

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2018AP19-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

MICHAEL WILLIAMS,
Defendant-Appellant-Petitioner.

ON APPEAL FROM THE MARCH 16, 2017, JUDGMENT OF
CONVICTION, FILED IN THE MILWAUKEE COUNTY
CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER,
PRESIDING.
MILWAUKEE COUNTY CASE NO. 2016CF991

PETITIONER'S APPENDIX

Respectfully submitted by:

Matthew S. Pinix, 1064368

PINIX & SOUKUP, LLC
1200 East Capitol Drive, Suite 360
Milwaukee, Wisconsin 53211
T: 414.963.6164
F: 414.967.9169
matthew@pinixsoukup.com
www.pinixsoukup.com

Attorneys for the Petitioner

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**COURT OF APPEALS
DECISION
DATED AND FILED**

February 6, 2020

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP19-CR

Cir. Ct. No. 2016CF991

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fitzpatrick, P.J., Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Michael Williams appeals a judgment of conviction for first-degree reckless homicide as a party to a crime, by use of a

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dangerous weapon, and felon in possession of a firearm, following a jury trial. Williams contends that the circuit court erred by allowing a witness to testify that she had seen Williams “once or twice” in the past with Williams’s alleged co-actor in the homicide. Williams also contends that the prosecutor made improper remarks during closing arguments that shifted the burden of proof to Williams to prove his innocence. Finally, Williams contends that the standard jury instruction directing the jury to “search for the truth” lowered the State’s burden of proof below the reasonable doubt standard. For the reasons set forth in this opinion, we reject these contentions. We affirm.

¶2 In September 2016, Williams was charged with first-degree intentional homicide as a party to a crime, by use of a dangerous weapon, and felon in possession of a firearm. The charges stemmed from the July 2015 shooting death of Frederick Martin at a gas station on Center Street in Milwaukee. The State’s theory was that Williams shot Martin and fled the gas station with Tony Madison, and that Williams and Madison were shortly thereafter the victims of a second shooting that was in retaliation for the Martin shooting.

¶3 Prior to trial, Williams objected to the State eliciting testimony from witness Tiffany McAfee that McAfee had seen Williams with Madison on one or two occasions prior to the shooting. Williams argued that the relevance of the testimony was substantially outweighed by the danger of unfair prejudice because McAfee did not see Williams at all on the day of the shooting. He also argued that the testimony “would be totally irrelevant.” The court determined that Williams’s argument went to the weight of the evidence and allowed the testimony.

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¶4 Also prior to trial, Williams requested a modified jury instruction on the State's burden to prove the elements of the charged offenses beyond a reasonable doubt. Williams requested that the court omit language from the standard jury instruction that directs the jury: "While it is your duty to give the defendant the benefit of every reasonable doubt, you are not [to] search for doubt. You are to search for the truth." Instead, Williams argued for the court to instruct the jury only: "It is your duty to give the defendant the benefit of every reasonable doubt." The court denied Williams's request to modify the instruction.

¶5 The State introduced the following evidence at trial to support its theory of Williams's involvement in Martin's shooting. Miguel Henderson testified that he met Martin at a gas station on Center Street shortly before the shooting on July 24, 2015. Henderson was sitting in the front passenger seat of Martin's car while Martin sat in the driver's seat when a man entered the backseat and shot Martin. Gas station surveillance camera footage showed that a man in camouflage pants had entered the backseat of Martin's car right before Martin was shot and that, immediately after the shooting, the man fled the scene in a red truck driven by a man wearing a white, blue, and red sweatshirt.

¶6 A silver car that had arrived at the gas station before the shooting followed the red truck as it fled the gas station after the shooting. About fifteen minutes later, a second shooting was reported about five miles away on 54th Street. Surveillance video camera footage in the immediate area of the second shooting showed a silver car, similar to the one from the gas station, on the scene. A witness testified that he encountered a man in camouflage pants in that area who had been shot. Police located a red truck with smeared blood on the driver's side, and a maroon minivan with bullet holes that were identified as exit strikes, at a residence near the site of the second shooting. Madison was found by emergency

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responders several blocks away, suffering from a gunshot wound and wearing a white, blue, and red sweatshirt that matched the one worn by the driver of the red truck in the gas station video footage, and was transported to the hospital. Williams also arrived at the hospital on the evening of July 24, 2015, about an hour after the 54th Street shooting, suffering from gunshot wounds and wearing camouflage pants.

¶7 McAfee testified that a shooting occurred outside her home on 54th Street on July 24, 2015. She testified that she was acquainted with Madison, and that Madison had been at her house that day and had left about an hour before the shooting occurred. The driveway where the red truck and maroon minivan were located after the shooting was the driveway for McAfee's house, and McAfee identified the maroon minivan as belonging to Madison. Over Williams's objection, the State showed McAfee a photograph of Williams, and McAfee stated that she did not know him but had seen him with Madison "once or twice" in the past.

¶8 In closing arguments, Williams argued that the State had not met its burden of proof to establish that Williams had killed Martin. He argued that "the truth is that we simply don't know what happened" and that "[w]e don't have concrete evidence that tells us what happened to Fred Martin on that day." In rebuttal, the State argued that "[t]he thrust of [defense counsel's] remarks, that's a -- kind of a moldy, old ratty defense that we sometimes see when the defense has no good facts." Williams objected and, at sidebar, requested a mistrial on grounds that the State had shifted the burden of proof to the defense. The court denied the request for a mistrial.

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¶9 After the sidebar, the State continued its rebuttal, arguing that the defendant's argument had "no answer" for the facts tying Madison to both shooting scenes, "no answer" for McAfee's testimony that she had seen Williams with Madison, and "no answer" for the fact that Williams had arrived at the hospital with a gunshot wound and wearing camouflage pants. In the closing jury instructions, the court gave the following instructions that it intended as curative related to Williams's objection to the State's closing arguments: "Consider carefully the arguments of the attorneys, but ... their arguments and opinions are not evidence"; and "[t]he burden of proof is entirely on the State of Wisconsin. And the defense can just -- do nothing. The elements have to be proved by the [S]tate beyond a reasonable doubt." The court gave the standard jury instruction on the State's burden of proof, including the following: "While it is your duty to give the defendant the benefit of every reasonable doubt, you are not [t]o search for doubt. You are to search for the truth." The jury found Williams guilty of the lesser included offense of first-degree reckless homicide as a party to a crime, by use of a dangerous weapon, and felon in possession of a firearm. Williams appeals.

¶10 Williams contends that the circuit court erred by allowing McAfee to testify that she had seen Williams with Madison once or twice in the past but without specifying dates or locations. He contends that the evidence should have been excluded under WIS. STAT. § 904.03 (2017-18)¹ because its probative value was substantially outweighed by the resulting prejudice.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

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¶11 Evidence must be relevant to be admissible at trial. WIS. STAT. § 904.02. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” WIS. STAT. § 904.01. Even if evidence is relevant, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” WIS. STAT. § 904.03.

¶12 “We review a circuit court’s decision to admit or exclude evidence under an erroneous exercise of discretion standard.” *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We “will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.” *Id.*

¶13 Williams contends that the probative value of McAfee’s testimony that she previously had seen Williams with Madison “once or twice” was extremely low. He contends that the evidence had little weight because McAfee did not explain when or where she had seen Williams with Madison. He points out that McAfee did not testify that she had seen Williams on the day of the shootings, gave no opinion as to the closeness of their relationship, and testified that she did not even know Williams’s name prior to the police investigation in this case. Williams contends that, in contrast, the prejudicial nature of the evidence was extremely high, arguing that McAfee’s testimony connecting Williams to Madison was key to the State’s case. Williams argues that the State had good evidence that Madison had been at the scene of both shootings, but very little to connect Williams with the shootings. Williams contends that the State

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therefore needed McAfee's testimony connecting Williams to Madison to convince the jury to link Williams to the shootings, and that the State did so by arguing repeatedly that McAfee's testimony established that Williams and Madison were "associates."

¶14 Williams also contends that the circuit court failed to properly exercise its discretion when it admitted McAfee's testimony because the court did not explain how it weighed the probative value against the danger of unfair prejudice. He contends that the circuit court admitted the evidence on its assessment that the evidence would not carry much weight with the jury, rather than weighing the evidence's probative value against its potential prejudice.

¶15 In response, the State argues that the evidence was probative of the connection between Williams and Madison, and that it was therefore relevant. The State then contends that Williams's prejudice argument fails because Williams argues only that the evidence prejudiced Williams by supporting the State's theory that Williams and Madison were involved in the homicide together. That is, the State contends, Williams fails to make any argument that the evidence was *unfairly* prejudicial as required under WIS. STAT. § 904.03. It argues that Williams's argument that the court failed to properly exercise its discretion fails because the court indicated that the issue had been discussed in chambers. It also argues that the court's on-the-record explanation that Williams's argument went to the weight of the evidence did not indicate an erroneous exercise of discretion.

¶16 In reply, Williams makes an argument that McAfee's testimony was *unfairly* prejudicial. He contends that it had "a tendency to influence the outcome by improper means," *see State v. Sullivan*, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998), by inviting the jury to reach a decision about Williams's connection to

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Madison based on mere speculation. See *Cudd v. Crownhart*, 122 Wis. 2d 656, 662, 364 N.W.2d 158 (Ct. App. 1985). He contends that the circuit court's limited remarks in admitting the evidence were not a sufficient exercise of discretion, and that the court's off-the-record statements in chambers cannot establish that the court properly exercised its discretion.

¶17 We are not persuaded that admission of McAfee's testimony was an erroneous exercise of discretion. While we agree with Williams that McAfee's testimony that she had seen Williams with Madison "once or twice" had low probative value,² we do not agree that the evidence was unfairly prejudicial. We reject Williams's initial argument that the evidence should have been excluded because it was highly prejudicial to Williams. As the State points out, that is not the test. Rather, the test is whether the evidence was *unfairly* prejudicial. As to unfair prejudice, we reject Williams's contention that the evidence tended to influence the outcome by improper means. McAfee's testimony that she had seen Williams with Madison once or twice did not invite the jury to reach a verdict based on speculation. Rather, it was an allegation of fact for the jury to consider along with all of the other trial evidence in deciding whether Williams was involved in Martin's shooting, and the State encouraged the jury to draw a reasonable inference from the evidence when it described Williams and Madison as "associates." We are not persuaded to reach a different conclusion based on the circuit court's lack of a detailed explanation of its exercise of discretion in admitting the evidence. *State v. Pico*, 2018 WI 66, ¶15, 382 Wis. 2d 273, 914

² Williams does not argue on appeal that the evidence was not relevant.

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N.W.2d 95 (stating that the reviewing court may search the record for reasons to sustain a circuit court's discretionary decision).

¶18 Next, Williams contends that the State made improper remarks during closing arguments that shifted the burden of proof to Williams to prove his innocence. He contends that the State's closing arguments, as a whole, denied him a fair trial and violated his right to due process.³

¶19 “[A] motion for a mistrial based on prosecutorial misconduct is reviewed under an erroneous exercise of discretion standard.” *State v. Patterson*, 2010 WI 130, ¶56, 329 Wis. 2d 599, 790 N.W.2d 909. We will not reverse a circuit court's decision to deny a motion for a mistrial based on improper arguments by the State “unless there is evidence of an erroneous exercise of discretion and prejudice to the defendant.” *See id.* (quoted source omitted).

¶20 First, Williams contends that the State made improper personal attacks on opposing counsel. *See United States v. Young*, 470 U.S. 1, 9 & n.7 (1985) (“A personal attack by the prosecutor on defense counsel is improper” (quoted source omitted)). Williams cites the following remark by the State in closing arguments as personally disparaging defense counsel: “The thrust of [defense counsel's] remarks, that's a -- kind of a moldy, old ratty defense that we sometimes see when the defense has no good facts.” Williams contends that this

³ The State argues that Williams forfeited any objection to the arguments the State made after Williams's objection and the court's ruling at sidebar by failing to make any further objection. Williams replies that his objection in the middle of the State's comments covered the State's further objectionable comments after the sidebar. Because we conclude that the State's comments do not establish reversible error in light of the court's curative instructions, we need not reach the issue whether Williams properly preserved his objections to each of the State's comments.

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opined as to the merits of Williams's defense and the character of his defense counsel, thus shifting the burden of proof to Williams to prove his innocence. Second, Williams contends that the State also shifted the burden of proof to Williams by repeatedly stating that Williams had "no answer" for the facts that the State asserted established Williams's guilt. Williams argues that the State's comments left the jury with the impression that Williams had the burden of providing answers to the State's evidence to prove his innocence.

¶21 Williams contends that this case is akin to *State v. Smith*, 500 F.2d 293, 294-95 (6th Cir. 1974), which held that the State impermissibly shifted the burden of proof to the defense when it told the jury to "require" the defense to show a "reasonable explanation" for the State's evidence. Williams argues that here, as in *Smith*, the State's closing arguments confused the jury as to the burden of proof and impermissibly commented on Williams's exercise of his right not to testify. *See id.* at 296-97. He argues that the State's comments denied him his due process right to a fair trial by infecting the trial with unfairness. *See State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992).

¶22 The State does not dispute that the prosecutor made inappropriate remarks in closing arguments,⁴ but argues that Williams was not prejudiced by them because the court gave the following curative instructions following the State's closing arguments: "Consider carefully the arguments of the attorneys, but ... their arguments and opinions are not evidence"; and that "[t]he burden of proof

⁴ The State takes the position that its "moldy, old ratty defense" comments were inappropriate. It does not state its position as to whether the "no answer" arguments were inappropriate. We caution the State that this court does not sanction closing arguments that imply that the defense has any obligation to present evidence.

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is entirely on the State of Wisconsin. And the defense can just -- do nothing. The elements have to be proved by the [S]tate beyond a reasonable doubt." See *State v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (1983) ("Where a [circuit] court gives the jury a curative instruction, the appellate court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the [circuit] court's admonition."). The State contends that, here, there is no evidence that the jury disregarded the court's curative instructions.

