COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3622-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NATHANIEL CRAMPTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN F. FOLEY and MAXINE A. WHITE, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

FINE, J. Nathaniel Crampton appeals from a judgment, entered on jury verdicts, convicting him of first-degree reckless homicide while armed with a dangerous weapon, as party to a crime, *see* §§ 940.02(1), 939.05, & 939.63, STATS., and attempted armed robbery, as a party to a crime, *see* §§ 943.32(1)(a) &

(2), 939.32(1), & 939.05, STATS., both as an habitual offender, *see* § 939.62, STATS., and from the trial court's order denying his motion for postconviction relief. He contends that the trial court should not have answered without his and his lawyer's presence a question posed by the deliberating jury. We agree that the trial court erred, but conclude that the error was harmless. Crampton also argues that he is entitled to a new trial because of what he says is newly discovered evidence. Finally, Crampton contends that he is entitled to a new trial in the "interest of justice." We affirm the judgment of conviction and the trial court's order denying Crampton's motion for postconviction relief.

I.

The State proved to a jury's satisfaction that Crampton, along with two others—Joe Robinson and Marc Henry, attacked and attempted to rob Fernando Peralta, who was using a pay telephone to talk to his girlfriend. Peralta died as a result of the attack. Crampton and Robinson were tried together. Henry pled guilty and testified for the State at the trial. He told the jury that he, Crampton, and Robinson were walking down a street in Milwaukee when they saw Peralta using the telephone. Crampton asked whether they wanted to "whup" Peralta, whom they did not know. According to Henry, he responded "no," and Robinson said that he did not care. Then, Henry testified, Crampton picked up a two-by-four piece of wood, walked over to Peralta, and hit Peralta in the head. Henry testified that Crampton told him to go through Peralta's pockets, which he did, and, although he thought that he felt money, he took nothing, telling Crampton that Peralta did not have any money. A citizen witness, Ulysses Turner, saw the attack, and identified Crampton as the one who hit Peralta with the board. He also said that Crampton was the one who went through Peralta's pockets.

Rodney Nabors, who was an acquaintance of Crampton, Robinson, and Henry, testified on direct-examination that he had a conversation with them during which Crampton admitted to hitting a man in the head with "'a stick.'" Nabors said on cross-examination, however, that he told his then attorney that Crampton's comment had nothing to do with the Peralta matter. He also admitted telling Crampton's mother that he did not believe that Crampton had been involved in the attack on Peralta. Although he testified on cross-examination that he did not know that Crampton was not talking about hitting Peralta when he made the comment, he also testified on cross-examination that the comment must have been about a different incident:

> A But from the conversation that I heard, it seemed to be that they were fighting more than just one person.
>
> Q Right. That's what I'm getting at. The conversation you heard them talking about suggested that these guys [Crampton, Robinson, and Henry] were fighting with more than one person, right?
>
> A Right.
>
> Q This case is not about fighting with more than one person, is it?
>
> A I guess not.

Nabors's former attorney testified and told the jury that Nabors had told him that Crampton's comment concerned an altercation where "there were six or seven people on the other side of the fight," and in which Crampton "had picked up a stick to defend himself from a person with a brick, an unknown person."

Both Crampton and Robinson testified at the trial, and both denied any involvement in the attack on Peralta.

II.

A. *Trial court's comments to the jury.*

Crampton claims that the trial court erred in answering the jury's question without both him and his lawyer being present. We agree. *See* ***State v. Burton***, 112 Wis.2d 560, 570, 334 N.W.2d 263, 268 (1983). But this does not end the matter, because the trial court's action is subject to an harmless-error inquiry. *See* ***ibid.*** In this inquiry, the State has the burden of showing that there is "no reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985). This is a question of law that we review *de novo*. *See* ***State v. Harris***, 199 Wis.2d 227, 256–263, 544 N.W.2d 545, 557–559 (1996) (undertaking *de novo* analysis). On our *de novo* review, we believe that the State has met its burden.

After having been both instructed on the applicable legal principles and having heard the lawyers' closing arguments on the preceding day, the jury began its deliberations in the morning. Several hours later, the jury sent a note to the trial court asking: "What is the definition of abetted?" The trial court responded even though Crampton, his lawyer, and the prosecutor were not present:

> THE COURT: In your written packet with regard to abetted, you do have the Wisconsin instruction relative to party to a crime. And let me read that to you.
>
> As applicable in this case, a person is concerned in the commission of a crime if he either directly commits the offense or intentionally aids or abets in the commission of it. Now, here is the key. A person intentionally aids and abets in 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 renders to the person who commits the crime or is ready and willing

to render aid, if needed, and the person who commits the crime knows of his willingness to aid him. That's what abetting is.

