STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2012AP1398-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW R. BALLENGER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE JOHN R. RACE, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. In its view, the parties' briefs adequately set forth the relevant facts and applicable law. Publication is also unnecessary because the issues presented can be resolved by applying established legal principles to the facts.

STATEMENT OF THE CASE

Facts additional to those presented in defendant-appellant Andrew Ballenger's brief will be discussed in the Argument section below.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE EVIDENCE WAS SUFFICIENT TO CONVICT BALLENGER OF ARMED ROBBERY AS A PARTY TO A CRIME.

Ballenger first argues that the evidence was insufficient to sustain the jury's guilty verdict as a party to the crime of armed robbery because there was no evidence that Ballenger had knowledge of the armed robbery at the Delavan Domino's Pizza before it occurred (Ballenger's brief at 13-16).

Viewed in the light most favorable to support the conviction, the evidence was sufficient. Ballenger admitted being a knowing part of the final portion of the robbery. Moreover, the evidence was sufficient to permit the jury to infer that Ballenger was lying when he told police that he lacked prior knowledge of the robbery.

A. Introduction.

On June 12, 2009, at a Domino's Pizza store in Delavan, a man walked into the manager's office while wearing a hooded sweatshirt and a bandana across his face (47:96-99). The man pointed a gun at the two employees in the office, who were counting out money for the next day's operations (47:99-100). He demanded that they put the money in a backpack that he had brought (47:99). The employees complied, and the robber left (47:100).

On June 30, 2009, Kenosha police questioned Ballenger about the Delavan Domino's robbery as well as

a series of other similar armed robberies that had occurred in various gas stations and pizza restaurants in Kenosha and Walworth counties (51:Exhs. S-4, S-5; R-Ap. 131-76). Ballenger acknowledged that he was involved, beginning in May of that year, in several of those robberies with Terrence Walker, Michael Boyle, and others (51:Exh. S-5:31; R-Ap. 161).

As for his general involvement in the robberies, Ballenger acknowledged that he made entries in a black book tabulating the money that the group brought in (51:Exh. S-5:6; R-Ap. 136). He also told police that his role was for "information" such as how to hold a gun properly and how to fight (51:Exh. S-5:45; R-Ap. 175). Nevertheless, during the interview, Ballenger consistently minimized his involvement in the robberies, stating that he only heard of several after they occurred or maintaining that his role in the group was simply to provide information and instruction. *E.g.*, 51:Exh. S-5:2; R-Ap. 132 (stating that he "pretty much sat in the truck" for the robberies); 51:Exh. S-5:3-4; R-Ap. 133-34 (stating that the others robbed a Domino's in Antioch while he was just hanging out); 51:Exh. S-5:16; R-Ap. 146 (stating that he would never carry or touch the backpack of loot).

Ballenger's minimizations backfired at times. At least once, police caught Ballenger in a lie after he claimed multiple times that he had never entered a gas station that the group robbed (51:Exh. S-5:6-8; R-Ap. 136-38). Police then presented him with a security camera photo of him in a gas station in Union Grove holding a pipe (51:Exh. S-5:8-9; R-Ap. 138-39). Ballenger backpedalled, claiming that he sometimes blocked things out due to stress, and that yes, that was him in the photograph assisting in the Union Grove robbery (*id.*).

In addition to the Union Grove robbery, Ballenger admitted involvement in the following robberies:

- At a Kwik Trip in Kenosha, Ballenger admitted that he drove the car and dropped off and picked up Walker, who robbed the Kwik Trip (51:Exh. S-5:15-16; R-Ap. 145-46).

- At a Citgo in Salem, Ballenger also drove the car and received $100 (51:Exh. S-5:18-20; R-Ap. 148-50).

- At a Domino's Pizza in Antioch, Ballenger rode in the getaway vehicle with Boyle (51:Exh. S-5:3, 32; R-Ap. 133, 162).