¶23 The State argues that *State v. Mayo*, 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115, is instructive. In *Mayo*, the State made disparaging remarks about the role of defense counsel during closing arguments. *Id.*, ¶42. The court concluded, however, that the remarks did not prejudice Mayo when considered in the context of the entire trial because the role of defense counsel is common knowledge, and the jury was instructed that closing arguments are not evidence. *Id.*, ¶¶43-44. The State contends that here, as in *Mayo*, there is no likelihood that the State's remarks so infected the trial with unfairness as to deprive Williams of due process in light of the court's instructions to the jury.

¶24 Williams replies that the court's curative instructions were insufficient in light of the State's repetitive improper arguments. See *Hoppe v. State*, 74 Wis. 2d 107, 120, 246 N.W.2d 122 (1976) (stating that if improper arguments by the State were egregious and repetitive, curative instruction may be insufficient to dispel prejudice). Williams contends that the purported curative instructions were not, in fact, curative because they failed to specify which statements the jury should disregard and merely reworded the standard burden of proof instruction. He argues that *Mayo* is distinguishable because, in *Mayo*, the

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improper comments were not as repetitive as compared to this case and did not shift the burden of proof to the defense.

¶25 We conclude that the State's improper remarks in closing arguments did not prejudice Williams. See *Patterson*, 329 Wis. 2d 599, ¶56. While the State's remarks may have criticized the defense for not presenting evidence, and may have indicated that the defense had an obligation to present evidence to counter the State's evidence of Williams's guilt, the court then issued curative instructions after closing arguments were completed that the attorneys' arguments were not evidence and that "[t]he burden of proof is entirely on the State of Wisconsin. And the defense can just -- do nothing. The elements have to be proved by the [S]tate beyond a reasonable doubt." Thus, the court instructed the jury that, contrary to any indication otherwise from the State's remarks, the defense had no burden to introduce any evidence at trial. We do not agree with Williams that the curative instructions were insufficient because they reworded the burden of proof instruction. The court issued the additional instructions to the jury as to the burden of proof to cure any potential that the State had prejudiced Williams with remarks criticizing the defense for allegedly failing to present evidence. Because there is no evidence that the jury disregarded the curative instructions, we conclude that those instructions erased any possible prejudice from the State's improper remarks.⁵ See *Bembenek*, 111 Wis. 2d at 634.

¶26 Finally, Williams contends that the standard burden of proof jury instruction directing the jury to "search for the truth" violated his right to be

⁵ Williams has not established that *State v. Smith*, 500 F.2d 293 (6th Cir. 1974), is controlling and compels a different result. We note that, here, the State did not tell the jury to "require" the defense to provide an explanation for the State's evidence.

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convicted on evidence beyond a reasonable doubt. See *State v. Harvey*, 2002 WI 93, ¶19, 254 Wis. 2d 442, 647 N.W.2d 189 (1970). Williams recognizes that, in *State v. Avila*, 192 Wis. 2d 870, 535 N.W.2d 440 (1995), our supreme court rejected the same challenge to the standard burden of proof instruction and held that it was not reasonably likely that the instruction reduced the burden of proof below the reasonable doubt standard. Williams contends, however, that *Avila* was wrongly decided, and argues that social science research after *Avila* further demonstrates that *Avila*'s reasoning was incorrect.

¶27 We previously placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review in *State v. Trammell*, No. 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018) to address whether the holding in *Avila* was good law or if *Avila* should be overruled on the ground that it had been rebutted by empirical evidence. The supreme court has now issued a decision in *Trammell*, holding that the standard jury instruction “does not unconstitutionally reduce the State’s burden of proof below the reasonable doubt standard.” *State v. Trammell*, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564. Accordingly, we reject Williams’s contentions that *Avila* was wrongly decided.

¶28 Williams also argues that, even if the standard burden of proof jury instruction is not facially unconstitutional, it was unconstitutional as applied to him because, in connection with the facts of this case, it lowered the State’s burden of proof below the reasonable doubt standard. See *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). He contends that the State’s burden of proof was lowered below the reasonable doubt standard because, in

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addition to the objectionable jury instruction for the jury to “search for the truth”: (1) the State relied heavily on circumstantial evidence, including McAfee’s testimony about Williams’s connection to Madison; (2) the presenter emphasized to the jury that the prosecutor’s opinion was that the “truth” was that Williams had killed Martin and that, if he had not, Williams was the “unluckiest son of a gun in the world”; and (3) the State faulted Williams for failing to answer questions as to his guilt that were raised by the evidence. We are not persuaded.

¶29 As explained above, our supreme court reaffirmed in *Trammell* that the standard jury instruction directing the jury to “search for the truth” does not lower the State’s burden of proof below the reasonable doubt standard. See *Trammell*, 387 Wis. 2d 156, ¶67. Thus, the jury here was properly instructed on the State’s burden of proof. We have also concluded that Williams was not prejudiced by the State’s improper remarks in closing arguments because the court issued a curative instruction directing the jury that the defense had no obligation to present any evidence, and reiterating that the burden of proof was entirely the State’s. We do not agree with Williams that the State’s reliance on circumstantial evidence or its argument that the evidence established Williams’s guilt effectively lowered its burden of proof. Accordingly, we reject Williams’s contention that his due process right to be convicted on evidence that established his guilt beyond a reasonable doubt was violated in this case.

¶30 For the foregoing reasons, the judgment of the circuit court is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 38 MILWAUKEE COUNTY

State of Wisconsin vs. Michael Williams

Judgment of ConvictionSentence to Wisconsin State
Prisons and Extended
Supervision

Date of Birth: 02-14-1984

Case No. 2016CF000991

FILED

03-16-2017

John Barrett

Clerk of Circuit Court

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	[939.05 Party to a Crime] [939.63(1)(b) Use of a Dangerous Weapon] 1st-Degree Reckless Homicide	940.02(1)	Not Guilty	Felony B	07-24-2015	Jury	01-26-2017
2	Felon Possess Firearm	941.29(2)(a)	Not Guilty	Felony G	07-24-2015	Jury	01-26-2017

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	03-16-2017	State Prison w/ Ext. Supervision	55 YR		credit for 375 days time served.
2	03-16-2017	State Prison w/ Ext. Supervision	10 YR		

Total Bifurcated Sentence Time

Ct.	Confinement Period			Comments	Extended Supervision			Total Length of Sentence		
	Years	Months	Days		Years	Months	Days	Years	Months	Days
1	40	0	0		15	0	0	55	0	0
2	5	0	0		5	0	0	10	0	0

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	03-16-2017	Restitution			Restitution hearing scheduled for April 28, 2017.
1	03-16-2017	Costs			-The Court ordered that all court costs, fines, surcharges and/or restitution be paid through collection by the Department of Corrections from the defendant's prison funds at a percentage to be determined and as a condition of extended supervision. Any amount remaining due and owing is subject to civil judgment. -Pay all costs, assessments and victim/witness surcharges. -Provide a DNA sample for the Data Bank and pay all appropriate costs; DNA surcharge.
1	03-16-2017	Firearms/Weapons Restrict			The defendant is advised as a convicted felon he may not carry or possess any firearms/body armor. The court advises the defendant that voting privileges are suspended during the length of this sentence.
2	03-16-2017	Costs			
2	03-16-2017	Firearms/Weapons Restrict			

Sentence Concurrent With/Consecutive Information:

Ct.	Sentence	Type	Concurrent with/Consecutive To	Comments
2	State prison	Consecutive	count 1,	credit for 0 days time served.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 38 MILWAUKEE COUNTY

State of Wisconsin vs. Michael Williams

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Date of Birth: 02-14-1984

Case No. 2016CF000991

FILED 03-16-2017 John Barrett Clerk of Circuit Court

Conditions of Extended Supervision:

Obligations: (Total amounts only)

Table with columns: Fine, Court Costs, Attorney Fees, Restitution, Other, Mandatory Victim/Wit. Surcharge, 5% Rest. Surcharge, DNA Anal. Surcharge. Values: TBD

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Table with columns: Fine, Court Costs, Attorney Fees, Restitution, Other, Mandatory Victim/Wit. Surcharge, 5% Rest. Surcharge, DNA Anal. Surcharge. Values: 326.00, TBD, 26.00, 184.00, 500.00

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:

The Defendant is [] is not [X] eligible for the Challenge Incarceration Program.

The Defendant is [] is not [X] eligible for the Substance Abuse Program.

IT IS ADJUDGED that 375 days sentence credit are due pursuant to §973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

If the defendant is in or is sentenced to state prison and is ordered to pay restitution, IT IS ORDERED that the defendant authorize the department to collect, from the defendant's wages and from other monies held in the defendant's inmate account, an amount or a percentage which the department determines is reasonable for restitution to victims.

If the defendant is placed on probation or released to extended supervision, IT IS ORDERED that the defendant pay supervision fees as determined by the Department of Corrections.

BY THE COURT:

Distribution:

Jeffrey A. Wagner-38, Judge
Karl Peter Hayes, District Attorney
Michael G. Levine, Defense Attorney

Electronically signed by John Barrett
Circuit Court Judge/Clerk/Deputy Clerk

March 16, 2017
Date

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

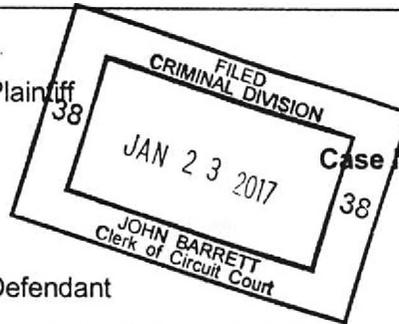
STATE OF WISCONSIN,

Plaintiff
38

-vs-

MICHAEL WILLIAMS,

Defendant



DEFENDANT'S MOTION & BRIEF IN SUPPORT OF THE REQUESTED JURY INSTRUCTION ON THE BURDEN OF PROOF

TO: Mr. Karl Hayes
Office of the District Attorney
Milwaukee Co. District Attorney's Office
821 W. State Street, Rm 405
Milwaukee, WI 53233

Defendant, appearing specially by his attorneys, The Law Offices of Robert A. Levine by attorney Michael G. Levine, moves the Court as follows: for modification to the language in **Wis. J.I. CRIMINAL 140** in the case captioned above.

I. THE BURDEN OF PROOF

In 1970, the United States Supreme Court held that "the Due Process Clause protects the accused against conviction *except upon proof beyond a reasonable doubt . . .*" *In Re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). Strangely, however, after defining reasonable doubt, Wisconsin's pattern instruction concludes by telling the jury that "you are *not* to search for doubt. You are to search for the *truth*." **Wis. J.I. CRIM. 140** (emphasis added).

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JAN 23 2017

As explained below, instructing the jury to disregard its constitutionally mandated search for doubt in favor of a search for the truth lowers the government's burden of proof *below* the constitutionally-guaranteed reasonable doubt standard. To correct this serious problem, the defendant proposes a jury instruction that is identical to Wisconsin's pattern instruction, except that it deletes the offending language and simply concludes: "It is your duty to give the defendant the benefit of every reasonable doubt." (Exhibit A.)

Deleting the last portion of the pattern instruction is well within the Court's authority. The pattern instructions are not law, and this Court is not bound by them. Rather, "a trial judge may exercise wide discretion in issuing jury instructions . . . This discretion extends to both choice of language and emphasis." ***State v. Vick***, 104 Wis. 2d 678, 690 (1981).

The prosecutor in our case may argue that the pattern instruction should remain unchanged because a trial *is* a search for the truth, and, even if it is not, the defense is merely *speculating* that the pattern instruction lowers the state's burden. In the following sections, I will address the trials-are-about-truth argument, and then demonstrate—both logically and empirically—that the pattern instruction does, in fact, lower the state's burden.

II. COMPETING TRIAL OBJECTIVES

Today, the idea of a trial as a search for the truth is, at best, highly questionable. In fact, many modern cases and statutes ensure that the truth is hidden *from*, rather than revealed *to*, the jury.

For example, under *State v. Denny*, 120 Wis. 2d 614 (Ct. App. 1984), a defendant is precluded from presenting evidence—including eyewitness testimony and physical evidence—that a third party committed the charged crime, unless the defendant can also prove the third party's *motive*. However, at the same time, the jury is specifically instructed that "the State is *not* required to prove *motive* on the part of a defendant in order to convict." **Wis. J.I. CRIM. 175** (emphasis added). Such an arbitrary double standard that excludes evidence of innocence, while allowing evidence of guilt, greatly obstructs the truth-seeking function, yet is justified due to its efficiency. As one court stated in denying a defendant the right to present a third-party defense, "One can only imagine how much longer this six-week trial would have lasted had the court granted [the defendant's] request to introduce third-party liability evidence[.]" *State v. Avery*, 337 Wis. 2d 351, 385 (Ct. App. Wis. 2011).

As another example, even though a witness's prior inconsistent statements are admissible for impeachment purposes and, in Wisconsin, even as substantive evidence, **Wis. Stats. sec. 905.045** prevents the defendant's use, at trial, of any such statements made by an accuser to a domestic advocate. Hiding such relevant evidence from the jury certainly serves a purpose, but it obstructs the search for the truth.

Another example is evidenced in *State v. Landrum*, 191 Wis. 2d 107 (1995). In *Landrum*, the defendant tried to keep out other-acts evidence because he had been found not guilty at trial. If a trial were a search for the truth, then he would be "not guilty" and the other acts wouldn't be admissible,

right? Wrong. The trial court held: "an acquittal only establishes that there was a reasonable doubt in the jury's mind as to whether the defendant committed the prior crime, not that the defendant is innocent."

Even the competing goal of protecting non-party witnesses from possible, temporary embarrassment is placed above the truth-seeking function. For example, in a child sexual assault case, even when the prosecutor "repeatedly emphasized [the child's] detailed sexual knowledge as proof of [the defendant's] guilt," the defendant is *still* not permitted to introduce evidence of alternative sources for that "detailed sexual knowledge"—evidence that would indeed be highly relevant if the trial's objective was to search for the truth. *State v. Carter*, 324 Wis. 2d 640, 685, n. 6 (2010) (Bradley, J., concurring); see also Wis. Stats. sec. 906.11(1) (court may control the presentation of evidence to "protect witnesses from . . . embarrassment").

