not really want a speedy trial." (370:7)(App.29). To the extent that is a factual finding, it is clearly erroneous.

Helmueller both demanded a speedy trial, and expressed his belief that that right was being violated, on several occasions throughout this case. The first demand was made through counsel at arraignment. (300:7). Thereafter, Helmueller filed various letters referencing his earlier speedy trial demand and asserting that it had been violated. (58; 64). The demand was again invoked by counsel on March 16, 2021. (306:9). That was followed by additional letters and motions from Helmueller requesting release and dismissal based on the violation of his right to a speedy trial. (82; 93; 146). *See Green v. State*, 75 Wis.2d 631, 637, 250 N.W.2d 305 (1977)(Green "asserted the right to a speedy trial by seeking dismissal based on his denial of the right to speedy trial.").

None of the conduct the circuit court pointed to—Helmueller's letters or refusal to attend status hearings—was inconsistent with Helmueller's

unambiguous desire for a speedy trial. Helmueller's immediate and repeated demands for a speedy trial weigh heavily against the state.

D. Prejudice.

The final factor is whether prejudice exists. Prejudice "is assessed in light of a defendant's interests which the speedy trial right is designed to protect…(1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired." *Borhegyi*, 222 Wis.2d at 514. Although prejudice is an important factor, an affirmative showing of prejudice in fact, isn't necessary to establish a violation. *Ramirez*, 2024 WI App 28, ¶85.

The circuit court found that Helmueller wasn't prejudiced by the delay and hadn't shown that his defense was impaired. (370:7)(App.29). This finding is clearly erroneous.

Helmueller endured prolonged pretrial incarceration and suffered extreme anxiety and distress while this case was pending. Prolonged pretrial incarceration is an element that is "to be weighed most heavily against the state." *Green*, 75 Wis.2d at 638. "[T]ime spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little to no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a

defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 532-533 (1972).

Helmueller was held on high cash bail for 589 days. In *Borhegyi*, this court held that Borhegyi's 17-months in custody, along with the attendant anxiety and concern about the charges, supported the finding of a speedy trial violation. *Borhegyi*, 222 Wis.2d at 514-518. Specifically, the court found "that at least some minimal prejudice flowed from the significant length of time Borhegyi was forced to wait until the criminal charges against him were resolved." *Id*. at 514. Helmueller spent the same significant length of time in custody prior to being brought to trial.

Further, courts have long recognized that a criminal defendant lives "under a cloud of anxiety, suspicion, and often hostility." *Barker*, 407 U.S. at 533. Helmueller "was undoubtedly concerned and anxious about the pending charges" during the extended period of time it took to resolve this case. *See Borhegyi*, 222 Wis.2d at 514-515. This is especially so in light of the serious nature of the charges he faced. It could come to no surprise that the anxiety and hostility a defendant charged with homicide experiences is worse than that of one charged with arson and criminal damage to property, as *Borhegyi* was. But speculation isn't necessary in this case. The anxiety and frustration Helmueller felt, as well as the hostility he faced in the jail, were expressed in the multiple letters

he filed with the court.[2] (100; 103; 104; 112; 116; 132, 134; 135; 142, among others).

Finally, in the time it took to bring him to trial one witness (Ben Carlson) died, and another (Gary Gores) was placed in the memory care unit of an assisted living residence and thus became unavailable for trial. (335:54-55). *See Barker*, 407 U.S. at 532 ("If witnesses die or disappear during a delay, the prejudice is obvious").

Helmueller was prejudiced by the delay; this factor also weighs against the state.

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The 17-month delay in this case is presumptively prejudicial and Helmueller's confinement, "extending more than five months beyond the bare minimum needed to trigger the presumption of prejudice, [] weighs against the State." *See Borhegyi*, 222 Wis.2d at 518. Further, Helmueller immediately demanded a speedy trial and repeatedly asserted that right throughout the proceedings. "A defendant's assertion of his right to a speedy trial is entitled to strong evidentiary weight." *Id*. The reasons for the delay also weigh against the government. Finally, Helmueller was prejudiced by the delay due to the stress and anxiety he suffered while being incarcerated for a significant period of time and the loss of witnesses.

[2] Helmueller even swallowed a battery to bring attention to the conditions in the jail. (112:9).

Balancing the factors in this case demonstrates that the delay in bringing Helmueller to trial violated his constitutional right to a speedy trial. His convictions must be vacated and the case dismissed with prejudice.

II. The evidence was insufficient to support Helmueller's conviction for first-degree reckless homicide.

The evidence presented at trial was insufficient to prove beyond a reasonable doubt that Helmueller directly committed, or aided and abetted Cameron in committing, first-degree reckless homicide. As a result, Helmueller's conviction must be vacated.

"In order to obtain a conviction, the state must prove every essential element of the crime charged beyond a reasonable doubt." *State v. Ivy*, 119 Wis.2d 591, 606-607, 350 N.W.2d 622 (1984). A conviction obtained without sufficient evidence is a violation of the defendant's right to due process of law. *In re Winship*, 397 U.S. 358, 365 (1970).

"The question of whether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law," which this court reviews de novo. *State v. Smith*, 2012 WI 91, ¶24, 342 Wis.2d 710, 817 N.W.2d 410. In doing so, this court will uphold the verdict unless the evidence "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id.* (quoting *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990)). Should

this court determine that the evidence produced at trial is insufficient, it must order a judgment of acquittal. *Ivy*, 119 Wis.2d at 608-610.

To convict Helmueller of first-degree reckless homicide, the state was required to prove beyond a reasonable doubt that Helmueller either directly, or by aiding and abetting Cameron: 1) caused the death of Rose; 2) caused the death by criminally reckless conduct; and, 3) the circumstances of the conduct showed utter disregard for human life. *See* WIS JI-CRIMINAL 1022. (175:4-5). "A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either: assists the person who commits the crime; or is ready and willing to assist and the person who commits the crime knows of the willingness to assist." WIS JI-CRIMINAL 400. (175:2).