And Mickey got the dictionary definition. I can't see it; it's so small. I can't even see it with my glasses.

Webster's says to encourage, support, or countenance, especially an offender, or the commission of an offense. So it's the same. That's it. Anything further?

[A JUROR]: No. Can we ask you a question? Now I just lost my train of thought. So a person by not -- by just being there, would he--

THE COURT: Now, wait a minute here.

[A JUROR]: Like a person, would they have to do an action that -- by just being there, are they abetting?

THE COURT: Well, listen to this here. However, a person -- and this is in your packet too -- does not aid or abet if he's only a bystander or a spectator, innocent of any unlawful intent, and does nothing to assist or encourage the commission of a crime.

Does that answer your question?

[A JUROR]: Yes.

THE COURT: A person does not aid and abet if he's only a bystander or spectator, innocent or any unlawful intent, and does nothing to assist or encourage the commission of a crime.

In other words, if a person is on the scene and is watching what happened or is a bystander and has no intent to do anything unlawful and does nothing to assist or nothing to encourage the commission of the offense, then he is not a party to a crime.

[A JUROR]: Okay.

THE COURT: Got it?

[ANOTHER JUROR]: Is cover-up subsequent -- subsequent cover-up included in abet?

THE COURT: Cover?

[ANOTHER JUROR]: Subsequent cover-up, is that included in abet?

THE COURT: I have to -- I really think on that particular question, you'll have to just rely on the definition that I gave you. Okay. All right. Thank you all very much.

[A JUROR]: Thank you.

A trial court has substantial latitude in instructing a jury, and this includes re-instructing when the trial court believes that to be appropriate. ***State v. Simplot***, 180 Wis.2d 383, 404, 509 N.W.2d 338, 346 (Ct. App. 1993). Crampton complains that the trial court unduly emphasized a portion of the instructions over the others, and that the dictionary definition was "far less precise, far more inclusive, and could potentially encompass a far greater range of prohibited conduct." We disagree.

First, taken as a whole, the re-instructions—including the dictionary definition—accurately stated the law. *See* ***State v. Zelenka***, 130 Wis.2d 34, 49, 387 N.W.2d 55, 61 (1986) (jury instructions must viewed as a whole). The law recognizes that a person aids those committing a crime when that person "reassures and keeps the other participants cohesive in their illegal endeavor, or apprises them of developments." *See* ***State v. Whitaker***, 167 Wis.2d 247, 262, 481 N.W.2d 649, 655 (Ct. App. 1992) (for purposes of co-conspirator exclusion to the rule against hearsay). Thus, "aiding and abetting" for party-to-a-crime liability encompasses "either verbal or overt action" that is intended to help "another person in the execution of a crime," and which has that result. ***Hawpetoss v. State***, 52 Wis.2d 71, 78, 187 N.W.2d 823, 826 (1971). Thus, there was no error in the substantive content of the re-instructions. *See* ***State v. Waalen***, 125 Wis.2d 272, 274, 371 N.W.2d 401, 402 (Ct. App. 1985), *aff'd*, 130 Wis.2d 18, 386 N.W.2d 47 (1986). Nevertheless, the dissent argues that the trial court's importation of the word "countenance" requires reversal because the word could, under some circumstances, be construed to mean, as it is defined in the dictionary quoted by the dissent (but *not* in the definition given to the jury by the trial court), to "extend approval or toleration." Dissent at 3 n.2. The dissent ignores, however, that the trial court's re-instruction also told the jury *twice* that a person "does not aid or abet if

he's only a bystander or spectator" who (as the trial court expressed it the first time) "is innocent of any unlawful intent, and does nothing to assist or encourage the commission of a crime," or who (as the trial court expressed it the second time) "does nothing to assist or encourage the commission of a crime." The trial court then amplified on its second statement:

> In other words, if a person is on the scene and is watching what happened or is a bystander and has no intent to do anything unlawful and does nothing to assist or nothing to encourage the commission of the offense, then he is not a party to a crime.