- At a Domino's Pizza in Burlington, Ballenger was in the car while the group considered robbing the store (51:Exh. S-5:22; R-Ap. 152). According to police, at least one of their party did go in to try to rob the restaurant, but the manager shut the office door and the person or persons then left without taking anything (51:Exh. S-5:23; R-Ap. 153).

As for the Domino's Pizza in Delavan on June 12, 2009, Ballenger stated that on that night, Boyle suggested that Ballenger and Walker go with him to a Walmart in Delavan to buy wiper fluid[1] (51:Exh. S-5:29; R-Ap. 159). Boyle parked the car at the far end of the Walmart parking lot among cars for sale; a satellite image of the lot showed that that area was closer to the back door of the Domino's than it was to the front of Walmart (51:Exhs. S-2, S-5:27, 29; R-App. 130, 157, 159). According to Ballenger, Walker remained in the truck while Boyle and Ballenger went to Walmart (51:Exh. S-5:27; R-Ap. 157). While Boyle and Ballenger were in the store, Walker called a cell phone that Ballenger was carrying and told them that they had to leave immediately, at which point Ballenger said that he realized that "[s]omething must have happened" (51:Exh. S-5:29; R-Ap. 159). He knew that

[1] According to the criminal complaint, Ballenger lived in Twin Lakes, Wisconsin (1).

Walker robbed the Domino's when he came out of the Walmart and saw the police arriving (51:Exh. S-5:27, 29; R-Ap. 157, 159).

Boyle and Ballenger met Walker at the car, at which point Walker directed them to drive by a nearby dumpster to retrieve the backpack with the money (51:Exhs. S-2, S-5:29; R-Ap. 130, 159). When Walker ran from the car to retrieve the bag, Ballenger said that he and Boyle yelled at Walker for being foolish because police cars had begun arriving (*id.*). Ballenger also witnessed Walker counting the money after he retrieved it (*id.*). Ballenger maintained that he did not know about the armed robbery until "after it happened" when Walker called him in Walmart (*id.*).

After a trial, a jury found Ballenger guilty of armed robbery as a party to a crime of the Delavan Domino's (27).

B. Standard of review.

In *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990), the supreme court explained the deferential standard of review for a challenge to the sufficiency of the evidence to support a conviction:

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

(Citations omitted.)

The trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of

weighing the evidence. *See id.* at 506. In other words, it is exclusively within the trier of fact's province to decide which evidence is worthy of belief, which is not, and to resolve any conflicts. *Id*. Moreover, when more than one inference can reasonably be drawn from the evidence, the reviewing court must follow the inference that supports the trier of fact's verdict. *Id.* at 506-07.

Accordingly, "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully[]established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

> It is vitally important to maintain this standard of review. An appellate court should not sit as a jury making findings of fact and applying the hypothesis of innocence rule de novo to the evidence presented at trial.

State v. Watkins, 2002 WI 101, ¶77, 255 Wis. 2d 265, 647 N.W.2d 244 (citing *Poellinger*, 153 Wis. 2d at 505-06).

C. Elements of party-to-a-crime liability.

Ballenger concedes that the evidence is sufficient to demonstrate that an armed robbery occurred. His argument is that the evidence was insufficient to support his conviction under a party-to-a-crime theory.

Wisconsin Stat. § 939.05(2) provides, in part, that a person is concerned in the commission of a crime if he intentionally aids and abets in the crime's commission or is "a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it." To convict a defendant as a party to a crime, the State must prove by evidence satisfying the jury beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of the crime or was a

member of a conspiracy to commit the crime. Wis. JI-Criminal 401 (2005).

The Wisconsin Jury Instructions provide a definition of aiding and abetting:

> A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either:
>
> - assists the person who commits the crime; or
>
> - is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

Wis. JI-Criminal 401 (2005). "However, a person does not aid and abet if he is only a bystander or spectator and does nothing to assist the commission of a crime." *Id.*

The instructions further define being a member of a conspiracy, in part:

> A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins another for the purpose of committing that crime. A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose.