The evidence presented in this case was insufficient to support the necessary finding that Helmueller either directly caused the death of Rose, or knew that Cameron intended to cause Rose's death and had the purpose to assist in the commission of that crime.

The only evidence presented that would suggest that Helmueller directly caused Rose's death was Cameron's testimony. On cross-examination, Cameron testified that he and Helmueller went to Gores' apartment to retrieve the gun in order to sell it, he stayed in the van while Helmueller went inside, and

then Helmueller ran out, pulled a gun on him, and told him to drive. (332:280-288). Cameron's testimony, however, was contrary to all of the other evidence in the case. Other witnesses testified that they saw Cameron drive up to the apartment complex, exit the van, and go into Gores' apartment before the shooting. Further, multiple witnesses testified that Rose repeatedly said Cameron was the one who shot him. The state conceded that Cameron was the shooter and the parties and court agreed that Cameron's testimony was largely incredible. (336:9,61-63,95). Thus, no reasonable jury could have found that Helmueller directly committed first-degree reckless homicide.

The evidence was also so lacking in probative value and force that no reasonable jury could've found Helmueller guilty of aiding and abetting Cameron in the crime. Aside from Cameron, the witnesses present at the apartment complex had little to offer. Tammy testified that she, Emma, and Rose had been drinking and using drugs and that Rose had gone downstairs twice that evening, but she was inconsistent about the timing and wasn't sure who Rose was getting meth from. (327:201,223,225-226). For her part, Emma testified that she hadn't been at the apartments for long and was outside about to leave when Cameron and Helmueller arrived looking for Justin Delaria. (327:235-241). She saw Helmueller look behind the building and then enter Gores' apartment, followed a few minutes later by Cameron. (327:238-241,249-251). Rose then came down to find out what was happening and, when informed that Helmueller and Cameron

were there, he went into Gores' apartment to see what was going on. (327:241).

The state repeatedly claimed that Helmueller and Cameron "were in it together the entire way," but there was no evidence to suggest that there was any "it" for the two to be in on together. (336:44). None of the evidence suggested that they went to the apartments looking for Rose, or planned to confront or engage him in an argument. In fact, the evidence showed that they were there to get cat litter (or were looking for Justin), and that Rose approached them to find out what was going on. The state's evidence simply failed to establish that there was any plan in which Helmueller could've participated or assisted with.

Nor was there evidence proving that Helmueller had possession of the firearm when they arrived at the complex (Cameron's testimony was to the contrary). Most importantly, there was absolutely no evidence about what happened inside Gores' apartment. There was no evidence to suggest that there was an argument or confrontation, that Helmueller provided Cameron with the gun, or that Helmueller was even in the same room as Cameron when Cameron shot Rose. Sergeant Cramlet "was not able to determine why or how [the shooting] took place." (332:30).

There was simply no evidence that Helmueller knew Cameron would shoot Rose and was ready and willing to assist him, or that Helmueller actually did assist Cameron in the commission of the crime.

Evidence regarding Helmueller's conduct afterwards—hiding the gun, speeding, being evasive when questioned—is insufficient for a reasonable jury to find, beyond a reasonable doubt, that Helmueller somehow aided and abetted Cameron in committing the crime. His conduct afterward may show that he knew something illegal had happened, but it doesn't prove that, prior to the shooting, he knew that Cameron was going to shoot Rose, and assisted, or was ready and willing to assist, in the commission of that crime.

The state failed to meet its burden of proof; Helmueller's conviction of first-degree reckless must be reversed.

III. Helmueller's constitutional rights to the assistance of counsel and presumption of innocence were violated by the seating arrangements at trial.

Helmueller is entitled to a new trial, as the circuit court erroneously exercised its discretion when it decided to seat him at a separate table, slightly behind his counsel, and that decision was unconstitutional. Under the circumstances, the seating arrangements undermined the presumption of innocence and adversely affected Helmueller's ability to communicate with his attorney.

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial."

Estelle v. Williams, 425 U.S. 501, 503 (1976); *see also Deck v. Missouri*, 544 U.S. 622, 630 (2005). To protect a defendant's right to the presumption of innocence, "courts must be alert to factors that may undermine the fairness of the fact-finding process," and "evaluate the likely effects of a particular procedure based on reason, principle, and common human experience." *Williams*, 425 U.S. at 503-504.

The "core concern in this area is to avoid any procedure that undermines the presumption of innocence by conveying a message to the jury that the defendant is guilty." *United States v. Larson*, 460 F.3d 1200, 1215 (9th Cir.2006), on reh'g en banc, 495 F.3d 1094 (9th Cir.2007). Courts have recognized that "certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial." *Carey v. Musladin*, 549 U.S. 70, 72 (2006).[3] Courts "must carefully exercise [their] discretion" in deciding whether to implement a particular practice "and then, on the record, must set forth [their] reasons justifying" that practice in that particular case. *State v. Grinder*, 190 Wis.2d 541, 552, 527 N.W.2d 326 (1995). Such decision is upheld "unless it can be shown that the court erroneously exercised its discretion." *Id*. at 551.

[3] *See Deck*, 544 U.S. at 632-35 (invalidating the routine practice of compelling defendants to wear visible shackles); *Williams*, 425 U.S. at 503-05 (invalidating requirement that a defendant appear in prison garb); *United States v. Olvera*, 30 F.3d 1195, 1197(9th Cir.1994)(reversing a conviction because the defendant was compelled to speak the words of the bank robber in front of the jury).