In light of this, we do not understand, and we emphatically reject, the dissent's attempt to inject into the trial court's brief and fleeting reference to "countenance" the concept of "approval or toleration"—explained by the dissent as, in its words: "extending approval or toleration without aiding and abetting." Dissent at 4 n.2. The trial court told the jury the exact opposite. Moreover, there was no evidence submitted to the jury by either the State or by Crampton that he was merely standing around "tolerating" what someone else did to Peralta. The dissent's reliance on the definition of "countenance" that includes the concept of "approval or toleration" is a red herring.

Second, the party-to-a-crime instruction was directed at Robinson, not Crampton. All of the evidence linking Crampton to the attack on Peralta indicated that Crampton was the one who hit Peralta with the board, and that either Henry searched the bleeding Peralta at Crampton's direction, as Henry testified, or that Crampton himself searched Peralta, as Turner testified; Crampton's liability was as a direct actor (either personally or through the use of an agent), not

someone who merely "aided and abetted" the direct actor.[1] This latter point is significant because an erroneous instruction that cannot have affected the jury's verdict against a complaining defendant does not deprive that defendant of any of

[1] The State "concedes" (its term) that: "The aiding and abetting instruction would have been relevant to the jury in assessing Crampton's responsibility for the attempted armed robbery." We disagree. A person who acts directly through an agent is responsible as a principal, not as an aider and abetter, which merely requires assistance to the direct actor. *See* ***State v. Wilson***, 180 Wis.2d 414, 422–423, 509 N.W.2d 128, 130–131 (Ct. App. 1993) ("direct actor could constructively deliver a substance by means other than a physical hand-to-hand transfer"; "direct actor can use another person" to effectuate transfer); *but cf.* ***State v. Hecht***, 116 Wis.2d 605, 618, 342 N.W.2d 721, 728 (1984) (*dictum*) (distinguished by ***Wilson***, 180 Wis.2d at 421–422, 509 N.W.2d at 130). The dissent disagrees with the proposition noted in ***Wilson*** that a person who acts through an agent can be responsible as a principal, not merely as an aider and abettor. Dissent at 3 n.1. In support of its disagreement, the dissent relies on what it characterizes, without citation to authority, "common understanding and practice of criminal law." ***Ibid.*** We respectfully disagree.

Wilson's recognition that a person who acts through an agent can be responsible as a principal is neither an island in the law nor, as the dissent posits, restricted to "the drug delivery" situation in ***Wilson***. More than one-hundred years ago, the Wisconsin Supreme Court recognized that it was "well established that one who commits a crime through [even] an innocent agent is a principal, [even] though he may be personally absent when the act itself is done." ***State v. Hunkins***, 90 Wis. 264, 268, 62 N.W. 1047, 1048 (1895) (bracketed words inserted to reflect that, *a fortiori*, a person who commits a crime through a *guilty* agent—under one view of the facts, Henry searching Peralta at Crampton's direction—and who *is* present, is also guilty as a principal). Moreover, § 939.05, STATS., the party-to-a-crime statute, was enacted, in part, to codify this axiom. *See* ***Holland v. State***, 91 Wis.2d 134, 140–141, 143, 280 N.W.2d 288, 291–292, 293 (1979). Indeed, § 939.05(2)(c), STATS., specifically provides that a person who "hires, counsels or otherwise procures another to commit" a crime is "concerned in the commission of the crime" and, therefore, "is a principal," by virtue of § 939.05(1), STATS. ("Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act."). Thus, the jury need not be unanimous as to *how* the defendant attains his or her status as "a principal"—direct actor, procurer, aider, or conspirator. ***Holland***, 91 Wis.2d at 143, 280 N.W.2d at 292–293. ***Holland*** relied, in part, on a decision issued by the Supreme Court of Washington, which interpreted a party-to-a-crime statute that ***Holland*** noted was "similar to sec. 939.05, Stats." ***Holland***, 91 Wis.2d at 139–140, 280 N.W.2d at 291. The Washington statute provided: "Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or ... hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such." *See* ***Holland***, 91 Wis.2d at 139 n.5, 280 N.W.2d at 291 n.5.

his or her protected rights. *See* ***Zelenka***, 130 Wis.2d at 49–52, 387 N.W.2d at 61–63.

There is no reasonable possibility that the trial court's error in communicating to the jury without Crampton or his lawyer being present contributed to Crampton's conviction.