In short, numerous considerations—including shortening the length of jury trials, promoting communications between complaining witnesses and their non-lawyer advocates, and protecting the government's witnesses from possible temporary embarrassment—all trump the truth-seeking function. Therefore, given the incomplete evidentiary picture that trials are designed to paint, the Court should *not* instruct jurors to disregard their constitutionally mandated search for doubt in favor of a fictional, even if idealistic, search for the truth.

III. "TRUTH IS NOT THE JURY'S JOB"

Even to the extent that truth is *one* of the many competing objectives of a jury trial, truth refers to a goal of the larger, overall system and is *not* a concern for

the jury. More to the point, "truth is not the jury's job." **State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012)**. Instead, "The question for any jury is whether the burden of proof has been carried by the party who bears it. In a criminal case . . . [t]he jury cannot discern whether that has occurred without *examining the evidence for reasonable doubt*." *Id.* (emphasis added).

So even the big-picture truth-seeking objective—to the extent it is has not been displaced by numerous competing interests—would be best served by instructing jurors on *their specific role* within the system: to examine the state's evidence for reasonable doubt. Telling the jury "not to search for doubt," but instead "to search for the truth," is the exact *opposite* of what the jury should be doing, and is a constitutionally defective instruction.¹

In an effort to preserve the jury instruction "not to search for doubt" but instead to "search for the truth," the state has, in the past, pointed out that "The word 'verdict' comes from the Latin for "to speak the truth.'" But this interesting historical fact offers no support for Wisconsin's modern-day jury instruction. That is, the word verdict ("to speak the truth") originates in the 1400s, and has since been displaced by the (relatively) modern burden of proof beyond a reasonable doubt.

¹ Many courts have warned that attempting *any* definition of reasonable doubt is problematic, and that the phrase reasonable doubt "is self-defining, that there is no equivalent phrase more easily understood . . . that the better practice is not to attempt the definition, and that any effort at further elucidation tends to misleading refinements." **United States v. Lawson, 507 F.2d 433, 443 (7th Cir. 1974)**. But to specifically instruct jurors *not* to do their duty, i.e., *not* to evaluate the evidence for reasonable doubt but instead "to search for the truth" of what they think really happened, invites them to speculate and is a blatantly defective instruction.

This heightened burden of proof was impliedly recognized in the late 1800s and then explicitly adopted in 1970. *See In Re Winship*, 397 U.S. 358 (1970).

Therefore, the word verdict and its medieval origins, while interesting, is of no value when instructing the jury on the state's burden of proof in our more enlightened and modern legal system. And if any doubt about the jury's role remains, one need only look to the *substance* of a jury's verdicts, where it must choose between guilty or "not guilty," rather than "innocent." That is, "[a]n acquittal is *not* a finding of . . . innocence, but merely a finding that the State has not met its burden"; and similarly, in light of numerous DNA exonerations, "[a] conviction is *not* a finding that an accused is *actually* guilty, but a finding that the State has met its burden of proof beyond a reasonable doubt." Erik R. Guenther, *What's Truth Got to Do with It? The Burden of Proof Instruction Violates the Presumption of Innocence*, 13 WIS. DEFENDER, Fall 2005, at 1, 2 (emphasis added); see also Yali Corea-Levy, *Making Sense of Reasonable Doubt: Understanding Certainty, Doubt, and Rule-Based Bias Filtering*, 8 AMERICAN U. CRIM. L. BRIEF 48 (2012) ("Jurors are essentially asked to answer two questions . . . (1) Do you think the defendant is guilty?; (2) If so . . . are you certain beyond a reasonable doubt?").

IV. LOWERING THE BURDEN OF PROOF

Wisconsin's pattern instruction defines reasonable doubt, and then instructs the jury not to search for it, but instead to search for the truth. Both textually and logically, such qualifying language at the end of the instruction lowers the government's burden of proof. That is, "seeking the truth suggests determining

whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of the evidence standard. *Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt.*" **United States v. Gonzales-Balderaz**, 11 F.3d 1218, 1223 (5th Cir. 1994) (emphasis added). In other words, if a jury feels the government's version of events is only *slightly* more likely than the defendant's version to be true, it would follow that, in a search for the truth, the jury would be obligated to convict the defendant.

Instructing the jury to "search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden." **State v. Berube**, 286 P.3d 402, 411 (Wash. Ct. App. 2012). And worse than merely lowering or even sweeping aside the state's burden, "Jury instructions on reasonable doubt which charge the jury to seek the truth are disfavored because they run the risk of unconstitutionally *shifting* the burden of proof to a defendant." **State v. Aleksey**, 343 S.C. 20, 27 (2000) (emphasis added).

This problem—lowering, sweeping aside, or even shifting the government's burden of proof to the defendant—is obvious from the plain language of Wisconsin's pattern jury instruction. Nonetheless, the prosecutor in this case may still assert that the defendant's claim relies on mere logic rather than evidence. Therefore, Dr. Lawrence T. White—Professor and Chair of Psychology and Director of the Law & Justice Program at Beloit College—and Michael D. Cicchini, an attorney with Cicchini Law Office, LLC in Kenosha, WI - designed, conducted, and published a controlled study to empirically test the impact of Wisconsin's pattern

instruction on juror decision-making. See Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICHMOND L. REV. 1139 (2016) (available at <http://lawreview.richmond.edu/wp/wp-content/uploads/2016/06/Cicchini-504.pdf>).

In the controlled study, 298 participants served as mock jurors. These mock jurors all read the *identical* case summary of a hypothetical criminal trial, including the elements of the crime, a synopsis of the trial testimony, and the lawyers' closing arguments. Participants were then randomly assigned to one of three groups, each of which received a *different* burden of proof jury instruction: Group A was instructed to render a verdict based only on a "search for the truth"; Group B was *properly instructed* on reasonable doubt, i.e., they were given Wisconsin's pattern jury instruction *without* the truth-related language; and Group C was given Wisconsin's pattern jury instruction that concludes by instructing jurors to disregard doubt in favor of a search for the truth.

Group A convicted at a rate of 29.6 percent. Group B, which received a legally proper reasonable doubt instruction, convicted at a rate of only 16 percent. Finally, Group C, which received Wisconsin's pattern instruction—defining reasonable doubt but then instructing them not to search for doubt, but instead to search for the truth—convicted at a rate of 29 percent. This conviction rate was nearly *double* that of the group that received a legally proper reasonable doubt instruction, and was statistically *identical* to the group that received no reasonable doubt instruction whatsoever.

The statistical significance of our findings is fully explained in the article. But in summary, with the large sample size and the large difference in conviction rates, the authors were able to conclude with more than 97 percent certainty—they obtained p -values of 0.023 and 0.028—that the authors did not commit a “Type I error.” That is, the authors are more than 97 percent certain ($1-p$) they did not obtain a “false positive” when testing our hypotheses.

After the publication of this article, the authors conducted a follow-up study in order to test the reliability of our findings and expand their original work. See Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 COLUMBIA L. REV. ONLINE __ (forthcoming, 2017) (pre-publication draft available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=2813596).

In their conceptual replication the authors again found a statistically significant difference in conviction rates between mock jurors who were properly instructed on reasonable doubt, and those who were instructed “not to search for doubt” but instead “to search for the truth.” Further, the authors expanded their study to include additional post-verdict questions and, in the process, identified a cognitive link between Wisconsin’s truth-related language and jurors’ higher conviction rate.

More specifically, jurors assigned to the group that received Wisconsin’s truth-related language were nearly *twice* as likely ($p = 0.01$) to indicate, in their response to a post-verdict question, that “[e]ven if I have a reasonable doubt about the defendant’s guilt, I may still convict the defendant[.]” Further, jurors who held

this mistaken belief, regardless of the group to which they were randomly assigned, actually voted to convict the defendant at a rate *2-1/2 times higher* ($p < .001$) than jurors who correctly understood the burden of proof. In other words, the authors studies empirically demonstrated that Wisconsin's truth-related language creates in jurors a mistaken belief about the constitutionally-mandated burden of proof; the jurors, in turn, base their verdicts on this mistaken belief, which results in a significantly higher conviction rate.

The constitutional defects in Wisconsin's pattern instruction have long been obvious from a logical and textual analysis. Now, statistically significant empirical evidence proves telling a jury to disregard doubt in favor of a search for the truth lowers the state's burden of proof below the constitutionally-guaranteed reasonable doubt standard.

V. SERVING NO PURPOSE

The only reason a prosecutor would oppose the defendant's jury instruction (Exhibit A) is that, quite obviously, it is much easier to convict when the court instructs the jury not to evaluate the evidence for reasonable doubt, but instead to search for the truth of what they think happened. There is simply no other reason for a prosecutor to object to a burden of proof instruction that concludes, as the defendant's proposed instruction does: "It is your duty to give the defendant the benefit of every reasonable doubt."

Further, no court has held that the search for the truth language in the pattern instruction is *required*, or *preferable*, or serves *any purpose whatsoever*. Rather, when affirming convictions, the best thing that courts have been able to say

about such truth-related language is that it probably didn't affect the jury's verdict—a claim that has always been highly suspect and now empirically debunked in two studies.

For example, after considering "the context of the entire instruction," Wisconsin courts have merely concluded that "it is *not reasonably likely* the jury understood **Wis. JI – Criminal 140 (1991)**, to allow conviction based on proof below the *Winship* reasonable doubt standard." ***State v. Avila*, 192 Wis. 2d 870, 889 (Wis. 1995)** (emphasis added).

Similarly, in South Carolina, the court "strongly urge[d] trial courts to avoid any 'seek' language," including the trial judge's instruction that jury should be "in search of the truth." ***State v. Needs*, 333 S.C. 134, 154 (1999)**. Nonetheless, the court tolerated such truth-related language, and affirmed the conviction, because the truth mandate was not combined with "any other offending terms." *Id.*

Likewise, in Washington, the court held that instructing the jurors to determine "the truth" probably doesn't diminish the beyond a reasonable doubt standard, "but neither does it add anything of substance" to the burden of proof jury instruction. ***State v. Pirtle*, 904 P.2d 245, 262 (Wash. 1995)**.

When the best thing that can be said of truth-related language is that it adds nothing of value, but probably doesn't do any harm, logic and prudence require that it be deleted from the burden of proof instruction. And now that empirical evidence debunks even that lukewarm justification, continuing to instruct the jury "not to search for doubt," but instead "to search for the truth," would, without any doubt, be unconstitutional.

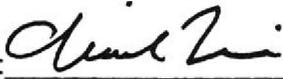
VI. CONCLUSION

The defendant's proposed jury instruction (Exhibit A) is identical to Wisconsin's pattern instruction except that, rather than instructing the jury to disregard its constitutionally mandated search for doubt in favor of a speculative search for the truth, the defendant's instruction concludes with this mandate: "It is your duty to give the defendant the benefit of every reasonable doubt."

No prosecutor has offered, or would be able to offer, any legitimate objection to a burden of proof instruction that so accurately and clearly conveys the state's constitutionally-imposed burden.

Dated this 23rd day of January, 2017.

Law Offices of Robert A. Levine

By: 

Michael G. Levine
(SBN 1050078)
Attorney for Defendant

630 N. Broadway
Milwaukee, Wisconsin 53202
Telephone: (608) 784-6356
Fax: (608) 784-6359

NOTE – This brief is largely based on one drafted by attorney Michael D. Cicchini of Kenosha, Wisconsin and attorney James L. Kroner, Jr., of La Crosse, Wisconsin.

EXHIBIT A

140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

Presumption of Innocence

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.

State's Burden of Proof

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.

Reasonable Hypothesis

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty.

Meaning of Reasonable Doubt

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

It is your duty to give the defendant the benefit of every reasonable doubt.

1 P R O C E E D I N G S

2 THE CLERK: State of Wisconsin versus Michael
3 Williams, 16CF991.

4 MR. HAYES: Karl Hayes for the state. Good
5 morning.

6 MR. LEVINE: Attorney Michael Levine and
7 Attorney Rachel Wolf appearing on behalf of
8 Mr. Williams, who's present, in custody.

9 THE COURT: Okay. There were a number of
10 different issues that counsel both had. The first one
11 being that the defendant's motion regarding the jury
12 instruction on the burden of proof instruction, in
13 chambers that issue came up. The Court told both
14 counsel that the Court is not going to change the burden
15 of proof instruction. That's discretionary with the
16 Court. There was no need to do that. And until the
17 instruction's changed, the Court's going to use the form
18 instruction.

19 The other issue that came up was apparently
20 the state had made an offer to the defense. And perhaps
21 you want to put that offer on because I don't recall
22 what the offer was.

23 MR. HAYES: We discussed a plea to the charge
24 of felony murder with the predicate felony being
25 attempted armed robbery.

1 outreach people trying to find him and serve him for --
2 normal period of time prior to trial. And now I was
3 informed I guess over the weekend that law enforcement
4 had planned then to search him out in a different sort
5 of a way and that they're working on that right now.

6 THE COURT: I mean, your expert is somebody
7 who's in the state?

8 MR. LEVINE: In Beloit.

9 THE COURT: So he wouldn't have to know until
10 Tuesday morning; is that right?

11 MR. LEVINE: He asked me to make sure I let
12 him know by today if he is to be here Tuesday or
13 Thursday.

14 THE COURT: All right. Thursday morning at
15 8:15.

16 MR. LEVINE: Judge, in chambers, I also raised
17 the fact that at the last trial Tiffany McAfee-Jiles
18 testified that she doesn't know my client Mr. Williams,
19 doesn't know his name, but that she had seen him on one
20 or two previous times with Tony Madison. My objection
21 is that while the state is seeking that information to
22 establish a connection between my client and Tony
23 Madison, my position is that the danger of unfair
24 prejudice substantially outweighs its relevance because
25 she doesn't know when she saw him or -- all we know is

1 she didn't see Michael Williams the day of the shooting
2 and didn't see him after the shooting. And therefore,
3 any other time that she saw my client allegedly with
4 Tony Madison would be totally irrelevant.