In addition to the presumption of innocence, "the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel." *Deck*, 544 U.S. at 631. "[O]ne of the defendant's primary advantages of being present at the trial[] [is] his ability to communicate with his counsel." *Illinois v. Allen*, 397 U.S. 337, 344 (1970). Thus, the right to counsel includes the right to consult with counsel. "This court independently reviews whether deprivation of a constitutional right has occurred." *State v. Jones*, 2010 WI 72, ¶23, 326 Wis.2d 380, 797 N.W.2d 378.

Here, the circuit court failed to exercise its discretion when separating Helmueller from his counsel. At trial, Helmueller was seated at a separate table, slightly behind trial counsel's table, and the two were about 6-10 feet away from each other. (358; 364:18,54)(App.156,192). Helmueller was also required to wear a mask and a stun belt under his clothes. (364:18,54-55)(App.156,192-193). Other than stating that it would explain Helmueller's "distancing from his attorney, for purposes of social distancing," the court made no record regarding the seating arrangements. (327:16-17). While it may be inferred that Helmueller's separation from counsel was due to his positive COVID test, the court made no record of its reasoning.[4]

[4] In its decision denying Helmueller's postconviction motion the circuit court held that the seating arrangements were necessary in "light of the Defendant's decorum and demeanor as well as the COVID-19 pandemic." (370:8)(App.30).

Postconviction, the court's questioning of trial counsel revealed that an informal conference on the subject may have been held.[5] (364:49-50)(App.187-188). Yet, no record of this conference was made so this court is unable to review any factors the circuit court may have weighed in reaching its decision.

At the time of trial, and postconviction, the circuit court made no findings, provided no reasoning, and made no indication that it had considered the implications Helmueller's separation could have on his rights to counsel and the presumption of innocence, as it was required to do. *See Grinder*, 190 Wis.2d at 552; *Williams*, 425 U.S. at 504 ("Courts must do the best they can to evaluate the likely effects of a particular procedure."). It erroneously exercised its discretion.

Further, although the court stated that it would explain Helmueller's separation to the jury, it never explained, nor instructed the jury that it shouldn't consider the seating arrangements in determining guilt. *See State v. Cassel*, 48 Wis.2d 619, 624, 180 N.W.2d 607 (1970)("when it is necessary to have an accused on trial in restraints before a jury in a courtroom, the court has a duty to offset the effect").

Finally, in light of the events that unfolded during trial, the court's failure to exercise discretion regarding the seating arrangements wasn't harmless

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It didn't address the fact that it failed to exercise its discretion or make a record at the time of trial.

[5] There was no indication Helmueller was present for this discussion.

in this case. Requiring Helmueller's separation both imposed a significant impediment to his ability to consult with trial counsel and prejudiced him in the eyes of the jury.

A jury reasonably expects a defendant to be seated next to his counsel during his trial. The departure from that status quo in this case, without any explanation, likely raised some speculation from the jury. The unusual seating arrangements alone might not be enough to establish a violation of Helmueller's right to the presumption of innocence. However, combined with other facts, it is clear that Helmueller's separation from his counsel would have been interpreted as a sign that he was particularly dangerous and guilty; that even his advocate needed protection from him.

Helmeuller's ability to communicate with counsel was significantly impeded. The circuit court's finding to the contrary is clearly erroneous. Helmueller was at a separate table, behind his attorney, and was informed only that he could communicate with counsel in the courtroom or in the holding cells during breaks, if needed. (327:16-17)(App.41-42). The court didn't inform Helmueller that he could walk to counsel table, lean forward to talk, or pass notes to counsel; rather, it implied otherwise. Further, Helmueller testified that he wasn't able to easily speak with counsel during the trial. (364:54)(App.192). He explained he "didn't feel comfortable moving towards" counsel because of a prior interaction he had with a court officer and the

fact that he was wearing a stun belt: "I didn't know how patient Officer White was going to be with using that shock belt, and I did not want to get lit up like a Christmas tree." (364:54-55)(App.192-193).

Moreover, due to his positive COVID status, Helmueller was required to wear a mask and stay six feet away from others; he couldn't quietly and discreetly communicate any concerns to his counsel. When he tried, he was overheard by the court and the court reporter. (327:27). Further, even if court security would've allowed Helmueller to approach counsel, counsel gave no indication that he was willing to accept the risk of contracting COVID due close contact. The court itself noted that the separation was designed to accommodate everyone's health. (370:8-9).

Finally, allowing Helmueller to consult with counsel during breaks isn't sufficient to comply with his constitutional right to counsel. Helmueller had the right to communicate with counsel throughout trial, providing information for cross-examination of witnesses, or sharing concerns during jury selection. The burden shouldn't have been on Helmueller to ask for a break every time he needed to consult with counsel.

Here, the violation of Helmueller's right to consult with counsel also led to a violation of his right to the presumption of innocence. Due to his inability to privately consult with counsel, Helmueller loudly spoke out on several occasions. (327:25-27,150,206-207)(App.50-52,80-81). This led to his statement, in

front of the jury, that he was firing his attorney, the jury being excused from the courtroom, and Helmueller's eventual removal from the proceedings. (327:207-212)(App.81-86). There was a commotion, including several minutes of "scuffling…very loud yelling and screaming by Helmueller." (327:213-214)(App.87-88). The jury confirmed that it had heard yelling and was informed by the court that Helmueller had "expressed some emotions" and wouldn't be returning to the courtroom that day. (327:218)(App.92). In fact, Helmueller never returned to the courtroom. These facts would lead any reasonable jury to infer that Helmueller was seated separate from his attorney because: he was dangerous, his attorney was scared of him, and he was guilty.

The circuit court erroneously exercised its discretion in requiring Helmueller to sit at a separate table, behind his attorney, violating his constitutional rights. A new trial must be granted.