B. *Alleged Newly Discovered Evidence.*

A convicted defendant is entitled to a new trial if he or she can demonstrate, by the "clear and convincing evidence" standard, that newly discovered evidence makes a different result at any new trial reasonably probable. ***State v. Coogan***, 154 Wis.2d 387, 394–395, 453 N.W.2d 186, 188 (Ct. App. 1990). Additionally, the defendant must show that the evidence proffered as "newly discovered" was discovered after the trial, that the defendant was not negligent in failing to ferret out the evidence, that the evidence is relevant to a material issue, and that it was not cumulative to evidence presented at the trial for the conviction that the defendant is seeking to overturn. ***Ibid.*** The trial court is given substantial deference as to whether newly discovered evidence warrants a new trial. ***State v. McCallum***, 208 Wis.2d 463, 479–480, 561 N.W.2d 707, 712–713 (1997). Here, Crampton's alleged newly discovered evidence falls into two categories: First, post-trial statements made by Marc Henry and Rodney Nabors; second, post-trial comments made by a person incarcerated with Crampton who told Crampton in prison that he knew that Crampton was innocent of the Peralta attack. We discuss these matters in turn.

1. *Recantations.*

a. *Marc Henry.*

After Crampton's conviction, his mother sought to cast doubt on the validity of that conviction by secretly taping three-way conversations between herself, Crampton, and Henry and Nabors.[2] She also hired a private investigator. The private investigator met with Henry several times and, ultimately, got Henry to sign a statement recanting his trial testimony. In an evidentiary hearing held by the trial court, however, Henry recanted his recantation, saying that his trial testimony was truthful. Although he said that the investigator had not threatened him to get him to sign the statement, Henry testified that the investigator was very persistent and that he signed the statement and said things in the recorded telephone conversation in order to, as phrased by the prosecutor in her question, "get Mr. Crampton off your back so that he wouldn't continue to bother you about the testimony that you had given." The trial court credited Henry's testimony that his short-lived recantation was, as phrased by the trial court in its written decision, "forced upon him by an overzealous investigator who would not stop pursuing him." The trial court's acceptance of Henry's testimony at the postconviction hearing is not "clearly erroneous." *See* RULE 805.17(2), STATS., made applicable to criminal proceedings by § 972.11(1), STATS. The trial court also believed Henry's postconviction testimony that the things he said to Crampton in the secretly recorded telephone conversations were also not true.

[2] She also taped a three-way conversation with the person with whom Crampton was incarcerated. The dissent also has disquietude because, in its words, "for reasons unknown, *the record on appeal contains neither the tapes nor the transcripts of the tapes.*" Dissent at 7 (emphasis by the dissent). It is, however, Crampton's burden to ensure that the record is sufficient to address the issues raised on appeal. *See* ***State Bank of Hartland v. Arndt***, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986). Indeed, when the appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. *See* ***Duhame v. Duhame***, 154 Wis.2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989). Inexplicably, the dissent assumes the opposite.

A recantation that is not credible cannot support a conclusion that a jury in any new trial would, based on the recantation, have a reasonable doubt as to the defendant's guilt. ***McCallum***, 208 Wis.2d at 475, 561 N.W.2d at 711. It is within the trial court's purview to determine whether the recantation is credible or incredible. ***Id.***, 208 Wis.2d at 479–480, 561 N.W.2d at 712–713. The trial court's decision to find Henry's trial testimony and his post-recantation testimony at the postconviction evidentiary hearing to be credible, and Henry's recanted recantation and recorded telephone conversation not credible is thus binding on us. *See* ***id.***, 208 Wis.2d at 480, 561 N.W.2d at 713 (trial court in better position than appellate court to determine whether recantation would raise a reasonable doubt as to a defendant's guilt); *see also* RULE 805.17(2), STATS.

b. *Rodney Nabors.*

Nabors testified at the postconviction hearing that his direct testimony at the trial was not truthful. He claimed that he was pressured by the State to implicate Crampton in the Peralta attack because he was afraid that the State would prosecute him for a theft. This was denied by the prosecutor who had discussed Nabors's testimony with him. More importantly in terms of the criteria that must be met by a defendant who seeks a new trial because of alleged newly discovered evidence, Nabors's postconviction testimony that he couldn't tie Crampton's statement to the Peralta attack essentially mirrored both his trial testimony on cross-examination, and the corroborating testimony by Nabors's former lawyer. Although Crampton claims that Nabors's postconviction statements and testimony that Nabors believed strongly that Crampton was not referring to the Peralta attack, in contrast to his less emphatic testimony on that point during his cross-examination during the trial, the difference is *de minimis* in light of the "clear and convincing" evidentiary standard. Nabors's testimony at

the postconviction hearing was cumulative to his trial testimony, and a defendant is not entitled to a new trial based on alleged newly discovered evidence that is cumulative to that presented at the trial. *See* ***Coogan***, 154 Wis.2d at 394, 453 N.W.2d at 188.