5 THE COURT: She'll not have too much weight
6 with the jury then, right? So it goes to the weight of
7 the jury -- weight of that evidence. So whether or not
8 somebody knows someone I don't think is -- is not -- it
9 goes to the weight of the evidence.

10 MR. LEVINE: And then next, we're objecting to
11 any reference that Michael Williams was the victim of a
12 shooting on 54th Street. There will be no evidence to
13 substantiate that fact that will be offered by the state
14 either by way of testimonial evidence or physical
15 evidence, and therefore, it's speculative and
16 prejudicial.

17 MR. HAYES: And I just couldn't disagree more.
18 It's not -- it's circumstantial. And it's a rational
19 and reasonable inference to draw from the evidence that
20 was adduced at the last trial.

21 We know that Michael Williams was brought to
22 the hospital and was treated there for a gunshot wound.
23 And we know that he was wearing camouflaged pants
24 because it's on video and the pants were recovered.

25 We know that there was a shooting

1 Your Honor and counsel, ladies and gentlemen
2 of the jury.

3 This is the closing argument phase. I'm going
4 to make a presentation and an overview of the evidence.
5 I'm going to make some arguments about how I think a
6 reasonable and rational person can interpret the
7 evidence and reason their way to a conclusion.

8 I'd like to begin my presentation by going
9 through the video at the gas station one final time. I
10 know you've seen it many times during the course of the
11 trial, but it is a key piece of evidence. So that's how
12 I'd like to begin.

13 So I'm -- can you move the cart, detective.

14 We don't have a witness in the box now so we
15 can actually put this a little bit closer to the jury.

16 Is your client going to be able to see that
17 from there?

18 THE DEFENDANT: Yes.

19 MR. HAYES: All right. So this is State's 25.
20 This is the third file from the top. And we're going to
21 -- the detective is going to hit play for us. We'll
22 just watch it clear through.

23 Although I think you may have turned the
24 television off.

25 Okay. Go ahead, detective. Thank you.

1 (DVD played in open court.)

2 MR. HAYES: It's about 6:30 in the evening on
3 July 24 of 2015. This is the gas station at 905 West
4 Center.

5 We've just seen a Toyota Venza pull up and
6 park right next to pump No. 2. That's the car that
7 belongs to the victim in this matter, Frederick Martin.

8 Now, in the video, we see the suspect vehicle,
9 which is a red Ford truck, pull up. And he's not taking
10 it quite steep enough, so there's a backing maneuver,
11 and then the truck pulls up so that it's parallel next
12 to the victim's car.

13 At this point, according to the testimony that
14 you heard, a man named Miguel Henderson, otherwise known
15 as Boogie, has joined Mr. Martin in the Venza that's
16 sitting in the front passenger seat. According to Mr.
17 Henderson, he met the victim there in order to purchase
18 a small amount of marijuana.

19 You see this figure emerge from the shadow and
20 head to the convenience store. Right hand in the pants
21 pocket.

22 Having viewed the interior camera video, we
23 know that he looks around at where the coffee and the
24 slurpy machine is. And he comes out right away, hand
25 still stuck in the pocket.

1 Here comes Mr. Martin. And we'll see this
2 individual turn around and follow Mr. Martin into the
3 store.

4 Again, having watched the interior camera
5 views, we know that Mr. Martin goes to the back of the
6 store and gets a soft drink. And that the other
7 individual purchases, according to Detective Harold
8 Thomas, a cigar or a cigarette, or something like that.

9 Now we see the silver two-door pull up. It's
10 got a sunroof and a spoiler. And it parks right in
11 front of the store.

12 Front seat passenger of the car getting out.
13 Here comes the victim. They greet each other. And Mr.
14 Martin points to the driver of that silver car.

15 And out comes the other individual. Clearly
16 lighting up something. You can see the puff of smoke.
17 He heads directly to Mr. Martin's car. Mr. Martin just
18 has a few seconds to live at this point.

19 People begin to scatter. There's the victim
20 clutching his right side. He enters the store. That's
21 where he ultimately died.

22 Brake lights come on in the red truck. We see
23 a figure moving around the victim's car. Opening the
24 various doors.

25 Now, the brake lights have come on the silver

1 car as well. The red truck peels off and heads west
2 down Center Street right there.

3 Passenger gets into the silver car in a hurry.
4 That car then pulls off and heads west on Center in the
5 same direction as the red truck.

6 Detective, you can go ahead and stop that file
7 right there.

8 Thank you.

9 All right. So there's two basic central facts
10 in this case. As complex as this case was and as many
11 pieces of evidence that came in and as small of a scale
12 as we got to, when you step back, there's two basic
13 ideas that we can hold onto and work with as we begin to
14 reason our way to a conclusion.

15 And it's just what I told you in the
16 beginning. It's sort of a tale of two videos. So the
17 two basic ideas that we want to focus on.

18 What I've got here on the viewer is State's 91
19 and State's 40. Ninety-one is a still isolated from
20 some video at St. Joe's Hospital. And 40 is a still
21 isolated from the video that we just watched.

22 And so the question is one of the basic facts
23 that we've got here. The ultimate question you have to
24 answer here is, is this person this person?

25 Because we know that the person shown in 91

1 has got wheeled into St. Joe's with a gunshot wound to
2 the groin is the defendant Michael Williams. That's a
3 fact. And we know that the person shown in State's 40,
4 the man wearing the camouflaged pants that we've seen in
5 the video, was clearly and beyond any reasonable doubt
6 involved in the murder of Fred Martin.

7 Nobody, I would submit to you, no reasonable
8 person can watch the video at the gas station and come
9 away concluding, oh, that guy in the camouflaged pants,
10 merely an innocent bystander. Had nothing to do with
11 anything. Nobody could reach that conclusion having
12 watched his behavior in the video.

13 When he passes Mr. Martin, he turns around.
14 Jams his hand in his pocket. Follows him in. Mr.
15 Martin comes out. Out comes the man in the camouflaged
16 pants. He makes a beeline to the victim's car. And the
17 next thing we know Fred Martin has been shot in the
18 back, and then off goes the red truck.

19 No reasonable mind could watch that gas
20 station video and not conclude that the man shown in
21 State's 40 wearing the camouflaged pants was not
22 involved with that murder.

23 And if you accept that the man in the
24 camouflaged pants in the gas station video was involved
25 in the murder, then, as I indicated, the question is, is

1 that person the defendant Mike Williams as shown in the
2 hospital video. That's the central question that's got
3 to be answered in this case.

4 Detective, just turn the Elmo off. It'll go
5 back to the computer. Thanks. And just hit the space
6 bar for me, please.

7 All right. So it's a two-count case. But
8 Count 1 comes with what we call a lesser included
9 offense. Okay.

10 So as the judge indicated to you, the
11 defendant is charged in Count 1 with first-degree
12 intentional homicide as a party to a crime, while armed
13 or using a dangerous weapon, okay.

14 And then you've also been asked to consider
15 what we call a lesser include offense, which is a less
16 severe form of homicide, which is first-degree reckless
17 homicide. And that's also a party to a crime.

18 So I'm just going to take you very quickly
19 through the charges and the elements so you have a
20 crystal clear idea of what the state has to prove.
21 Because it's important that you are able to take all the
22 evidence and match it up to the law. And if it matches,
23 that's how you get to a guilty verdict.

24 If it doesn't match, that's how you get to a
25 not guilty verdict.

1 So the concept of being a party to a crime,
2 okay. What that basically means is that a person is
3 guilty if he or she does the deed or is also guilty if
4 he or she aids and abets somebody else who actually does
5 the deed. That's what it means to be a party to a
6 crime. You're guilty either way under our law. Either
7 by directly committing or by aiding and abetting another
8 person who commits the crime.

9 Next slide, please.

10 So let's take a look at Count 1, the homicide
11 count. There's direct evidence and there's
12 circumstantial evidence. The direct evidence as to
13 Count 1 is that Fred Martin was shot and killed at 905
14 West Center on July 24 of 2015. That's a fact.

15 The video from the gas station and from the
16 church shows Mr. Martin walking to and from the
17 convenience store obviously unharmed, okay. You
18 couldn't watch the video and think he had arrived
19 suffering some wound. He's fine.

20 The video then shows Mr. Martin after he's
21 been shot, running back from his car to the store,
22 clutching at his right -- at his side.

23 The police testified that they end up locating
24 Mr. Martin lying on the floor in a pool of blood.
25 Detective Pajot told you when the detectives arrived and

1 searched the victim's clothing, it was found to contain
2 \$1,900 in cash.

3 The victim was declared deceased on scene, was
4 taken to the medical examiner's office, and Dr. Peterson
5 testified that Fred Martin died as a result of single
6 gunshot wound.

7 The entrance was lower right back. The exit
8 was at the upper left chest. It destroyed his liver and
9 his heart. And the bullet path was back to front, right
10 to left, and down to up.

11 And remember what Dr. Peterson said,
12 scientifically, he could tell you that the shooter had
13 to have been behind Fred Martin. Entirely consistent
14 with Mr. Martin's position behind the wheel of his
15 automobile and the shooters's position leaning in
16 through the rear passenger side door.

17 Next slide, please.

18 That bullet path, by the way, is also
19 consistent with the damage that was observed when Fred
20 Martin's vehicle was recovered on 39th Street. It was
21 an exit bullet hole in the driver's door which, again,
22 would be consistent with a shot fired from the rear
23 passenger side of the vehicle, travels through Mr.
24 Martin's body and then out through the door.

25 The video recovered from the gas station and

1 the church shows this male subject in the camouflaged
2 pants appearing in the parking lot shortly after the
3 arrival of the red Ford Expedition.

4 The video appears to show that this male
5 subject and in the camouflaged pants is following Mr.
6 Martin. That's a rational and logical conclusion based
7 on what the individual shows. He, Mr. Camo, had gone
8 into the store and come out. You figure his business
9 had been concluded, but he turns right around and goes
10 back in following Mr. Martin.

11 The video shows Mr. Martin returning to his
12 car. And it shows the man in the camouflaged pants
13 following the victim straight toward the Toyota while
14 he's lighting up.

15 And then the video shows Mr. Martin running
16 from the Toyota into the convenience store. A rational
17 and logical conclusion that you can draw simply from the
18 video, if nothing more, is that Fred Martin was shot
19 inside that car.

20 Because the video doesn't show the shooting,
21 okay. You don't see a gun in anybody's hand except
22 perhaps an unidentified fella behind the wheel of the
23 silver car.

24 You don't see the gun go off. You don't see
25 anything like that. There's no audio, so you have to

1 look at what's going on around it, okay.

2 But the one rational and logical conclusion
3 that you can draw based on the evidence solely in the
4 video is that Mr. Martin was shot while he was in the
5 car. Which is why you don't see it.

6 Next slide, please.

7 The video shows this red Ford then leaving the
8 scene westbound on Center. The male subject is no
9 longer visible.

10 Detective Thomas told you, in his review of
11 the video, he could see that this person gets into the
12 rear driver's seat door of the red Expedition, and
13 that's how he left the scene.

14 The video then shows this silver two-door
15 vehicle also leaving the scene also westbound on Center
16 Street.

17 Next slide, please.

18 Now, we've got one car, one relevant car left
19 at the scene for a short amount of time. But then that
20 leaves too. And the victim's Toyota ends up on 39th
21 Street. Miguel Henderson says he was trying to return
22 it to the victim's mother, or whatever the story was.

23 But imagine now, the police arrive at this
24 scene, and they've got a deceased body in the
25 convenience store, and nobody's around. They've got --

1 the victim's car is gone. The suspect's car is gone.
2 This silver car is gone. They've got no suspects
3 hanging around. They've got no eyewitnesses left.
4 Everybody just simply gone. So there wasn't much of a
5 scene for the homicide detectives to start working with
6 initially.

7 However, the police ultimately were able to
8 identify a guy by the name of Miguel Henderson as
9 somebody who was a witness to this. And so they brought
10 him in and interviewed him. And he gave the following
11 statement:

12 I was the front seat passenger in my friend
13 Fred Martin's Toyota at the time of the shooting. I was
14 there.

15 He states that the gunman opens the rear
16 passenger side door, leans in, and says, "You know what
17 time it is." And just simply shoots Fred Martin with a
18 large revolver.

19 Mr. Henderson testified that when the door
20 opened, he turned to his left and was able to see the
21 gun and was able to see the man holding the gun.

22 He described him as having a particular
23 expression. He described it as janky or shysty. And
24 the best he could do to explain what he meant was that
25 it was a look or an expression that somebody might wear

1 if they were meaning to do something to you.

2 Mr. Henderson didn't indicate that this gunman
3 made any demands or said anything at all other than "You
4 know what time it is," and simply opened fire.

5 Henderson testified that there was a second
6 shot. He ran out of the parking lot and across the
7 street. He observes this gunman moving around the
8 various doors of Fred's Toyota as if searching the
9 vehicle.

10 MR. LEVINE: Objection. Misstates the
11 evidence.

12 THE COURT: Well, the jury will recall what
13 the evidence would be so -- through their collective
14 memories.

15 Go ahead, counsel.

16 MR. HAYES: Thank you.

17 Again, Mr. Henderson decides rightly or
18 wrongly to get into the Toyota, drive away from the
19 scene not knowing that Fred is inside the convenience
20 store. He just leaves. The car died on him, and it's
21 found ultimately on 39th Street later that evening.

22 Next slide, please.

23 The investigation begins to come into focus
24 when the detectives realize they've got to put together
25 two shooting scenes. The homicide scene on 9th and

1 Center and this incident that takes place in the
2 vicinity of 54th and Hampton.

3 The defendant himself gets shot on the evening
4 of July 24, 2015. And he gets taken to the hospital by
5 a male and a female subject which you saw in the St.
6 Joe's parking lot video.

7 The video shows the defendant is wearing his
8 bloody camouflaged pants when he's admitted. The pants
9 were recovered. You've seen photographs of them. You
10 heard testimony that he had like 80 cents in his pocket,
11 and he also had a cigarette lighter.