IV. Helmueller's constitutional right to choose the objective of his defense was violated.

Helmueller's Sixth Amendment right to choose the objective of his defense was violated when, at trial, his counsel conceded guilt to several offenses. This is a structural error requiring that Helmueller's convictions be vacated and a new trial granted. *McCoy v. Louisiana*, 584 U.S. 414, 427 (2018).

"'Autonomy to decide that the objective of the defense is to assert innocence' belongs in the category of decisions reserved for the defendant alone. A lawyer

violates that autonomy '[w]hen a client expressly asserts that the objective of 'his defence' is to maintain innocence of the charged criminal acts' and the lawyer acts contrary to that objective." *State v. Chambers*, 2021 WI 13, ¶18, 395 Wis.2d 770, 955 N.W.2d 144 (internal citations omitted). "When a client expressly asserts that the objective of "his defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *McCoy,* 584 U.S. at 423.

Thus, in order to establish a *McCoy* violation, Helmueller must prove that: 1) he expressly asserted that the objective of his defense was to maintain innocence of the charges; and, 2) trial counsel overrode that objective by conceding guilt. *See Chambers*, 2021 WI 13, ¶20. This court independently reviews whether the defendant's constitutional right to choose the objective of his defense was violated. *Id*., ¶13.

There can be little dispute that trial counsel conceded Helmueller's guilt to at least three of the charges. Counsel told the jury that it would find Helmueller guilty of at least one crime and admitted that the state had evidence establishing each of the elements of felon in possession of a firearm, carrying a concealed weapon, and bail jumping. (327:187-192; 336:106-108)(App.61-66,112-114). He told the jury it would see a video that "clearly shows" Helmueller "pull[] a gun out of the back of his waistband," which explains why his DNA was on the gun. (327:187,189)(App.61,63). He also told the jury that Helmueller had a felony conviction and "had three

open cases that were pending when this happened." (327:191)(App.65). As trial counsel conceded guilt, the question becomes whether that concession was contrary to the objective of Helmueller's defense.

Postconviction, Helmueller testified that trial counsel never told him that he was planning to concede guilt to any charges, and that he had "made it very clear to [counsel] and the Court" that it was his intention to maintain his innocence of all charges. (364:52-53)(App.190-191). The record supports that testimony. Helmueller frequently wrote to the court asserting his innocence, his belief that the state lacked evidence to prove the charges, and explaining his refusal to enter a plea. (75; 100; 129; 147). He also refused to stipulate that he was a felon or that he had been released on bond in felony cases. (327:17-31).

For his part, trial counsel admitted that he was aware of Helmueller's filings and his position regarding the charges. (364:17)(App.155). He acknowledged that, contrary to his advice, Helmueller had refused to stipulate that he was a felon or that he was on felony bond. (364:16)(App.154). Trial counsel further testified that, while the two "had ongoing discussions" about how to the focus on the most serious charges, they never had specific discussions about conceding charges. (364:15-16)(App.153-154). He admitted that he never told Helmueller that his strategy would be to concede guilt to any of the charges at trial. (364:15-16,47)(App.153-154,185).

Helmueller made his intentions clear. But even if the court finds otherwise, the law doesn't require a defendant to specifically tell his attorney that the objective of his defense is to maintain innocence. That is obvious by the defendant's choice to proceed to trial. The requirement that the defendant object to a proposed strategy to concede guilt only comes into play when the attorney specifically informs his client that he intends to pursue such a strategy. *See Chambers*, 2021 WI 13, ¶¶16,19. That conversation never occurred in this case; trial counsel never told Helmueller that he was planning to concede guilt to any of the charges. Thus, Helmueller couldn't consent or object to a strategy he wasn't informed of. And, without the necessary conversation, counsel wasn't free to concede guilt. He was required to honor the objective of Helmueller's defense and maintain his innocence.

Helmueller's objective to maintain his innocence being apparent, counsel wasn't free to execute a strategy that conceded guilt to the less serious charges, no matter how reasonable that strategy may have been. *See McCoy*, 584 U.S. at 428. Counsel violated Helmueller's Sixth Amendment right to choose the objective of his defense and, consequently, Helmueller is entitled to a new trial on all charges.

V. Helmueller's constitutional right to the effective assistance of counsel was violated.

Trial counsel made several errors that fell below objective standards of reasonableness and rendered the outcome of Helmueller's trial unreliable. As a result, Helmueller was denied the effective assistance of counsel and his convictions must be vacated.

Criminal defendants are guaranteed the right to counsel by both the United States and Wisconsin Constitutions. *State v. Carter*, 2010 WI 40, ¶20, 324 Wis.2d 640, 782 N.W.2d 695. The right to counsel includes effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish ineffectiveness, a defendant must show that his counsel's performance was deficient and that he was prejudiced by that deficient performance. *Id.* at 687.

Review of a claim of ineffective assistance of counsel involves a mixed question of law and fact. *State v. Sanchez*, 201 Wis.2d 219, 236-37, 548 N.W.2d 69 (1996). This court grants deference to the circuit court's findings of fact; overturning them only if they are clearly erroneous. *Id.* "However, whether counsel's performance was deficient and whether the deficient performance prejudiced the defense are questions of law" which this court reviews de novo. *Sanchez*, 201 Wis.2d at 236-37.

Here, the circuit court failed to make any specific factual findings related to Helmueller's ineffective assistance of counsel claim, holding only that trial counsel "offered plausible explanations for his performance, or lack thereof, which were reasonable under the circumstances," and that "[a]ny so-called errors were harmless and had no effect on the outcome of this case." (370:10)(App.32). To the extent this is a factual finding, it is clearly erroneous.

A. Deficient performance.

A lawyer's performance is deficient if he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." *Id*. at 690.