2. *Statement by Fellow Inmate.*

Crampton and Dennis Avant were inmates in prison together. Avant testified at the postconviction hearing that he told Crampton while they were both in prison that he, Avant, knew that Crampton was not involved in the Peralta attack, and that he, Avant, knew who was. Avant also testified, however, that he was, in effect, just blowing smoke: "I lied to him from the start." Johnny Herde, who was a cellmate of Avant at the time Avant discussed the Peralta matter with Crampton, testified at the postconviction hearing that he heard Avant tell Crampton that Avant knew that Crampton was not involved in the Peralta attack. The trial court credited the in-court testimony of Avant, rather than Avant's out-of-court, in-prison, remarks to Crampton. This is a finding of fact insulated from our contrary conclusion by RULE 805.17(2), STATS., and the supreme court's admonition that the trial court is to be given significant discretion in assessing testimony at a postconviction hearing seeking a new trial because of alleged newly discovered evidence. *See* ***McCallum***, 208 Wis.2d at 479–480, 561 N.W.2d at 712–713. As noted earlier, we must give to the trial court great deference when reviewing its determination whether newly discovered evidence—either a recantation or other evidence alleged to be newly discovered—would lead a reasonable jury to have a reasonable doubt as to the defendant's guilt. ***Id.***, 208 Wis.2d at 480, 561 N.W.2d at 713. Here, following the postconviction evidentiary hearing, the trial court wrote: "There is no credible evidence on this record from

which the court can conclude that a different result would be produced at a new trial." We are bound by this assessment. *See* ***ibid.***

C. *New Trial in the Interest of Justice*.

Under § 752.35, STATS., we may order a new trial if we are persuaded either that the "real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Crampton's final plea to undo the consequences of what the jury found was his brutal attack on an unarmed man talking on a public telephone to his girlfriend is a mere repetition of his other arguments, dressed in new garb. Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; "[z]ero plus zero equals zero." ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976). Moreover, insofar as Crampton's arguments, sprinkled liberally through both of his briefs on this appeal, contest the weight that the jury gave to the evidence, these arguments are similarly unavailing. *See* ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757–758 (1990) ("[A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.").

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.

No. 97-3622-CR(D)

SCHUDSON, J. *(dissenting).* It is undisputed that the trial court erred when, during deliberations, the jury asked for a definition of "abetted," and the trial court: (1) responded without the participation or presence of Crampton or either counsel; (2) re-read the party to a crime instruction adding, "now, here's the key," before the sentence of the instruction that elaborates when "a person intentionally aides and abets in the commission of a crime …"; and (3) additionally read the Webster's Dictionary definition of "abet," which included three words — "encourage, support, or countenance" — not appearing in the jury instruction.

The State argues, and the majority concludes, that these errors were harmless. Most of the State's theories fail completely. In the first place, the primary authorities on which the State relies are distinguishable. They involve cases in which courts, without consulting with or allowing for the presence of defendant and counsel, either referred the jury to the proper instructions that already had been presented, or re-read the instructions. In the second place, the State's claim that the trial court emphasized portions of the instructions that could only have favored Crampton is belied by the trial court's emphasis, "now, here is the key," before a portion that also could have favored the State. In the third place, the State's argument that providing the dictionary definition might not necessarily have been improper is undermined by ***State v. Ott***, 111 Wis.2d 691, 695-96, 331 N.W.2d 629, 631 (Ct. App. 1983) (Where, during deliberations, a juror provided the jury with a dictionary definition of "depraved," and where, in post-conviction proceedings, the trial court did not determine the exact dictionary

definition the juror provided, and where, on appeal, this court determined that "the dictionary definition … in all likelihood centered on words … sufficiently broader than the technical meaning embodied in the instruction," this court rejected the State's argument that the dictionary definition was "equivalent to the legal one," and concluded that the defendant was probably prejudiced by the dictionary definition.).