12 At that point the police simply see him as a
13 shooting victim. The investigation is still in its very
14 beginning stages. Nobody's yet put the pieces together.

15 And so the defendant then is off. And that's
16 why, when the police begin to make some headway and to
17 develop suspects, they have to do a photo array instead
18 of a live lineup in August with Miguel Henderson.

19 However, the defendant does get arrested seven
20 months after the fact, in March of 2016. And then he's
21 made to stand in a live lineup. And Miguel Henderson
22 identifies the defendant in the live lineup as the
23 person he saw shoot and kill Fred Martin.

24 Next slide, please.

25 Now, those -- that was the direct evidence.

1 Now we're going to move onto the circumstantial
2 evidence.

3 The red Ford, which you see in the gas station
4 video, has a couple of unique characteristics. And
5 noteworthy characteristics that would differentiate it
6 from any other red Ford truck, it's got these
7 nonstandard dealer placards. Not a regular license
8 plate on both the front and the back.

9 We can see also there's this rectangle of
10 adhesive on one of the rear windows. That's clearly
11 visible in the video. And I'm going to show you the
12 stills in a second here.

13 We can also see, based on the review of the
14 video recovered at the gas station, that the driver
15 appears to be wearing some kind of a garment that's got
16 blue sleeves and a white front and back and a red hood.
17 That's visible in the video as well.

18 Another piece of circumstantial evidence that
19 we can mine out of the video from the gas station is
20 that there appears to be some sort of relationship
21 between the victim Fred Martin and these fellas in the
22 silver car. Fred shakes hands with the front seat
23 passenger and does one of these to the driver, points to
24 him. Okay. There's a recognition there. He wouldn't
25 do that to somebody you wouldn't know.

1 So it's a rational and a reasonable conclusion
2 that Mr. Martin has some sort of relationship with these
3 fellas in the silver car.

4 And then the silver car follows the red Ford
5 as it escapes from the homicide scene.

6 So those are all pieces of circumstantial
7 evidence that we can use.

8 So let's begin with what we can see of the red
9 Ford in terms of the adhesive and the nonstandard plate.

10 So here's two stills. This is State's 48 and
11 45 as well as 41 and 42, all taken from the video
12 recovered from the church across the street. Okay.

13 All right. So here's the red Ford pulling out
14 from the gas station parking lot to head westbound on
15 center. This is a great shot because it gives us a nice
16 view of the stylized S on the dealer placard and a
17 pretty good view of the tricolored garment worn by the
18 driver. This is the white body and red up on the collar
19 and the blue sleeves. That's State's 41.

20 State's 42. It's a very similar picture. You
21 can again make out the stylized S on the dealer placard
22 and what the driver is wearing.

23 Here's another camera angle recovered from the
24 church. As the red Ford makes its way on -- westbound
25 on Center, you can see that rectangular patch of that

1 adhesive on the rear passenger side window.

2 And this is State's 45. And you can make out
3 the adhesive quite clearly in that photograph.

4 Here's 28 and 29. These are stills from the
5 gas station radio, and they give you a nice look at what
6 the driver is wearing. You can clearly see the patch of
7 red at the back as he turns to back up and the blue
8 sleeve on the shoulder and the white body of the
9 garment.

10 And this is State's 29. Another view of the
11 peculiar top that the driver is wearing.

12 Now, what's interesting about that silver car
13 is not just that the video certainly strongly suggests
14 that the driver and the front seat passenger of that
15 silver car had a relationship with Fred Martin, but if
16 you watch the video, there's that moment when the
17 shooting is actually happening, when you can see the
18 driver of that -- of that silver car raise up his right
19 hand. And it looks -- it's not unreasonable to
20 conclude, based on the video evidence and the still
21 recovered from the video, there's his arm there that he
22 is, in fact, raising a pistol.

23 That was State's 115 that I just put up there
24 on the viewer for you.

25 Detective, could you turn the Elmo off, and

1 we'll go back to the slide.

2 Okay. So about 15 minutes after the homicide,
3 at about quarter to seven, same evening, we have this
4 shootout that occurs in the front yard of a woman by the
5 name of Tiffany McAfee. She lived at 4815 North 54th
6 Street. And you saw all the evidence markers and how
7 many casings there were. And you look at the scene
8 diagram, there was something like 20 plus spent shell
9 casings. It was literally a hail of gunfire.

10 So this is about, like I said, it's 6:45 p.m.,
11 15 minutes after the homicide. And those two locations,
12 the gas station at 9th and Center and the McAfee home
13 on North 54th Street, are about 12 minutes away by car.

14 And you'll recall the detective, Detective
15 Keller, in Exhibit 83 plotted the route for you. And
16 one way you could get from McAfee's house from the gas
17 station on 9th and Center is by heading 9th and Center
18 just like the red Ford did, as it tore off from the
19 murder scene just like the silver car did.

20 Next slide, please.

21 So the police get there to investigate that
22 scene. And they believe that there's a victim somewhere
23 because there's blood on the pavement next to this red
24 Ford Expedition. And there's casings everywhere. So
25 they begin to suspect that somebody got hit here.

1 They observe two important cars parked in the
2 McAffee driveway. There's the car that's closest to the
3 street that's backed in. That's a maroon minivan, and
4 it lists to a guy named Tony Madison.

5 And then behind that further and -- closer
6 rather, to the garage, front facing the garage, is this
7 red Ford Expedition with dealer placards. And it's got
8 this patch of adhesive in the rear passenger side
9 window.

10 You heard from Tiffany McAfee who lives
11 there. She indicated that Tony Madison was her friend
12 back in the summer of 2015, and that he visited her. In
13 fact, she testified that he was there earlier that
14 evening. And Ms. McAfee told you what when she came
15 home, that red Ford Expedition was not in her driveway.
16 It wasn't there when she got home. But after the
17 shooting, when she came outside, there it was in her
18 driveway.

19 Next slide, please.

20 She indicated that when she came home, Tony
21 himself wasn't around, but his van was parked on the
22 street. And then she indicated --

23 MR. LEVINE: Objection. Misstatement of
24 evidence.

25 THE COURT: The jury will be able to recall

1 through your collective memory as to what the evidence
2 was. So go ahead.

3 MR. HAYES: She further testified that
4 Madison's van was backed into her driveway, blocking
5 this red Ford truck which she's never seen before.

6 Tiffany McAfee was shown picture of the
7 Michael Williams, and she identified him as somebody she
8 had seen with Tony Madison on a couple of prior
9 occasions.

10 You also to hear from two neighbors,
11 Mr. Stewart and Mr. Ward. They live on 55th Street,
12 about half a block north of this particular shooting
13 scene. And they both told the police and then you
14 during the trial that they had observed a male subject
15 wearing camouflaged pants who had been suffering from a
16 gunshot wound. And they both called 911. But by the
17 time they came out from doing that, this fella in
18 camouflaged pants who had been shot was gone.

19 And that scene where they observed this
20 person, as I indicated, is about a block and a half
21 north.

22 I'm going to throw State's 82 up so we can
23 remember the relative locations of where all this stuff
24 happened.

25 Okay. So State's 82 shows the McAfee

1 residence here, 4815 North 54th Street. And then
2 Sergeant Grimm circled the location of where Mr. Stewart
3 and Mr. Ward saw this individual in the camouflaged
4 pants having been shot. It's just half a block north
5 and one block over on 54th Street. And that was
6 consistent with what Sergeant Grimm indicated about
7 seeing blood on the fence which led him to conclude that
8 somebody, in fact, had hopped the fence.

9 Now, at the right side of the exhibit we have
10 another position located, which is 4820 West Hampton
11 Avenue. And that is significant because that's where a
12 second shooting victim is found by the police. And that
13 was a person identified as Tony Madison, the listed
14 owner of the maroon minivan parked in the McAfee
15 driveway which was blocking the red Ford Expedition.

16 Now, you remember the stills that we just
17 looked at of the red car leaving the homicide scene.
18 And you can see in those stills from the homicide video
19 the adhesive bit on the passenger side window. And you
20 can see the stylized S on the dealer placard.

21 So here are some photographs of the red Ford
22 that was found at the McAfee shooting scene 15 minutes
23 after the homicide.

24 So this is State's 71. There's your
25 rectangular adhesive.

1 Seventy-two, a nice shot of the front plate.
2 Compare that to the homicide scene video.

3 Here's State's 61. The rear plate hanging by
4 one screw, and a close-up shot of the same. And that's
5 State's 63.

6 So when you take a look at the still images
7 from the homicide scene video, of the red Ford
8 specifically, and you take a look at the nice close-up
9 shots of the red Ford that was found at the McAfee
10 scene, you know, a few miles away, 15 minutes later, a
11 reasonable and rational conclusion that you could reach
12 is that that's one of the same vehicle. That's the same
13 red Ford.

14 Take a look at the plates. Take a look at
15 that square patch of adhesive. And most importantly,
16 remember the tricolored garment of the guy that was
17 driving that red Ford which you can see in the homicide
18 scene video. That's key. Here's why.

19 When they find Tony Madison a few blocks to
20 the east of the McAfee shootout, here's what he's
21 wearing. This is State's 78. The blood stained hooded
22 sweatshirt that was located with Tony Madison just a few
23 blocks to the east of the McAfee scene.

24 There's a close-up. Red hood, blue shoulders
25 and sleeves, white body.

1 Take a look at those pictures. Take a look at
2 those stills from the gas station video. And then ask
3 yourselves how could it possibly come to be that that
4 red Ford, which has the same dealer placard and the same
5 adhesive patch, is found at the McAffee scene, blocked
6 in by a car that lists to Tony Madison, and Tony
7 Madison's found a few blocks to the east shot, and he's
8 got the garment on that looks exactly like the garment
9 worn by the driver of the red Ford at the homicide
10 scene. How could all of that happen?

11 Well, one way it could happen is if Tony
12 Madison was driving the red Ford at the homicide scene,
13 and then took it to McAffee's house, and pulled it into
14 the McAffee driveway, and then blocked it in with his
15 own car. The car lists to him.

16 And then ask yourself, if all that happened
17 that way -- and the evidence strongly suggests it did --
18 we've got Tiffany McAffee identifying the defendant Mike
19 Williams as an associate of Tony's.

20 And then we've got Mike Williams turning up
21 shot at Froedtert -- or St. Joe's, rather, wearing pants
22 that are identical to the pants worn by the guy in the
23 homicide video.

24 Next slide, please. Go ahead. We've been
25 through that.

1 Okay. So that's -- that's the boat. The
2 direct evidence and the circumstantial evidence that you
3 can use as you decide whether the defendant Mike
4 Williams is guilty or not guilty of the homicide count
5 as charged.

6 And as the Court has told you, if you can't
7 agree that he's guilty of intentional homicide, you
8 should consider whether or not he's guilty of a lesser
9 form of homicide, which is reckless homicide. I'll get
10 to the elements of that.

11 The second count is not something you should
12 really trouble yourselves too much about, okay. Because
13 everybody here agrees that Mike Williams was convicted
14 of a felony offense prior to July 24 of 2015. Okay. So
15 you should accept that as having been proven.

16 The only issue is, of course, was he in
17 possession of a firearm on the date in question. And if
18 you find him guilty of the homicide, you should find him
19 guilty of being a felon in possession of a firearm
20 because he couldn't have done the murder without a gun.
21 There's no dispute that it was a death by gunfire.

22 Next slide, please.

23 All right. So the elements of the
24 first-degree intentional homicide charge is, the state
25 has to prove with evidence that satisfies you beyond a

1 reasonable doubt that the defendant caused the death of
2 the victim Fred Martin. And *caused* means that the
3 defendant did some things that were a substantial factor
4 in bringing about the death.

5 The state further also has to prove that the
6 defendant or another -- because it's charged as being a
7 party to the crime -- acted with the intent to kill
8 Frederick Martin. Okay.

9 Now, we all know that intent is something that
10 lives in our minds and in our hearts. You can't open
11 somebody's head up and see their intent. Okay.

12 But we also all know that you can judge a
13 person's intent. And you can tell when a person has
14 evil intent by looking at all of the facts and the
15 circumstances that surrounds what they do.

16 Okay. So ask yourselves this. What intent
17 could a person have when he shoots a guy in the back at
18 close range? Is there an intent to frighten that
19 person? Is your intent to wound that person slightly or
20 incapacitate him, but he'll be okay down the line? Or
21 is it your intent, when you shoot a guy in the back at
22 close range, is it your intent to kill that person? And
23 what other intent could there be?

24 According to Mr. Henderson, no demands are
25 made. It's just, "You what time it is," and then blam.

1 Next slide.

2 Now, you're being offered a lesser included
3 offense as to the homicide charge, which is first-degree
4 reckless homicide. That's a different form of homicide.
5 It's got slightly different elements.

6 The first is the same. The state has to prove
7 that the defendant or another caused the death of the
8 victim Fred Martin.

9 The state then has to prove that the defendant
10 or another caused that death by criminally reckless
11 conduct. *Recklessness* has a special definition in the
12 law. Okay.

13 Reckless -- conduct is criminally reckless
14 when it's conduct that creates a risk. Not just any
15 risk, but a risk of death or great bodily harm to
16 another human being. That when you create a risk that's
17 reckless.

18 And conduct that's criminally reckless is when
19 that risk is substantial and unreasonable. And conduct
20 is criminally reckless when the defendant or another was
21 aware that the conduct created that risk, okay?

22 So ask yourself this, do I create a risk of
23 death or great bodily harm when I shoot a guy in the
24 back at close range? Your common sense should answer
25 that question for you.

1 Is that a risk that is substantial and
2 unreasonable? Again, that's a common sense yes.

3 Was the defendant or another aware that the
4 conduct created that risk? How could one not be under
5 these facts when the trigger puller is in the car with
6 the victim? How could you fail to be aware that
7 shooting a guy in the back at close range created that
8 kind of a substantial and unreasonable risk.