Helmueller's counsel performed deficiently by introducing Cameron's testimony regarding the shooting, failing to object to the seating arrangements at trial, failing to introduce evidence regarding an earlier conflict between Cameron and Justin, and failing to object to Detective de la Cruz's hearsay testimony.

1. Introduction of Cameron's testimony.

Should the court find that the evidence was sufficient to support Helmueller's guilt on Count 1, Helmueller was denied the effective assistance of counsel. Specifically, trial counsel performed deficiently when he introduced testimony from Cameron which, if believed, would support a finding that Helmueller directly committed first-degree reckless homicide.

Cameron was a witness for the state. The state asked him questions regarding his relationship with Helmueller, and questions regarding the events leading up to the shooting. The state, however, stopped its questioning at the point that Cameron and Helmueller first arrived at Fletch's residence. (332:279-280). Prior to cross-examination, the state hadn't asked Cameron about what happened when he and Helmueller arrived at Gores' apartment complex. It wasn't until trial counsel crossed Cameron that the jury heard his story about the shooting.

During cross-examination, the jury repeatedly heard that Cameron had stayed in the van while Helmueller went into the apartment and then Helmueller ran out, pulled a gun on Cameron, and told him to drive. (332:281-282,284-290). Between trial counsel's questions and Cameron's answers, the jury heard that version of events at least six times. (332:284-291). As that testimony suggests that

Helmueller shot Rose, trial counsel couldn't—and didn't—have a reasonable strategy for introducing it.

Postconviction, counsel explained that he elicited that testimony because "by that point what [Cameron] had to say about the other facts that the State did elicit ... were so incredibly contrary to all the other witnesses that the jury was not going to believe what he said." (364:20)(App.158). Further, counsel believed that if he didn't introduce it, the state would on re-direct. (364:21,39)(App.159,177). This explanation isn't reasonable.

Contrary to counsel's belief, nothing that Cameron had testified to at that point was directly contradicted by any other witness. Until cross-examination, Cameron had actually testified to very little. The state had only asked about his relationship with Helmueller, his knowledge that Helmueller had a firearm, and what the two had been doing up to the time they first arrived at Fletch's residence. (332:264-280). None of that testimony was particularly harmful to Helmueller and none of it was "so incredibly contrary to all the other witnesses" that the jury wouldn't believe anything Cameron said. It wasn't until cross-examination that the jury heard Cameron's version of events which, although contrary to the testimony of other witnesses, was direct evidence of Helmueller's guilt of the most serious offense in this case. Even if counsel didn't think the jury would believe it, introducing evidence that could allow the jury to find Helmueller guilty is objectively unreasonable.

Further, unless counsel had opened the door, the state wouldn't have been able to introduce this evidence on re-direct as it would've been beyond the scope of cross-examination. Had the state intended to introduce Cameron's version of events regarding the shooting, it would've done so on direct. The state likely didn't elicit that testimony because it knew it would raise questions about Cameron's credibility, thus undermining the strength of the other testimony he provided. It's not reasonable to believe that the state was waiting until re-direct to ask Cameron about the shooting.

As Cameron's version of events, introduced only by trial counsel, would support a jury finding that Helmueller directly committed the crime, trial counsel's introduction of it was deficient. He had no reasonable strategic basis for introducing it and it harmed the defense.

2. Failure to object to seating arrangements.

Should the court conclude that Helmueller forfeited any challenge to the seating arrangements by not objecting at trial, or actually requesting them, he argues that he was denied the effective assistance of counsel. As set forth above, Helmueller's placement at a separate table, behind his counsel, significantly impeded his ability to consult with counsel and violated his right to the presumption of innocence. As such, trial counsel's failure to object to, or possibly

requesting those arrangements, constitutes deficient performance.

During the first day of trial, Helmueller was seated at a separate table, 6-10 feet away from counsel. (364:18,54)(App.156,192). Helmueller testified that he wasn't able to easily speak with trial counsel during the trial as he didn't feel comfortable moving or leaving his table. (364:54)(App192).

In response to questioning from the parties, trial counsel explained that he didn't object to the seating arrangements because he "didn't think it was a problem." (364:19)(App.157). Upon questioning by the court, he admitted that he may have requested those arrangements when it became apparent the trial was going to happen despite Helmueller's positive COVID status. (364:49-50)(App.187-188). Further, counsel explained that he wasn't worried about the impression the seating arrangements may leave with the jury because Helmueller "was closer to the jury than I was, ... And he had the mask on." (364:45-46)(App.183-184).

Trial counsel's testimony shows that he had no strategic reason for requesting, or not objecting to the seating arrangements. He simply didn't think they were problematic. As argued above, counsel was wrong. Helmueller's placement at a separate table, six feet away from his attorney, interfered with his constitutional right to consult with counsel and to the presumption of innocence. Helmueller wasn't able to quietly or effectively communicate with counsel throughout his trial. Further, his separation,

combined with the court's failure to explain the seating arrangements and Helmueller's later outburst, gave the impression that Helmueller was dangerous and guilty. Failure to object to, or possibly requesting, that your client be seated separately from you during his jury trial falls below objective standards of reasonableness.

3. Failure to introduce evidence of Cameron's conflict with Justin.

Trial counsel performed deficiently when he failed to introduce evidence regarding Cameron's conflict with Justin Delaria on the date of the shooting.

At trial, Emma testified that she had arrived at Rose's residence with Justin, that Justin had left shortly thereafter, and that Cameron and Helmueller were looking for Justin when they arrived. (327:235-241). Reports in discovery contained statements indicating:

- Cameron and Justin generally didn't get along;
- Just prior to arriving at Rose's residence they had both been at Cameron's apartment with Cameron and Helmueller;
- While there, Cameron and Justin began arguing about a picture of a dog on Emma's phone, Cameron became confrontational with Emma, getting in her face about it, and tensions grew between the three of them; and,

- Emma told Rose about the argument with Cameron over the picture and Rose told her he would, "take care of it."