Id. (footnote omitted).

D. Viewed in the light most favorable to the State, the evidence is sufficient to support the guilty verdict on the charge of armed robbery as party to a crime.

Here, the evidence viewed in the light most favorable to the State supports the jury's finding that Ballenger either aided and abetted in the commission of the armed robbery or conspired with others for the

purpose of committing the crime. The jury heard significant evidence supporting the finding that Ballenger was a party to the Delavan Domino's robbery. To summarize from the facts discussed above in Part I.A:

- Ballenger admitted to direct involvement with a group of people in at least five other similar armed robberies at gas stations and Domino's Pizza outlets in the months leading to the Delavan robbery, including entering a gas station with a pipe and riding in or driving a getaway car.

- Ballenger, during the police interview, consistently minimized his involvement in the robberies, at one point reversing himself on a lie when confronted with a photograph of himself committing a robbery in Union Grove.

- Ballenger admitted to general involvement with the group by being available to provide information, such as how to fight or how to hold a gun, by keeping track of the robbery proceeds, and by receiving proceeds from some robberies.

- Ballenger acknowledged that when he answered Walker's call, he understood that Walker had committed a robbery. He and Boyle then left Walmart and met Walker at the car and assisted him in retrieving the stolen money and warning him of police entering the parking lot.

- Despite ostensibly driving from Twin Lakes to the Delavan Walmart for wiper fluid, Ballenger and Boyle parked the car closer to the Domino's back entrance than to the Walmart and Ballenger did not indicate that he thought it odd that Walker did not join them in Walmart.

Taken together, that evidence supports the inference that Ballenger was a party to the Delavan robbery. As an initial matter, Ballenger admitted general

involvement with the group to commit robberies and acknowledged that he received money from some of the crimes. The Delavan robbery was similar in execution to other robberies in which Ballenger was involved.

To that end, Ballenger acknowledged that he understood that Walker had committed a robbery when Walker called him. Rather than refuse to join Walker and Boyle at the car, he actively participated in the crime by going to the car, riding to the location where Walker hid the backpack, and warning Walker of the police presence. Contrary to Ballenger's argument (Ballenger's brief at 16), the robbery was not complete at that point—Ballenger admittedly participated in Walker's efforts to leave the scene with the stolen money. His role would have been no different had he been sitting in the car, Walker jumped in with the money, and told Ballenger or Boyle to drive away, a role Wisconsin courts have long held to qualify as a party to the crime of armed robbery. *See Carter v. State*, 27 Wis. 2d 451, 455, 134 N.W.2d 444 (1965) (serving as lookout or getaway car driver can make the actor party to a crime).

Finally, looking at the evidence in the light most favorable to the State, the jury was entitled to find that Ballenger was lying about his lack of knowledge of the robbery, given the unlikelihood that Ballenger and two of his friends with whom he had participated in past robberies simply (1) decided to drive to a Walmart in a different county to purchase a common item, (2) then decided to park far from the Walmart but relatively proximate to the back door of a Domino's store, and (3) while two went into the Walmart, a third member of their party, on his own initiative, put on dark clothing and a bandana and took a gun into the Domino's to rob it, despite knowing that his getaway car drivers were in Walmart and were not likely expecting an urgent call from him. That illogical scenario, taken with Ballenger's minimizations and shifting versions of the truth during the police interview, entitled the jury to infer that he was lying

when he said that he was unaware of the plan to rob the Delavan Domino's that night.

Ballenger's arguments to the contrary are essentially premised on the notion that the jury had to believe Ballenger's denial of knowledge of the robbery. *See* Ballenger's brief at 15-16. That position cannot succeed, given that this court views facts in the light most favorable to the State and the conviction and the jury is entitled to disbelieve Ballenger in its credibility determination.

In addition, Ballenger argues that he cannot be a party to the crime because he was not an active participant in the crime (Ballenger's brief at 15-16). As explained above, Ballenger was active in the robbery by helping Walker retrieve the bag of stolen money. And, as explained above, the jury was entitled to believe that Ballenger knew about the robbery plan before or as it was occurring.