9 Finally, in order to convict of the lesser
10 charge, first-degree reckless homicide, the state would
11 have to show that the circumstances surrounding this
12 conduct showed an utter disregard for human life. An
13 utter disregard for human life. Shooting an unarmed man
14 in the back, that's the quintessence of utter disregard
15 for life.

16 Next slide.

17 All right. So let's take our direct evidence
18 and our circumstantial evidence and let's all put it
19 together.

20 Fred Martin gets shot and killed at this gas
21 station. The evidence leads only to one rational
22 conclusion, which is that it happened while he was
23 sitting in his car. The video suggests that.

24 And you've got the testimony of Miguel
25 Henderson who says he was there. And then you've got a

1 bullet hole in the door. And you've got the testimony
2 of the medical examiner that the shooter had to have
3 been behind the victim. It all adds up to the
4 inescapable conclusion that the shooting happens in the
5 car.

6 The red Ford in the video brings the shooter
7 to the scene and takes a shooter away from the scene.
8 There's no other conclusion you can reach based on the
9 video.

10 The shooter's wearing the camo pants. And the
11 red Ford is followed from the scene by the silver
12 two-door. And there's some sort of a connection
13 suggested by the video between the victim Mr. Martin and
14 the driver and passenger of that silver car.

15 Next slide.

16 Fifteen minutes later we've got the shooting
17 scene at the McAfee house. She's friends with Tony
18 Madison. And she identified the defendant Mike Williams
19 as Mr. Madison's associate. Madison's minivan is
20 blocking the red Ford Expedition in the driveway.

21 And I submit to you that the evidence shows
22 beyond any reasonable doubt that the red Ford in
23 McAfee's driveway is the red Ford that you see in it
24 the homicide video. That's the same car.

25 Next slide.

1 Tony Madison and Mike Williams both wind up
2 shot on July 24, same date as the Fred Martin homicide.

3 McAffee's neighbors, a block away. They
4 report seeing a gunshot victim in camo pants just like
5 the guy you see in the gas station video.

6 Madison's located a few blocks east of the
7 McAffee shooting scene wearing a tricolored hooded
8 sweatshirt just like the garment that you see the driver
9 wearing in the video from the gas station.

10 Next slide.

11 The defendant showed up at the hospital,
12 suffering a gunshot wound, wearing camo pants with a
13 cigarette lighter in the pocket.

14 I submit to you beyond any reasonable doubt
15 this evidence shows that the pants that the defendant
16 Mike Williams was wearing when he shows up at St. Joe's
17 are the same pants worn by the individual in the
18 homicide scene video.

19 Next scene.

20 Because if it's not Mike Williams in the
21 camouflaged pants in the gas station video, if it's not
22 him, he has to be the unluckiest man in the world. He
23 has to be the unluckiest son of a gun in the world
24 because the only way it can be all a coincidence --

25 Next slide.

1 -- is if you've got nearly an identical red
2 Ford Expedition at the homicide scene and at the McAfee
3 shooting scene. And that somehow the fact that Madison
4 and his associate Mike Williams the defendant both get
5 shot on the same date of the homicide, and it's
6 unrelated somehow both to each other and to the murder
7 scene. And somehow, some way Tony's wearing a
8 tricolored hooded sweatshirt when he gets shot, and the
9 defendant's wearing camouflaged pants when he gets shot,
10 and it's all just a big coincidence.

11 Miguel Henderson says he was there, he says he
12 saw it go down, and he identifies Mike Williams when he
13 saw the live lineup. So he's either lying or he's
14 mistaken about the ID in order for this to be a
15 coincidence.

16 Antoine Jackson, who was incarcerated in
17 September of 2016 in the same pod as the defendant Mike
18 Williams, came in court here, and told you that Mike
19 Williams had told him about certain things about what
20 happened.

21 And Antoine Jackson knew a thing or two. He
22 knew that somebody named Boogie was involved because he
23 claims that Mike Williams said I should have killed him
24 too. He said that Mike said it was a robbery that went
25 wrong somehow, and he had to pull the trigger.

1 That makes sense once we learned there's
2 \$1,900 in Fred Martin's pockets. He said that they --
3 that both he and Tony got shot. That's true. We know
4 that happened.

5 And Antoine told you that Mike said that Mike
6 and Tony had split up. And we know that's true.
7 Because Mike is seen a block north of the McAfee scene
8 and slightly to the west on 55th Street. And Tony's
9 found four blocks to the east of the McAfee scene.

10 So Mr. Jackson is either lying to you and
11 thereby exposing himself to an even harsher sentence
12 when he gets sentenced in April in federal court, not to
13 mention a perjury prosecution or --

14 Next slide, please.

15 Or it's the truth. And the truth is that the
16 defendant is the man wearing the camouflaged pants in
17 the homicide video. And Tony Madison is the man shown
18 behind the wheel of the red Ford Expedition at the
19 homicide. And Miguel Henderson correctly identified the
20 defendant as the shooter when he saw him in the live
21 lineup in March after the defendant was arrested.

22 And the truth is that the defendant was shot
23 by the occupants of that silver two-door in retribution
24 for the murder of Fred Martin. Whoever those guys were,
25 Fred got killed right in front of their eyes. And that

1 car takes right off after the red Ford. And both those
2 guys end up shot where the red Ford ends up parked.

3 Next slide, please.

4 THE COURT: Are you leaving some time for
5 rebuttal?

6 MR. HAYES: Thank you, Judge. I'm just about
7 done.

8 So I would close I guess -- I would close by
9 thanking you for your time. This was a tough case.
10 There's a lot here. And you've got your work cut out
11 for you when you deliberate.

12 But if you use logic and deductive reasoning,
13 if you connect these dots, and you can ask yourselves
14 how much coincidence is too much before it starts
15 bleeding over into reality and fact, I believe the
16 inescapable conclusions that you can draw based on the
17 evidence that we have, the cars match up, the garments
18 match up, the times match up, at that -- I don't have
19 any DNA for you. I don't have a gun. I don't have any
20 fingerprints, but what we've got is enough to
21 demonstrate beyond any reasonable doubt that Mike
22 Williams is the killer. And you should find him guilty
23 of Count 1 and Count 2 as charged.

24 Thank you very much.

25 THE COURT: Thank you.

1 Counsel.

2 MR. LEVINE: Thank you.

3 All right. Ladies and gentlemen of the jury,
4 I'm going to start with thanking you for your time. For
5 paying attention and being here and doing your job as
6 citizens. Because it's very important that we get
7 people that are willing to serve as jurors because it
8 makes the system work.

9 Your Honor, counsel, may it please the Court.

10 Mr. Hayes just put on a nice presentation of
11 theory. And that's what we talked about when we started
12 this trial. I told you that in opening statement they
13 were going to have a theory that sounded pretty good.

14 But I also talked to you in voir dire about
15 fake news. And that our society today has become
16 obsessed with taking things at face value without being
17 critical, without examining things. And in this room,
18 in this courtroom, that's not how it works.

19 Okay. What is required is proof beyond a
20 reasonable doubt. I'm going to get into that
21 instruction in a little bit. But where I want to start
22 is going through what I believe the evidence showed.
23 And we're going to take it one at a time.

24 There's a shooting that happens at a gas
25 station on 9th and Center. We are all aware of that.

1 Fred Martin was shot and he was killed.
2 Unfortunately, the evidence that the state was able to
3 produce for this trial does not prove who shot him, when
4 he was shot, or where he was shot.

5 I implore you to look at that video and see
6 what you can really see. We had a lot of
7 interpretation, telling you what you can see, but you
8 should watch that video closely.

9 So let's talk about the timeline first.

10 The state would have you believe that there
11 was a second shooting at 6:45 p.m.

12 Here's what we know about the first shooting.
13 We know that the first 911 call came in at 6:31 p.m.

14 We know that at 6:32 or 6:33, depending on
15 whether it was a minute delay or two-minute delay,
16 according to Officer Kamps, he gets dispatched on a
17 ShotSpotter call.

18 And we were told what ShotSpotter is.
19 ShotSpotter is a system that exists in the Milwaukee
20 Police Department that has these triangulation processes
21 and detects bullet shots and bullets or firearms being
22 fired. And it sets out an alert to the police, hey,
23 we've got shots fired.

24 That occurred at 51st and Hampton. Three
25 blocks way from the shooting that happens at Tiffany

1 McAfee's house. He's dispatched there.

2 Another thing critical about the timeline that
3 the state would have you believe, they actually -- the
4 one thing that Detective Shannon Orvis did do was some
5 -- or at least maybe told someone, maybe Sergeant Grimm,
6 they went to Hup's pizza video, or pizzeria and got
7 video.

8 And you'll remember when I had -- Detective
9 Orvis didn't know how long that video was. We went
10 through it. It was 14 minutes and 43 seconds.

11 Nobody got any sort of timestamps. But when
12 you watch the video, you'll know that within those 14
13 minutes and 43 seconds, that you never ever see a red
14 truck pull into Tiffany McAfee's driveway. You're not
15 going to see it. Watch the whole thing.

16 And you know the time is right, at least in
17 terms of -- right when the police showed up at that
18 house eventually, because the very last split second of
19 that video will show the police car pulling up in front
20 of the house.

21 So now back up 14 minutes and 43 seconds. You
22 never see that red truck pull in the driveway. And you
23 most certainly never see Tony Madison get out of the red
24 truck, get to his car, back it in, back it out, which
25 would take more time. You don't see any of that. So

1 their timeline is 100 percent inaccurate. And that's
2 where you need to start with time.

3 Then fast forward to 7:42 p.m. when, according
4 to Police Officer Kamps, is the ShotSpotter call
5 Teutonia and Villard.

6 Now, Mr. Hayes is going to argue that that's
7 not what he said. That he re-clarified with him that
8 was a ShotSpotter call, or it was shots -- or it was a
9 phone call to alert police of a shooting. But that's
10 one thing we certainly know, is that there was another
11 shooting that happened at 7:45.

12 And what do we know about July 2015 in the
13 city of Milwaukee? What we know is that it was the most
14 violent month probably recorded in recent history.
15 Hundreds and hundreds and hundreds of shootings happened
16 in 2015. And it's all concentrated in about two
17 neighborhoods.

18 So is it bizarre on a Friday night, in July,
19 in the summer to have multiple shootings? Not at all.
20 And unfortunately, that's the sad reality of the city of
21 Milwaukee. Is that those neighborhoods experienced
22 constant shootings and robberies constantly.

23 And the officer told you when he goes to the
24 hospital he spoke to my client Michael Williams. And
25 told him exactly where he was. And exactly what

1 happened. And what do the police choose to do?
2 Nothing. No further investigation other than we know by
3 the CAD that they sent squads out to investigate. The
4 corner of Teutonia and Villard, CVS, McDonald's, gas
5 stations. We got no video. Nothing was obtained by the
6 police. Why? What don't they want you to know. And
7 why in the Hup's pizza video do they only put it for 14
8 minutes and 43 seconds?

9 If there was really a shooting there that
10 happened like they said at 6:45, it would have been on
11 that video and you would have seen. But they chose to
12 not get the rest of the video.

13 It doesn't make any sense why that would
14 happen. But that's what we know what they produced as
15 far as evidence.

16 But I think I know what the reason is in terms
17 of the lack of investigation on that scene on 54th
18 Street is because Detective Shannon Orvis came before
19 this jury and said, my bad, I got all this evidence. I
20 mean, how many pictures did we see? We were shown blood
21 and bullets, and including an investigation.

22 He didn't collect one blood sample. He didn't
23 submit one casing, one bullet. Nothing to the state
24 crime lab. Not a single thing.

25 And if that's all that this courtroom requires

1 at this point, ladies and gentlemen, we are abridging
2 the constitutional rights that we are guaranteed as
3 citizens of this country.

4 We require -- and I don't care if they're
5 busy, understaffed, not enough resources -- when you're
6 talking about shootings, those take priority for the
7 Milwaukee Police Department. That should be the
8 priority. You don't just say, oh, he said oversight. I
9 just forgot to do it. I forgot. The day of the scene,
10 I forgot to send technicians out to collect evidence.
11 It's not even a plausible explanation. That's
12 incompetence.

13 So now we know we have three times that we
14 need to be considerate of as it pertains to Michael
15 Williams. Tony Madison may very well be guilty as
16 alleged in here. But he's not sitting there. Michael
17 Williams is sitting there.

18 The only connection that the state could
19 possibly produce in terms of a connection between
20 Michael Williams and Tony Madison, Tiffany McAfee, who
21 clearly has some interest in protecting Tony Madison or
22 herself or whatever happened with her, but she says,
23 yeah, they showed her a picture of my client. Not a
24 lineup or a photo array, or anything like we talked
25 about earlier this morning. They showed her a picture

1 months ago and said you know this guy, right? She says
2 no, I don't know his name, I don't know who is, but I
3 saw him with Tony Madison once or twice at some unknown
4 time and some unknown location.

5 What's the other connection to Tony Madison?
6 The other connection is the worst witness I have
7 encountered in my time practicing law. This guy was
8 absolutely full of it. And how do we know he's full of
9 it. Besides the fact that he said that his brother's
10 enemy is my client, and the fact that he said my client
11 knew he was cooperating with the feds and then is going
12 to tell him information.

13 Most importantly, though, how would we know
14 who's full of it. Oh, I forgot to mention besides the
15 fact he's facing a gazillion years in prison and he's
16 trying to do whatever he can to get his own self out of
17 his own problems, he said that Fred Martin and Mike
18 Williams were so close that Mike Williams used to go
19 protect him when things would get taken from him.

20 So if you believe him and you believe the
21 state that that person you see on the video of the gas
22 station is Michael Williams, then how did they, Fred
23 Martin and Michael Williams, cross paths twice, go into
24 the same gas station together, and never realized that
25 this is this protector, his own protector he doesn't

1 recognize? It's preposterous.

2 And frankly, it shows desperation on their
3 part they would put someone like that and give him
4 credit for that, for coming into court to do what that
5 guy did.

6 This process is supposed to be fair. And if
7 the state is using guys like that to gain convictions on
8 circumstantial cases, something is wrong.