(360). None of this came out at trial.

Postconviction, counsel testified that he didn't recall reviewing these reports, didn't recall if he had asked the witnesses about this information, and didn't know why he would've failed to introduce that evidence if he hadn't. (364:25,44)(App.163,182). Thus, trial counsel had no strategic reason for not introducing this evidence.

This additional information would've provided the jury with more background and context to understand why Cameron and Helmueller were looking for Justin, why Rose may have confronted Cameron, and therefore, why Cameron may have shot Rose. As a reasonably competent attorney would've introduced evidence supporting his strategy to defend against the homicide charge, trial counsel performed deficiently in failing to do so.

4. Failure to object to Detective de la Cruz's testimony.

Trial counsel performed deficiently when he chose not to object to hearsay testimony introduced through Detective de la Cruz. On the third day of trial, the state informed the court that it intended to have Cruz testify that Cameron told him that Helmueller had a revolver. (335:9). Counsel responded that he was originally going to object, but changed his mind.

(335:9). Cruz then testified, providing that information to the jury. (335:13).

Cruz's testimony as to what Cameron told him was inadmissible hearsay. The statement was made by someone other than Cruz and was offered for the truth of the matter asserted. *See* Wis. Stat. § 908.01(3). Further, while the statement was consistent with Cameron's testimony that he had seen Helmueller with a gun and informed the detective about it, trial counsel didn't expressly or impliedly accuse Cameron of any recent fabrication or improper motive related to that. Thus, it wasn't admissible as a prior consistent statement. *See* Wis. Stat. § 908.01(4)(a).

Trial counsel testified that he didn't object to this testimony because Helmueller wanted it introduced and he thought, at worst, the evidence was neutral to the defense. (364:25-26,41)(App.163-164,179). Helmueller testified about his reasoning—he wanted counsel to point out that the police had information that he may have had a gun and didn't do anything about it in the ten days leading up to the victim's death. (364:66)(App.204).

Despite the fact that Helmueller may have thought the evidence was helpful, the decision about whether to object to hearsay was left to trial counsel. Under the circumstances, his decision not to object was unreasonable. A reasonably competent lawyer would know that the argument Helmueller wanted him to make wouldn't be helpful to the defense and, in fact, counsel didn't make that argument. Further, any

lawyer would've recognized that, rather than hurting the state's case, Cruz's testimony actually bolstered it. It only served to corroborate Cameron's testimony, giving him credibility that he didn't have, and strengthening the state's claim that Helmueller owned the firearm believed to have been used in the homicide.

B. Prejudice.

Counsel's errors undermine confidence in the outcome of Helmueller's trial. Under the second *Strickland* prong, defendants must show that they were prejudiced by their attorney's deficient performance. *Strickland*, 466 U.S. at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

When more than a single deficiency is alleged, the court determines prejudice by assessing whether the aggregative effect of counsel's errors undermines confidence in the outcome of the trial. *State v. Thiel*, 2003 WI 111, ¶¶59-63, 264 Wis.2d 571, 665 N.W.2d 305.

Trial counsel's deficient performance in this case rendered the jury's verdicts unreliable. The evidence supporting guilt wasn't overwhelming. To the contrary, Helmueller asserts it was actually insufficient to support the jury's verdict on Count 1. Further, counsel's errors had a pervasive effect, altering the entire evidentiary picture.

Counsel's introduction of Cameron's testimony allowed the jury to hear evidence which supported a finding that Helmueller was guilty of first-degree reckless homicide. Without that evidence, the jury had nothing to support a finding that Helmueller played any role in Rose's death. Rather, the jury had evidence that Helmueller arrived at the apartments to get kitty litter and/or find Justin, went into Gores' apartment, and then ran out and jumped in the passenger side of the van that Cameron then quickly drove away. None of the state's evidence proved that Helmueller knew Cameron was going to shoot Rose and provided, or was willing to provide, assistance. Cameron's testimony on cross-examination changed that entire picture—it gave the jury an alternate version of events on which it could find Helmueller guilty.

Counsel's failure to object to Cruz's testimony, and failure to introduce evidence of the earlier conflict with Justin, similarly altered the evidentiary picture. Cruz's testimony only served to corroborate Cameron's testimony that Helmueller had a gun and that Cameron was concerned someone may get shot. It bolstered Cameron's otherwise questionable credibility and contributed to the state's negative portrayal of Helmueller. Further, counsel's failure to introduce evidence of Cameron's conflict with Justin deprived the jury of helpful information that could've answered key questions about what happened. The evidence would've provided the jury with context, helping them understand why Cameron and Helmueller were looking for Justin, why Rose may have confronted Cameron, and why Cameron would've

shot Rose. The evidence of this conflict, therefore, would've bolstered the argument that Helmueller didn't shoot Rose, nor did he plan or assist Cameron in doing so.

Finally, counsel's failure to object to (or, in fact, request) the seating arrangements tainted the whole trial. It painted Helmueller in a damaging light and thus skewed the jury's view of the case from the beginning. As previously explained, the fact that Helmueller was separated from his attorney and later removed never to return, left the jury with the impression that Helmueller was dangerous and guilty.

The aggregative effect of these errors raises doubt as to the soundness of the verdict. Had the jury received necessary context to the events of the shooting, without Cameron's version implicating Helmueller, and without Helmueller appearing too dangerous to sit next to his counsel, there is a reasonable probability he wouldn't have been convicted.

Helmueller was denied the effective assistance of counsel and is entitled to a new trial.