The State, however, presents an additional and far more persuasive harmless error argument:

> It does not appear from the record that a precise meaning for the term "abet" was critical to the jury's determination of whether Crampton was guilty of first-degree intentional homicide. The state's theory at trial was that Crampton was a direct actor with respect to the homicide of Fernando Peralta. The defense put forward by both co-defendants was that neither of them participated to any degree in the crimes against Peralta. The co-defendants claimed they were elsewhere at the times the crimes were committed.
>
> … If the jury believed the eyewitness testimony of Turner and Henry, the jury necessarily found that Crampton directly committed the crime of first-degree intentional homicide by striking Peralta in the head with a board.

(Footnote omitted.)

As the majority correctly notes, the State's argument finds substantial support in ***State v. Zelenka***, 130 Wis.2d 34, 387 N.W.2d 55 (1986), in which the supreme court concluded that an erroneous instruction asking the jury to consider whether a defendant directly committed a murder was harmless error because all the evidence established that the defendant's responsibility, if any, was as an aider and abettor. In the instant case, however, as the State concedes, "[t]he aiding and abetting instruction would have been relevant to the jury in assessing

Crampton's responsibility for the attempted armed robbery."[3] The State maintains, nonetheless, that "the aiding and abetting instruction was not relevant to an assessment of Crampton's responsibility for the first-degree intentional homicide."

This issue presents a very close call. Given, however, that the State bears the burden to demonstrate that there is "no reasonable possibility that the error contributed to the conviction," ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985), and must do so beyond a reasonable doubt, ***Chapman v. California***, 386 U.S. 18, 24 (1967), I conclude: (1) the trial court erred, as the State concedes; (2) the trial court erred, as the State does not concede, by bringing emphasis to one portion of the instruction; (3) the trial court erred, as the State does not concede, in supplementing the instruction with a dictionary definition; (4) the dictionary definition's terms, "encourage, support, or countenance," are "sufficiently broader than the technical meaning [of aid or abet] embodied in the instruction," *see* ***Ott***, 111 Wis.2d at 695-96, 331 N.W.2d at 631, and, therefore, did prejudice Crampton;[4] (5) the State's harmless error arguments do not address or

[3] The majority rejects even the State's concession and, in the process, posits that "[a] person who acts directly through an agent is responsible as a principal, not as an aider and abetter." Majority slip op. at 7 n.1. In doing so, the majority has conceived an "aider and abetter" concept which, while interesting and arguably applicable in the context of the drug delivery case the majority cites, *see* ***State v. Wilson***, 180 Wis.2d 414, 509 N.W.2d 128 (Ct. App. 1993), stands at some distance from common understanding and practice of criminal law. Thus, I accept the State's reasonable concession.

[4] Perhaps most significantly, the concept of aiding and abetting generally involves two-way conduct and/or communication:

> 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
>
> (a) assists the person who commits the crime, or
>
> (b) is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

(continued)

defeat Crampton's request for a new trial on the attempt armed robbery charge; and (6) the State's final harmless error argument could defeat Crampton's argument for a new trial on the homicide charge, except that the trial evidence, with its considerable uncertainty on identification, does not allow for a conclusion, beyond a reasonable doubt, that the aiding and abetting dictionary definition did not also have a significant impact on the homicide verdict.

I also conclude that Crampton prevails on his argument that newly discovered evidence requires a new trial (or, perhaps more precisely, I conclude that, at the very least, we must review additional materials, inexplicably absent from the record on appeal, to properly evaluate this issue).

The victim was standing at a pay phone located at a service station parking lot at 51st and Hampton, talking with his girlfriend, when someone hit him on the head with a two-by-four, and then attempted to rob him by searching through his pockets. As summarized in Crampton's reply brief:

> There were no confessions obtained in this case; the "2" x "4" which was recovered from the crime scene was never linked to either defendant; Lee Patterson, by far the closest observer to the homicide, did not pick Crampton out of the line-ups he viewed just after the incident; Ulysses Turner, the only "eye-witness" who did identify Crampton, made his observations from a block and a half away within the span of some six (6) seconds, and first identified Crampton as one of the perpetrators, under highly suggestive circumstances [as he was being led into the court-room], six (6) months after the homicide. Turner's

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WIS J I—CRIMINAL 400. By contrast, "encourage," "support," and "countenance" do not necessarily do so. For example, "support" is defined, *inter alia*, as "countenance," and "countenance" is defined as "extend approval or toleration." WEBSTER'S THIRD NEW INT'L DICTIONARY 2297, 518 (1993). Needless to say, depending on the circumstances of the crime and the exact conduct and/or communication involved, one might very well be extending approval or toleration without aiding or abetting.

version of the events surrounding the killing differ[s] dramatically from the one offered by Patterson. The automobiles described by Turner as has [sic] having been involved in the homicide were never tied to either defendant; the clothing allegedly worn by the assailants, as described by Turner, was never linked to either of the defendants.