9 So that's the timeline. Okay. We've cleared
10 that. The timeline that the state has suggested to you
11 does not match up with the evidence.

12 And again, I want to be clear that it is their
13 job to do the investigation. It is the police
14 department's job to collect evidence. It's not Michael
15 Williams' job to come up here and prove anything to you.
16 And we've talked about that. And we'll get into that
17 more in a second.

18 Next, we've got Miguel Henderson. I don't
19 know what to make of Miguel Henderson. Was he involved
20 in some conspiracy to rob and kill Fred Martin? I don't
21 know. Was he his best friend or his good friend since
22 childhood? I don't know. But here's what I do know. I
23 know that his actions following the shooting of Fred
24 Martin do not make much sense.

25 Number one, he says he gets in the car to buy

1 some marijuana. Well, when we start looking at details,
2 the first thing he told police was \$10 of marijuana.
3 Then he came here and told you guys \$20 of marijuana.
4 He never has the marijuana. But the only reason he
5 leaves the scene is because he's concerned that he has
6 the marijuana on him. Except on direct examination,
7 when I asked did you lose anything, he said I lost my
8 sunglasses and I lost the marijuana. So why he left, I
9 don't know.

10 But what I do know is when he runs across the
11 street, he doesn't just come back and look for Fred like
12 he testified. Because the video is very clear that he
13 runs across the street, the black car that he came in
14 picks him up, and then a minute and a half to two
15 minutes later they come back. Why does he come back?
16 He thought Fred got out.

17 I specifically asked him, what did you think
18 happened to Fred? He said, oh, I thought he got away.
19 I didn't see where he went. So why is he coming back?

20 And then he gets in the car. Before he even
21 gets in the car he picks up something off the ground,
22 which we'll never know what that is. Was that a gun,
23 was that weed, was that money? I don't know. We don't
24 know. The video certainly isn't clear other than he
25 picks something up. And he gets in the car and leaves?

1 And what does he do? He doesn't go straight
2 to Fred's mom's house like he originally told detectives
3 before he came in here and said no, I actually went home
4 or to my mother's house, but he ends up on 39th off
5 Lisbon? Is that anywhere near Fred Martin's mother's
6 house? I don't know.

7 But what he told us is that the car just
8 stopped. Just cut out on him.

9 I'm going to show you a picture of what it
10 looks like when the car just cut out on him, if we have
11 one. Exhibit 14. It's parked. Does that look like a
12 car that shut off on him in the middle of the road?
13 Otherwise, he's a fantastic driver to park like that.

14 Well, we know that's not what happened because
15 he saw someone he knew, he pulled over, got out of the
16 car, parked it, and then he tried to restart it.
17 Because he didn't have a key, it didn't work. That's
18 what happened.

19 And then he goes into these people's house,
20 who he denied going into their house, but we know he
21 first told detectives that he goes into the house, and
22 he is there for ten to fifteen minutes until he's
23 alerted that the police are coming.

24 What does he do at that point if he's so
25 innocent and just a witness? He takes off again. He

1 goes out the back door and runs not to Fred Martin's
2 mother's house, but he runs home and changes clothes.

3 And how do we know he changed clothes?
4 Because when he shows up at the police station he was
5 not wearing what he was wearing on the scene. Why not?
6 Why change your clothes unless you've got something to
7 hide?

8 So Miguel Henderson goes to the police
9 department where he's interviewed on July 24. Gets
10 released. A few weeks later they bring him back. They
11 have him do some photo arrays. What does he do? He
12 does not pick Michael Williams out as being involved in
13 this homicide.

14 In fact, he doesn't even pick Tony Madison out
15 as being involved in the homicide that day. But the
16 very next day, on August 15, after he's been arrested
17 for providing false information and spending the night
18 in jail, he then picks Tony Madison out of a live
19 lineup. Picks him out as the shooter. That's what he
20 told police, and that's what was testified to when I
21 cross-examined him. That's who he identified as the
22 shooter.

23 But the problem for the state was at that
24 point it doesn't jive with their theory, so they discard
25 it like they're doing with the video and everything else

1 in this case in terms of physical or forensic evidence.
2 If it doesn't meet their theory, we're going to just
3 disregard it because we're going to show the jury what
4 we want them to see.

5 So that's the identification in this case.
6 Miguel Henderson's on the fourth try, fourth try is when
7 he identifies the right shooter. And that's what the
8 state wants you to believe today.

9 Then we've got Dave Stewart and Don Ward. And
10 those two guys, they're minding their own business.
11 They've got to deal with horrible stuff that's happening
12 in their neighborhood. That they've got to live with,
13 that they've got to deal with shootings on a regular
14 basis. And what do they do? They come in here and tell
15 what they remembered. And the state -- they're the
16 state's witnesses.

17 The state then brings in Lori Borchert to
18 impeach them. And what was the impeachment? Let's talk
19 about that.

20 Mr. Ward says young guy, wearing camouflaged
21 pants, 22, wasn't limping. And I'm going to get the
22 limping in a second. And he had on what I thought were
23 camouflaged pants, a white wife beater shirt, and short
24 dreadlocks. He was 22 or a younger.

25 And Mr. Stewart also agreed that he couldn't

1 remember what the clothes were at all, but he remembered
2 the guy being young, 25 or under, okay?

3 The other thing is the guy that they see
4 despite that they live a little bit north, they also
5 live west.

6 And the other thing is with what Sergeant
7 Grimm said about jumping over the fence -- which I think
8 was actually stricken testimony but it's been repeated
9 -- watch the video. And you'll see Hup's video is
10 focused right at that fence. There's two angles. One
11 that covers the driveway, one that covers the driveway
12 of the house. You never see someone go over that fence.

13 Moreover, 55th Street is west. My client is
14 found two miles east, and he's in the spot that is
15 called upon. He doesn't just magically, after being
16 shot in the penis, through the hip, get two miles away
17 on foot on a Friday night and not one single person
18 offers to help, calls 911. Nothing. That's just not
19 reasonable.

20 And why isn't it reasonable? Because the fact
21 is, he was shot on Teutonia and Villard. And the whole
22 theme of this case for the state has been to turn every
23 single person into a suspect. Every single person.

24 Miguel Henderson. We don't believe you.
25 We're going to arrest you. Maybe he was not involved.

1 What if he was just a witness. He's been arrested
2 twice. Dragged to court. Interviewed four or five
3 times. They don't believe him.

4 Mike Williams tells officers, hey, I called
5 911 -- or ShotSpotter goes off. They know from the CAD
6 that the witness says that he's being conveyed to the
7 hospital by private vehicle, probably because every
8 ambulance in town was already busy at the other scenes
9 that are going on in town. And they don't believe him.
10 You've got camouflaged pants on. That means you've got
11 to be the guy involved in a homicide that happened in a
12 totally separate part of town. They are Levis pants.
13 They can be bought at any single store that sells Levis
14 pants. Internet, Cabela's, Target, Kohl's, name a
15 place.

16 This is not like he had on a shirt like Tony
17 Madison's. That is, I will agree, unique. Which is why
18 I think Tony Madison may very well be involved. But
19 that doesn't then attribute to my client just because
20 he's got camouflaged pants on.

21 Where are the pink sunglasses? Where is the
22 green shirt? Where is the black shoes? You don't see
23 any of that. And nobody found anything to suggest that
24 he tossed it all.

25 And I know what the state's going to argue.

1 The state's going to argue he tossed it all, but I
2 forgot to toss the lighter, so therefore he must be,
3 must be, must be the same pants. That's what they're
4 going to argue. I'm pretty sure of that. That's why he
5 keeps mentioning the lighter.

6 The only thing is if you listen to the
7 statement that my client gave detectives is he said was
8 smoking a blunt. The only thing you can light a blunt
9 with is a lighter. So that doesn't prove anything.

10 I would implore you to disregard that
11 trickery.

12 Lori Borchert, when she came to testify that
13 what Don Ward had told her, she said, oh, I would have
14 remembered that he said, short dreads. I would have put
15 that in my report. Then when I crossed her on it, she
16 had previously testified that she remembered him telling
17 her that he had short hair. And then I said would you
18 look at your report. She didn't find anything about
19 hair in it. She just missed that detail at the
20 convenience of the state during this trial.

21 Now Shannon Orvis. I think I mentioned it
22 already, but I've got to say it again. How can you be
23 in charge of a scene and not process evidence. This is
24 a homicide.

25 We know based on Professor White that mistaken

1 identifications are the leading cause of wrongful
2 convictions. They are obligated in 2015 to use forensic
3 science. It is available to them. There is the
4 Wisconsin crime lab. Detective Pajot actually sent some
5 items to the crime lab. The only problem is he sent
6 items that really they could have watched the video to
7 determine what those are with the exception of the
8 bullet, which we never got any sort of confirmation
9 where that bullet came from. Was it involved in the
10 homicide? We have no idea.

11 We don't know if there was any casings that
12 weren't found because they didn't -- to my knowledge,
13 have a dog out there to look for casings that maybe came
14 from a different spot. They just came up with a theory,
15 and then they followed that theory. And evidence that
16 didn't mesh with their theory was discarded, were not
17 followed up on.

18 Detective Keller. Detective Keller, on
19 October 6, interviews a man named Edward Kemp who says
20 he was at the gas station at the time of the shooting
21 with Robin Kemp, his brother, I presume, or somebody,
22 and one other individual in a red Expedition or
23 Explorer. I submit to you that when that interview was
24 taking place in October, that Edward Kemp had no idea
25 that the suspect vehicle was a red Expedition or

1 Explorer, and the fact that Detective Keller just let
2 that go, what if those were the two guys that were Tony
3 Madison? Is that a theory that doesn't cross their
4 mind?

5 Or that they're so focused on what they
6 believe and their theory makes sense that we're going to
7 disregard potentially the people that were involved in
8 this homicide, just disregard it.

9 Not even have like a follow-up. Maybe go talk
10 to Robin Kemp, or maybe ask a few more questions like
11 something about the vehicle. Anything else? You know,
12 trying to get some information out of them? No. We'll
13 just take what he says that they left. No problem.

14 The other thing about the state's
15 disingenuously saying that Don Ward and Dave Stewart saw
16 my client as the guy in the camouflaged pants is both of
17 them got on the stand. Neither of them identified my
18 client. Neither of them. Not one of them.

19 Now, we know a few things. A hundred percent
20 my client was shot on July 24. And when he came to the
21 hospital, he was wearing camouflaged pants. I don't
22 dispute that. He doesn't dispute that. That is not
23 what is at issue here.

24 The issue is, is the guy that's seen on camera
25 wearing camouflaged pants -- because I tend to agree

1 with the state on this. I don't know if that guy is the
2 shooter that we see on camera, but I think he's involved
3 in something. I mean, his behavior is bizarre in terms
4 of following the guy out to his car and opening the back
5 door.

6 The problem is his theory and speculation are
7 all well and good when you want to charge someone with a
8 crime. The problem is when we get to this point, there
9 is no more speculating. There is no more guessing.
10 There is no more maybe it was him. It might have been
11 him. I think it was him. That's all done. They need
12 to have proof beyond a reasonable doubt.

13 And frankly, Detective Orvis to come in here
14 and say he just forgot, it was year and a half later,
15 what has he been doing for a year and a half? Why not
16 follow up on anything over the last year and a half?

17 It's mind boggling. It's an embarrassment for
18 the Milwaukee Police Department if this is how they're
19 handling homicide investigations.

20 Excuse me, how am I doing on time, Your Honor?

21 THE COURT: As well as the state.

22 MR. LEVINE: Okay. The state gets a rebuttal.
23 I don't, so you guys only get to hear from me once. And
24 I'm trying not to be as longwinded. And I am almost
25 done. But this is the only chance that I get to talk.

1 And the state is going to rebut everything I say, and so
2 I want you to remember what I'm saying. So this is my
3 one and only opportunity to talk to you.

4 All right. I'm getting done here.

5 So no gun. Never see one. No DNA or any
6 forensic evidence of any kind, whether that be
7 fingerprints, hair samples, sweat, whatever it is,
8 nothing attributes my client to either scene at 54th
9 Street or at the gas station.

10 The identification. Not reliable. Phone
11 records, DMV records, surveillance, anything you could
12 imagine that you would want to see in a criminal trial
13 didn't happen in this case.

14 We have no history about that red truck. Who
15 is the owner? When was it purchased? Who is it
16 registered to? What was the VIN number? Was it the
17 same car? It looks like the same car, but they never
18 actually did anything to prove that it's the same car.

19 And while I agree that it looks very similar,
20 my opinion doesn't matter. Opinions don't matter under
21 these circumstances. This is not about an opinion or
22 theory. They have an obligation to prove allegations.

23 They didn't test clothing for gunshot residue.
24 They didn't test that hat that they found. They didn't
25 -- essentially, what they did, they preserved a scene.

1 This wasn't investigation, this was scene preservation.
2 And they let it go. And its unfortunate because
3 everybody loses when they don't do their job.

4 Mr. Martin's family isn't going to get the
5 answers that they deserve. And they're going to be
6 wondering did they get the right person? Did they do
7 the right thing? And they deserve more than that,
8 frankly.

9 And I would be angry if I were them if this is
10 how their son's death was treated. Neglect.

11 So I was asking myself as I'm preparing, what?
12 Why? Was it just oversight? Was it under resources?
13 Or did they simply just not care anymore.

14 And I think a lot of people in our society
15 have forgotten about people that live in these
16 neighborhoods, and what they have to deal with, and
17 whether or not they're worth the time. And I really
18 think that's what happened here. I think that nobody
19 really cared.

20 This was some petty drug dealer that got shot
21 doing nefarious things with various people like everyone
22 that we've had the last three months. It's unfortunate.
23 And it's sad.

24 They didn't even confirm that the car key
25 found on him was the Toyota that was found on 39th

1 Street. They didn't even confirm the key. And I'm not
2 saying it wasn't the key. I'm just saying all you've
3 got to do is test it. Test it. Just make sure. That's
4 all you've got to do. Even that was too much.