VI. Helmueller's bail jumping convictions are multiplicitous.

Counts 4-6 of the information, each charging bail jumping for committing a crime, are multiplicitious in violation of Helmueller's rights under the double jeopardy and due process clauses.

Consequently, Helmueller's convictions for Counts 5 and 6 must be vacated and the charges dismissed.

"The double jeopardy clauses of the Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution, which are nearly identical, protect a person from being 'placed twice in jeopardy of punishment for the same offense.'" *State v. Trawitzki*, 2001 WI 77, ¶20, 244 Wis.2d 523, 628 N.W.2d 801. This includes "protection against multiple punishments for the same offense." *Id*. This protection is the basis of multiplicity claims, as multiplicitous charges involve charging a single criminal offense in multiple counts, subjecting a defendant to multiple punishments for that offense contrary to double jeopardy protection. *State v. Anderson*, 219 Wis.2d 739, 746, 580 N.W.2d 329 (1998). "Whether an individual's constitutional right to be free from double jeopardy has been violated is a question of law that this court reviews de novo." *Id*., ¶9.

The test for determining whether charges are multiplicitous contains two prongs: 1) whether the charged offenses are identical in law and fact; and 2) if the offenses aren't identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count. *Id.*, ¶11. If the charges are identical in both law and fact under the first prong, a presumption arises that the Legislature didn't intend or authorize cumulative punishments and the charges are therefore multiplicitous. *Id*; *State v. Davison*, 2003 WI 89, ¶43, 263 Wis.2d 145, 666 N.W.2d 1.

Counts 4-6 of the information are identical in law as they all allege a violation of the same statute, § 946.49. *See Anderson*, 219 Wis.2d at 747. As they are also identical in fact, they are presumed multiplicitous.

"Under Wisconsin law, offenses which are the same in law are different in fact if those offenses are either separated in time or are significantly different in nature." *State v. Stevens*, 124 Wis.2d 303, 322, 367 N.W.2d 788 (1985). Offenses are of a significantly different nature if each requires "a new volitional departure in the defendant's course of conduct," or "proof of an additional fact that the other charges do not." *Anderson*, 219 Wis.2d at 750; *Trawitzki*, 2001 WI 77 at ¶28. Here, the offenses charged in Counts 4-6 aren't separated in time or significantly different in nature.

The conduct underlying Counts 4-6, as alleged in the complaint and argued at trial, is identical and occurred at the exact same time and place. Specifically, the state argued that on August 20, 2020, having been released on bond with a condition that he not commit crimes, Helmueller committed a crime by either possessing a weapon as a felon or carrying a concealed weapon. (336:69-70,81-83). To obtain a conviction, the state needed to prove the exact same thing for each count: that Helmueller had been released on the bond that he signed June 22, 2020, and that he violated a single condition of that bond–that he not commit a new crime. WIS JI-CRIMINAL 1795. The state presented the same evidence to prove all

three charges—the clerk's testimony, and a certified bail/bond, establishing that Helmueller signed a bond on June 22, 2020, that said bond covered three felony cases, and that it contained a condition that Helmueller not commit any new crimes. As charged in this case, Counts 5 and 6 didn't require any proof that Count 4 did not. Conviction of all three counts subjected Helmueller to multiple punishments for the same offense.

The fact that Helmueller's bond covered three felony cases doesn't affect this determination. Although Helmueller had three open cases, he was only released on one bond. Bail jumping "is committed by one who has been released from custody on bond and intentionally fails to comply with the terms of that bond." WIS JI-CRIMINAL 1795. To establish whether the offense is a misdemeanor or felony, the state must prove whether the underlying case was a misdemeanor or felony, but that isn't an element of the offense itself. *Id*., fn.3. The offense is the violation of a condition of bond which the defendant agreed to follow in exchange for his release from custody. *Id*. As the circuit court characterized it, bail jumping is essentially a contempt of court—it's a failure to abide by a court order. (330:49-50). Here the court order Helmueller violated was one condition contained in the single bond he signed.

This case can be distinguished from *State v. Eaglefeathers*, 2009 WI App 2, 316 Wis.2d 152, 762 N.W.2d 690. Eaglefeathers signed a single bond that covered two separate cases. Both cases were set for a

preliminary hearing on the same date and at the same time. When Eaglefeathers failed to appear for the hearings, he was charged with two counts of bail jumping. This court found that the charges weren't multiplicitous because they each required proof of a fact that the other didn't—the state had "to prove that the court notified Eaglefeathers of the preliminary hearing in each case, and that Eaglefeathers failed to appear in each case. Proof of notification and failure to appear in one case would not prove notification and failure to appear in the other." *Eaglefeathers*, 2009 WI App 2, ¶11.

That isn't the situation in this case. There was no requirement that the state prove any fact for Counts 5 and 6 that it wouldn't have to prove for Count 4. All counts relied upon Helmueller's signature of a single bond and his intentional violation of the same condition of that bond by committing the same new crime. The offenses charged in Counts 4-6, therefore, are multiplicitous and Helmueller's convictions for Counts 5 and 6 must be vacated.

VII. Helmueller is entitled to resentencing.

The circuit court erroneously exercised its discretion when it denied Helmueller's request for new counsel at sentencing and when it later denied his postconviction motion for resentencing on this issue.

"[I]f at any time during the proceeding, a defendant makes a substantial complaint that could reasonably be interpreted as a request for new counsel, the trial judge should inquire whether there

are proper reasons for substitution." *State v. Kazee*, 146 Wis.2d 366, 371, 432 N.W.2d 93 (1988). A circuit court's exercise of discretion in deciding whether to grant a request for substitution of counsel "must be made on an informed basis," after considering relevant factors. *Id.* at 372. The court "must make a sufficient inquiry to ensure that a defendant is not cemented to a lawyer with whom full and fair communication is impossible." *State v. Jones*, 2007 WI App 248, ¶13, 306 Wis.2d 340, 742 N.W.2d 341.