In short, to convict these defendants the jury clearly had to believe Marc Henry's testimony beyond a reasonable doubt. If afforded an opportunity to hear what Henry said to Crampton after the trial – when he thought no one save Crampton was listening – could that same jury possibly formulate such a belief? Reason and common sense suggest that they absolutely could not.

The post-conviction record is such that the defendant has established all of the following:

1. That, subsequent to his conviction on April 11, 1992, and prior to his sentencing on July 14, 1992, Marc Henry, the central witness against [Crampton] at trial, both authored a written statement renouncing his trial testimony, and participated in tape recorded conversations wherein he acknowledged his trial perjury, and stated he knew the defendant were [sic] not involved in the Peralta homicide;

2. That, subsequent to Crampton's conviction, and prior to his sentencing, Rodney Nabors participated in tape recorded conversations wherein Nabors unequivocally admitted that the key piece of evidence which the State had adduced through him (i.e. the conversation which Crampton allegedly made the remark about "fucking up the guys head with a stick") was in fact completely irrelevant to the Peralta homicide; and, that Rodney Nabors testified untruthfully at trial; and,

3. That Dennis Avant, whose family lived in the immediate vicinity of the homicide at the time it occurred stated, both in person to Johnny Herde and over the telephone to Nathaniel Crampton, that he knew Nathaniel Crampton was not involved in the homicide, that he knew who was involved in the homicide, and that he would not divulge

> their identities because they were friends of his.

Crampton's mother, a State of Michigan Corrections Agent, secretly tape recorded telephone conversations with Marc Henry, in which he disavowed his trial testimony and explained the incentives and inducements that had led him to testify falsely. Additionally, he signed a statement prepared by a defense investigator, summarizing his disavowal.[5] Still, as the State points out, at the postconviction hearing, Henry again altered his account, and dismissed the significance of his phone conversations. But significantly, as Crampton contends, Henry could not explain away his phone comments; his claim that he made them out of fear was unsupported and illogical.[6]

Crampton declares that "[t]he tapes do not lie," and he repeatedly implores this court to give them the most careful consideration. He contends:

> The tapes themselves were admitted into the record and the trial court indicated that it would listen to them before rendering a decision. (TR. 9/14/95, p. 90-97). Because these recorded conversations are at the heart of appellant's post-conviction challenge, and because their true character can only be discerned by actually listening to

[5] As Crampton explains, it is somewhat misleading to view the tape recordings and transcriptions of the telephone conversations as recantations, given that Henry did not realize he was being recorded and did not know the conversations were going to be presented in court for purposes of seeking a new trial. It is more accurate to view his statement to the investigator as the recantation, and the telephone conversations as corroborations of the recantation.

[6] Additionally, Henry's renunciation of his phone comments may be further compromised by the record of his sentencing. Crampton has filed a motion with this court to supplement the record to include the transcript and/or to have this court take judicial notice of Henry's sentencing. The significance of the transcript, according to undisputed representations in Crampton's brief to this court, is that, at Crampton's postconviction hearing, Henry testified that he had no deal with the State motivating his testimony at Crampton's trial. At Henry's sentencing, however, the prosecutor was asked, "Did he receive a deal because of his cooperation?" The prosecutor responded, "Yes, he did…. [A]nd he received a favorable recommendation as a result of his trial testimony." I would grant Crampton's motion to supplement the record.

> them, appellant respectfully requests that this Court consider the tapes themselves (Exhibits #9-14), and not simply rely upon the transcripts which were received into the record.

The State does not dispute the importance of the tapes and/or transcripts. Yet, for reasons unknown, *the record on appeal contains neither the tapes nor the transcripts of the tapes*.

Thus, I have serious misgivings about reaching any conclusion on Crampton's appeal on this issue without first reviewing that portion of the record Crampton deems most important. If forced to decide based on the incomplete record before us, however, I would conclude that Crampton has satisfied the standard of ***State v. McCallum***, 208 Wis.2d 463, 561 N.W.2d 707 (1997), and, therefore, that a new trial is required.

Accordingly, on both issues, I respectfully dissent.