In sum, the evidence was sufficient to support the jury's verdict of party-to-a-crime liability. Ballenger is not entitled to relief on this ground.

II. BALLENGER FORFEITED HIS CHALLENGE TO THE JURY INSTRUCTIONS.

Ballenger next argues that the jury instructions were erroneous such that they possibly confused the jury (1) into finding Ballenger guilty of committing an armed robbery, not necessarily the Delavan Domino's armed robbery, or (2) into finding that Ballenger was a party to armed robbery by a person or persons with whom he was not aiding and abetting or conspiring (Ballenger's brief at 17-22). Ballenger concedes that his counsel did not raise the issue at trial, but argues that this court should nevertheless reach the merits of his argument because the error was "plain" and affected his "fundamental rights" (Ballenger's brief at 18-22).

Wisconsin Stat. § 805.13(3) provides, in part, that counsel's failure to object to a jury instruction during the instruction conference forfeits any claim of error.[2] *See also State v. Pask*, 2010 WI App 53, ¶9, 324 Wis. 2d 555, 781 N.W.2d 751 (stating that a defendant must object to a proposed jury instruction at trial to preserve the right to appellate review of any alleged error in that instruction). The purpose of the forfeiture rule is one of judicial economy and fairness:

> [It] is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

State v. Ndina, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (footnotes omitted). Here, Ballenger admits that his counsel told the court that he had no objection to the instructions provided; accordingly, he forfeited his right to appellate review of the merits of this issue.

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[2] The statute uses the word "waiver" to describe the effect of counsel's failure to object. The Wisconsin Supreme Court has more recently distinguished between the concept of waiver and forfeiture in *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612: "'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" (Quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

Despite the use of the word "waiver" in Wis. Stat. § 805.13(3), forfeiture is the applicable concept in the context of the failure to object to a jury instruction. *Best Price Plumbing, Inc. v. Erie Ins. Exchange*, 2012 WI 44, ¶37 n.11, 340 Wis. 2d 307, 814 N.W.2d 419.

Ballenger argues that this court should evaluate the merits of his position under the "plain error" rule and suggests that the error here has constitutional magnitude (Ballenger's brief at 18-22). As an initial matter, Ballenger fails to identify exactly which instructions he quibbles with by quoting them directly or citing to the appropriate portion of the record in which they appear. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (this court may decline to address issues inadequately briefed). Similarly, Ballenger's constitutional argument amounts to simply stating that the error impacted his "fundamental rights" (Ballenger's brief at 18-19). *See id.* Finally, the "plain error" rule is not an exception to the forfeiture rule in Wis. Stat. § 805.13(3). *State v. Damon*, 140 Wis. 2d 297, 304, 409 N.W.2d 444 (Ct. App. 1987).

Rather, this court may address these alleged errors through the context of an ineffective assistance of counsel claim. *See Pask*, 324 Wis. 2d 555, ¶9 (stating that because Pask's counsel "was 'fine' with the given instruction, [Pask] mainly approaches his argument—as he must—through the guise of an ineffective assistance of counsel claim"). Accordingly, the State addresses Ballenger's argument through the lens of ineffective assistance of counsel in the argument below.[3]

[3] Alternatively, this court may consider such claims of error under its discretionary reversal authority if the record demonstrates that a miscarriage of justice has occurred or the real controversy has not been tried. Wis. Stat. § 752.35; *State v. Draughon*, 2005 WI App 162, ¶8 n.2, 285 Wis. 2d 633, 702 N.W.2d 412. Ballenger does not seek to invoke this court's discretion under § 752.53 on appeal, nor does the record support such an exercise. Nevertheless, the State in Part III addresses the relevant facts and merits of the claim and explains why the instructions here were not erroneous.