This court reviews whether the circuit court erroneously exercised its discretion in denying a motion for substitution of counsel by considering a number of factors, including: "(1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *State v. Lomax*, 146 Wis.2d 356, 359, 432 N.W.2d 89 (1988). "A discretionary decision which does not demonstrate consideration of the facts on which the court's reasoning should be based is an abuse of discretion." *Kazee*, 146 Wis.2d at 372.

Helmueller's postconviction motion asserted that the circuit court erroneously exercised its discretion when it denied his request for new counsel at sentencing and requested that a retrospective hearing be held. *See Id.* at 374. Helmueller then elicited testimony on this issue during the

postconviction hearing and argued that said testimony demonstrated that he was entitled to new counsel at the time of his request.

The circuit court denied the motion, simply concluding that it had found Helmueller in contempt and "was not obligated to inquire further into whether new counsel should be appointed." (370:12-13)(App.34-35). The court cited *State v. McDowell*, 2004 WI 70, 272 Wis.2d 488, 681 N.W.2d 500, in support of its decision. That case, however, reiterated that "[a] defendant's right to representation must be protected and, even absent an explicit request for new counsel, courts should inquire into what they may reasonably infer is a problem potentially undermining that right," before examining the specific facts before it. *McDowell*, 2004 WI ¶¶71-75. Here, the court failed to explain why Helmueller's statements couldn't be reasonably interpreted as a request for new counsel. Nor did it consider whether there was a substantial breakdown in communication warranting the appointment of new counsel. By failing to do so, it erroneously exercised its discretion.

At trial, Helmueller told the court that trial counsel was "fired" and he wanted a new attorney. (327:208-209)(App.82-83). The court denied that request, Helmueller was eventually removed from the courtroom, and didn't return. At sentencing, Helmueller objected, "based on the fact [counsel] was fired on ... on the first day of trial." (330:21)(App.136). After the court reminded him to "refrain from making any comments or interrupting," Helmueller again

stated, "[counsel] was fired. Why is he --" (330:21-22)(App.136-137). The court then cut him off, explaining that it was "overruling" the objection and that sentencing would proceed. (330:22)(App.137). It wasn't until after his complaint was ignored that Helmueller had an outburst leading to his removal from the courtroom.

Helmueller's comments—objecting to the proceeding because trial counsel had been fired—could reasonably be interpreted as a request for new counsel. In *State v. Kazee*, 146 Wis.2d 366, 432 N.W.2d 93 (1988), the Wisconsin Supreme Court found that the defendant's statement, "I don't want him," made while being admonished by the court after interrupting his attorney's opening statement, "was tantamount to a request for new counsel." The court held that, "if at any time during the proceeding a defendant makes a substantial complaint that could reasonably be interpreted as a request for new counsel, the trial judge should inquire whether there are proper reasons for substitution." *Kazee*, 146 Wis.2d at 371. It noted "that Kazee's words 'I don't want him,' although not a specific request for substitute counsel, were sufficient in the context in which they were spoken to alert the trial judge that Kazee had a potentially substantial complaint about his counsel, and that such statement was tantamount to a request for new counsel." *Id*. at 371.

Here, Helmueller's objection "based on the fact [counsel] was fired," could reasonably be interpreted as a request for new counsel. In context, it was

sufficient to alert the court that Helmueller had a potentially substantial complaint about his counsel. Thus, the court's failure to inquire further was an erroneous exercise of discretion.

The remaining factors also support a finding that the circuit court erroneously exercised its discretion. Helmueller's request for new counsel was made at sentencing, it wasn't made to delay trial, and any delay caused by the appointment of counsel wouldn't have had a significant effect. Further, his request was based on a conflict that led to a "total lack of communication" frustrating a fair presentation of the case. *See Lomax*, 146 Wis.2d 359.

By the time of sentencing, there was a total breakdown of communication between Helmueller and trial counsel. Though he had tried, counsel hadn't spoken to Helmueller between the first day of trial and sentencing. (364:26-28,55-56)(App.164-166,193-194). Counsel recognized the breakdown in communication with Helmueller prior to sentencing and sent him a letter stating,

> As you know, Judge Needham has required me to continue in this case even though you have told him you do not want me to represent you. Because that means that I will have a reduced ability, or inability, to obtain information from you and argue on your behalf at sentencing, I suspect you are going to want to make your own presentation to the Judge.

(361; 364:28)(App.166). Postconviction, counsel admitted that he didn't "think there was good

communication after the incident that happened in court," and that he didn't feel that he was able to communicate with Helmueller enough to adequately prepare a sentencing argument. (364:28)(App.166). For his part, Helmueller testified that he didn't want counsel to continue representing him because counsel had conceded his guilt and portrayed him as a drug user. (364:56)(App.194).

By the time of sentencing, the conflict between trial counsel and Helmueller was so great as to result in a total lack of communication between the two which, by counsel's own admission, prevented a fair presentation at sentencing. Helmeuller was entitled to substitution of counsel and, consequently, is now entitled to resentencing.

CONCLUSION

For the reasons stated above, Helmueller respectfully requests that this court enter an order vacating his convictions and remanding the case to the circuit court with directions that it be dismissed with prejudice. If that request is denied, he respectfully requests the convictions be vacated, a judgment of acquittal be entered on Count 1, and the matter be remanded for a new trial. Finally, if both those requests are denied, Helmueller asks that this court vacate convictions in Counts 5 and 6, vacate his sentences on all counts, and remand the case to the circuit court for resentencing.

Dated this 21st day of June, 2024.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 12,701 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 including 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 21st day of June, 2024.

Signed:
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