5 Now, despite all the loss that has come in
6 this case, and in a homicide case in general, you have
7 the victim's loss of life, the victim's pain and
8 suffering. My client has been accused of this crime.
9 His family who's got to lose a loved one to this
10 process. But none of us can lose our constitutional
11 rights. None of us.

12 And that has been the central theme of my case
13 to you. And what you as jurors or as prospective jurors
14 confirmed to me that you would follow the constitution
15 and uphold those rights that we hold so sacred to us.

16 He had -- he has a right to an attorney. And
17 hopefully I have been a competent attorney because I've
18 certainly tried my best to represent him to the best of
19 my ability. He's entitled to a fair and impartial jury
20 to hear the case. That would be you guys. And you all
21 told me that you would come in here and do that job.

22 And he's entitled to the presumption of
23 innocence from the start and until the finish. And only
24 if the state proves by evidence. And I'm going to say
25 that again. Evidence, proof beyond a reasonable doubt,

1 could you find him anything but not guilty?

2 And the last point I want to make is as it
3 relates to the reasonable doubt instruction. The
4 state's going to come up here in rebuttal, and they're
5 going to argue one snippet of this instruction. And
6 here's what he's going to argue to you. He's going to
7 argue that you are to search for the truth and not
8 search for doubt. And while the instruction certainly
9 says that, it is but one snippet of a much larger
10 instruction. And it does not say you must find truth.
11 And it does not say you will find it. And it does not
12 say that a jury in this case can find it. And that's
13 the truth.

14 And the truth is that we simply don't know
15 what happened. We don't have concrete evidence that
16 tells us what happened to Fred Martin on that day. I'm
17 asking you to find my client not guilty.

18 Hold the state to their burden of proof.
19 Preserve the integrity of this system and don't let
20 desperate attempts like putting Antoine Jackson on the
21 stand convince you that my client did anything other
22 than get shot on July 24 on Teutonia and Villard.

23 Thank you.

24 THE COURT: Your short rebuttal.

25 MR. HAYES: Yes, Judge.

1 So as Mr. Levine pointed out the way this
2 works, because the state carries the burden of proof, it
3 has to prove these charges, we get to speak last. So I
4 don't have a ton to say.

5 The thrust of Mr. Levine's remarks, that's a
6 -- kind of a moldy, old ratty defense that we sometimes
7 see when the defense has no good facts.

8 MR. LEVINE: Objection, Your Honor. Can we be
9 heard sidebar.

10 (Whereupon, a discussion between the parties
11 and the Court was had off the record at sidebar.)

12 THE COURT: Go ahead.

13 MR. HAYES: Right. So the argument from Mr.
14 Levine is that the police did a bad job, and they're
15 incompetent, and you should be all riled up and angry at
16 the police, and you should punish the police for their
17 crummy work by finding the defendant not guilty. That's
18 essentially the thrust of the argument.

19 No answer for the red truck you see in the
20 homicide video and the red truck that you see at
21 McAffee's house on 54th Street. No answer for that.

22 No answer for the fact that Tiffany McAffee
23 knows Tony Madison. And that Tony Madison's minivan is
24 blocking the red truck with the Streff Auto Group plate
25 and with the adhesive square on it in the driveway. No

1 answer for that.

2 No answer for the fact that Tony Madison is
3 found a few blocks from the 54th Street dressed in the
4 tricolored hooded sweatshirt which you can see the
5 driver wearing in the homicide scene video.

6 And no answer for the fact that Tiffany
7 McAfee told the police that Tony Madison hangs out or
8 has hung out with the defendant Mike Williams on prior
9 occasions. And Mike Williams turns up shot wearing
10 these camouflaged pants which you see the man wearing in
11 the homicide video. No answer for any of that.

12 It's just the police are bad, and they don't
13 know how to investigate a scene, and the real culprit
14 got away.

15 There's this -- this phantom scene at Teutonia
16 and Villard, Detective Orvis -- or Sergeant Grimm,
17 rather, told you there were no casings found. There
18 were no bullet strikes. No blood evidence. No video
19 evidence showing there ever was a scene at that
20 location. If you look at the CAD report for the
21 Teutonia and Villard call, there was one caller. One
22 caller calls that thing in, and there's no contact
23 information.

24 And remember what Antoine Jackson told you.
25 He testified that the defendant Mike Williams confessed

1 to him that he used his wife to essentially manufacture
2 a fake shooting scene by taking him to a different
3 location and shooting his gun off a couple of times and
4 then he bamboozled her into getting rid of the gun.

5 And we see the St. Joe's Hospital video, and
6 there's the defendant Mike Williams showing up in the
7 bloody camouflaged pants, missing his shirt and missing
8 his shoes, and he's with her and him.

9 That's awfully coincidental that Antoine
10 Jackson would claim that the defendant told him that he
11 got picked up by his wife, and that he had his wife get
12 rid of the gun, and then he shows up at the hospital
13 with this lady.

14 The basic ideas are that the homicide happens
15 at 6:30 at 9th and Center. The video is what it is.
16 The video clearly shows you there's one red truck that's
17 pertinent to the investigation, and that's the red truck
18 that's later found four miles away in Tiffany McAfee's
19 driveway.

20 There's no second red truck. There's just
21 that red truck. That's what the video shows.

22 You watched Tiffany McAfee testify, you
23 watched Miguel Henderson testify, and you watched
24 Antoine Jackson testify. And it's for you to decide if
25 they told you the truth or if you should believe them,

1 or if you can credit anything they have to say. That's
2 your job. And it's your right, okay.

3 So I'm not going to stand up here and argue
4 that they're telling the truth or they weren't because
5 that's your job.

6 But the interesting thing about the case is
7 you can analyze it and reason your way to a conclusion
8 even without all that stuff based solely on the video
9 and the cars and the clothing.

10 Because the defendant Mike Williams is either
11 the murderer, he's either the guy in the camo pants in
12 the gas station video who opens up the rear passenger
13 side door of Fred's Toyota Venza and leans in, and
14 shoots and kills him, or he is the unluckiest man in the
15 world who just happened to get shot the same night that
16 his associate Tony Madison did. And he happens to be
17 wearing the same clothes that we see in the murder video
18 and that Mr. Stewart observed and Mr. Ward observed the
19 gunshot victim wearing that they saw. He's either
20 guilty or he's the absolute unluckiest guy in the world.

21 I think if you take a look at all the
22 evidence, and you look at the videos, and you look at
23 the photographs, and you piece together the levels of
24 circumstantial proof and connect the dots and put it all
25 together, there's no other conclusion that you can draw

1 other than that Mike Williams was involved in this
2 homicide. He either directly did it, or he aided and
3 abetted another person in the doing of the crime. And
4 he's therefore guilty. And you should return verdicts
5 of guilty as to Count 1 and Count 2.

6 Thank you.

7 THE COURT: Thank you.

8 Members of the jury, I'm about to submit the
9 case to you for your serious deliberation. Consider the
10 case fairly and honestly, impartially, in light of
11 reason and common sense. Free your minds of all
12 feelings of sympathy, bias or prejudice.

13 Consider carefully the arguments of the
14 attorneys, but I remind you that their arguments and
15 opinions are not evidence.

16 Draw your own conclusions and inferences from
17 the evidence and decide upon your verdicts according to
18 the evidence and the instructions given to you by the
19 Court.

20 Let me make something -- there's another
21 instruction. And that is that the burden of proof --
22 you should read the burden of proof. The Court's going
23 to give that to you. The burden of proof is entirely on
24 the State of Wisconsin. And the defense can just -- do
25 nothing. The elements have to be proved by the state

1 beyond a reasonable doubt.

2 Let the verdicts speak the truth, whatever the
3 truth might be.

4 Justice through trial by jury depends upon the
5 willingness of each of you to seek the truth as to the
6 facts and the same evidence presented to all of you and
7 to arrive at a verdict applying the rules of law as
8 given in the instructions of the Court.

9 As I stated earlier, some of those
10 instructions will be given to you to take back with you
11 during your deliberations.

12 Let me tell you what these verdicts are.

13 The verdicts are:

14 We, the jury, find the defendant, Michael
15 Williams, guilty of first-degree intentional homicide as
16 a party to a crime, as charged in the information.

17 Did the defendant commit the crime of
18 first-degree intentional homicide while using a
19 dangerous weapon? Yes or no. Signed by the foreperson.

20 That should have said:

21 We, the jury, find Michael Williams guilty of
22 first-degree intentional homicide. That's the verdict.

23 Or:

24 We, the jury, find the defendant guilty of a
25 lesser included offense of first-degree reckless

1 homicide as a party to a crime.

2 And did the defendant commit the offense of
3 first-degree reckless homicide while using a dangerous
4 weapon? Yes or no. Signed by the foreperson.

5 Or:

6 We, the jury, find the defendant, Michael
7 Williams, not guilty of a homicide as charged in the
8 information. Dated and signed.

9 The second verdict applies to the felon in
10 possession.

11 We, the jury, find the defendant, Michael
12 Williams, guilty of possession of a firearm by a felon
13 as charged in count -- charged in the information.
14 Dated and signed.

15 Or:

16 We, the jury, find the defendant not guilty of
17 possession of a firearm by a felon as charged in the
18 information.

19 It's up to you to determine whether the
20 defendant is guilty of one, and/or two, or none of the
21 offenses charged.

22 You must make a finding of guilt or innocence
23 as to each count of the information. Each count charges
24 a separate crime, and you must consider each one
25 separately.

1 The defendant's guilt or innocence of the
2 crime charged in one count must not affect your verdict
3 on the other count.

4 As I said to you -- and I said to you, for
5 your assistance and convenience, some of those
6 instructions will be given to you to take back with you
7 during your deliberations.

8 This is a criminal case, not a civil case;
9 therefore, before a jury may return a verdict which may
10 legally be received, such verdict must be reached
11 unanimously. In a criminal case, all twelve jurors must
12 agree in order to arrive at a verdict.

13 Any communications to me must be made in
14 writing and given to one of the deputies.

15 When you retire to the jury room, select one
16 of your members to preside over your deliberations. His
17 or her vote is entitled to no greater weight than that
18 of any other juror.

19 When you've agreed upon your verdicts, the
20 foreperson will sign it and date it, and all of you will
21 return to the courtroom with those verdicts.

22 On one of those substantive instructions,
23 which is the felon in possession instruction, one of the
24 last sentences was deleted, so I filled it in by
25 printing. It should be there, okay?

1 And it's the jury's decision. If you are
2 satisfied beyond a reasonable doubt that both elements
3 of this offense have been proved, you should find the
4 defendant guilty.

5 If you're not so satisfied, you must find the
6 defendant not guilty.

7 You'll see that in the instruction. It's just
8 deleted by chance because it was the end of a page.

9 So that concludes the trial. You can swear
10 the bailiffs.

11 (Deputies sworn to preside over the jury
12 panel.)

13 (Jurors excused.)

14 THE COURT: Okay. There was an objection that
15 was made during the course of the closing by the
16 rebuttal by the state. And that was the defense
17 preserved its right for a -- asking for a mistrial
18 because of what was said during the course of -- during
19 the state's argument.

20 And that was that the defense believed that
21 there's a shift of burden to the defense?

22 MR. LEVINE: That is correct.

23 THE COURT: And the state apologized for it.
24 If that's what they -- that was said.

25 And what the Court did, as you could see, the

1 Court gave a curative instruction because the Court
2 doesn't believe, based upon the instructions that the
3 Court gave previously, that the comments of the
4 attorneys are not -- are not the facts, and their
5 opinions.

6 But in light of the whole proceeding, the
7 Court doesn't find it was sufficient or prejudicial to
8 warrant a mistrial because the Court doesn't believe
9 there was a manifest in justice.

10 And the fact is that the Court gave a curative
11 instruction as one of the alternative -- a curative
12 instruction to disregard that.

13 So that's how the Court dealt with it.

14 MR. HAYES: And just so I'm clear, Your Honor,
15 the specific thing that the defense objected to was the
16 state's use of the word *defense*; is that correct?

17 THE COURT: Yes. Something of that.

18 MR. HAYES: Which I then simply substituted
19 out for the word *argument*.

20 THE COURT: But that's -- that's what
21 occurred. So the Court's going to deny the motion for a
22 mistrial. The Court gave a curative instruction. And
23 it's an instruction that permeates the entire
24 instruction process, so as the Court states regardless
25 throughout the course of the trial.

1 And it was said at the beginning of the trial
2 that the burden of proof is entirely on the state. So
3 the Court believes that the issue's been resolved in
4 that fashion. Okay.

5 MR. LEVINE: Judge, one other issue is that I
6 had reserved the right to argue a motion post-closing or
7 once I rested.

8 THE COURT: So like, go ahead. Yes, that's
9 correct.

10 MR. LEVINE: Thank you.

11 THE COURT: Yes.

12 MR. LEVINE: At this time I am moving for a
13 judgment of acquittal based on the evidence that no
14 reasonable juror could convict the defendant guilty
15 beyond a reasonable doubt.

16 At this point, Judge, it is no longer looking
17 at the evidence in the light most favorable to the
18 government, and based on the evidence and testimony as
19 it's come in, it is my position that no reasonable juror
20 could convict.

21 THE COURT: Do you want to --

22 MR. HAYES: Well, I don't think that was borne
23 out in the first trial where nearly a unanimous verdict
24 was reached. And I don't think that could be -- I don't
25 think that's a rational conclusion.

CERTIFICATION OF COMPLIANCE WITH
WIS. STAT. § (RULE) 809.19(13)(f)

In accordance with Wis. Stat. § (Rule) 809.19(13)(f), I hereby certify that I have submitted an electronic copy of this Petitioner's Appendix via the Wisconsin Appellate Court eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(13). I further certify that the content of the electronic copy of this Petitioner's Appendix is identical to the content of the paper copy of the Petitioner's Appendix. A copy of this certification will be served with the paper copies of this Petitioner's Appendix to be filed with the court and served on all opposing parties.

Dated this 4th day of March, 2020.

PINIX & SOUKUP, LLC
Attorneys for the Petitioner


By: Matthew S. Pinix, SBN 1064368