III. COUNSEL WAS NOT INEFFECTIVE FOR AGREEING TO THE JURY INSTRUCTIONS.

A. Background.

After the close of evidence, the court reviewed the State's proposed jury instructions with the attorneys (48:7-9). When asked, Ballenger's counsel informed the court that he had no objections to the instructions (48:7).

Accordingly, the court read the jury the form instructions explaining that Ballenger was charged with one count of armed robbery as a party to a crime (48:37-38; A-Ap. B:1-2). It told the jury that it could find that Ballenger was a party to the crime in this case if he aided and abetted others in committing the crime or was part of a conspiracy to commit the crime, and provided definitions of both of those concepts (48:38-40; A-Ap. B:2-4).

It further set forth the elements of armed robbery and told the jury that the State had to prove all elements of the crime (48:41; A-Ap. B:5). In that portion of the instructions, the court consistently identified the victims of the armed robbery as the Delavan Domino's employees and owners and the actors as "the defendant or another person" and tied them to each of the elements (48:41-42; A-Ap. B:5-6).[4]

After discussing those elements as they related to the Delavan Domino's, the court said,

> If, jurors, then you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of armed robbery or that the defendant was a member of a conspiracy to commit that crime and the crime was committed by a

[4] At the postconviction hearing, the prosecutor explained that the reason he proposed using the term "another person" rather than Boyle's or Walker's names was because neither had yet been convicted of the armed robbery (50:22; R-Ap. 122).

> member of the conspiracy[,] you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty.

(48:43; A-Ap. B:7).

In a postconviction motion to the circuit court, Ballenger challenged the jury instructions both as a stand-alone claim and in the context of an ineffective assistance of trial counsel claim (32). The circuit court held a hearing on the motion (50; R-Ap. 101-27). Ballenger argued there, as he does here, that the instructions were confusing to the jury in two respects: First, he challenged the instruction where the court told the jury that it should find Ballenger guilty if he assisted "in the commission of an armed robbery" (50:2-3; R-Ap. 102-03). In his view, because Ballenger had admitted involvement in other armed robberies, jurors could have found Ballenger guilty if they believed that he committed any of those robberies, not necessarily the Delavan Domino's robbery (*id.*).

Second, Ballenger challenged the portion of the instructions where the court went through the elements of armed robbery and described the actors as "[the defendant] or another person" (50:3; R-Ap. 103). In his view, those instructions also could have confused the jury into improperly delivering a guilty verdict based on party-to-a-crime liability if it believed a person whom Ballenger did not agree to aid and abet or conspire with had committed the armed robbery (50:22-24; R-Ap. 122-24).

Ballenger did not produce trial counsel for the hearing (50:13-14; R-Ap. 113-14), but ultimately did not need to: The circuit court denied the motion because Ballenger forfeited his right to challenge the jury instructions by not objecting to them during conference (50:25-26; R-Ap. 125-26). It also held that there was no need for a *Machner* hearing on ineffective assistance of counsel because the instructions were not erroneous: "I

don't see as a matter of law that the instructions are incorrect and I am therefore not going to make a finding without testimony of [trial counsel] that [trial counsel] was incompetent" (35; 50:26; R-Ap. 126, 128).

B. Relevant law and standard of review.

To establish ineffective assistance of counsel, a defendant must prove that the representation was (1) deficient and (2) prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must highlight specific acts or omissions that are "outside the wide range of professionally competent assistance." *Id.* at 690. To prove prejudice, a defendant must demonstrate that there is a reasonable possibility that, but for counsel's deficient performance, the results of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Courts need not address both prongs of the *Strickland* test if the defendant fails to make a sufficient showing on one. *See id.* at 697.

It is a prerequisite to a claim of ineffective assistance of counsel that the challenged counsel explain, at a postconviction hearing, the reasons that he or she took (or did not take) the actions in question. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). In other words, a defendant cannot prevail on a claim of ineffective assistance of counsel without a hearing at which challenged counsel has the chance to explain his or her actions. *See State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998).

This court's review of an ineffective assistance of counsel claim presents a mixed question of fact and law. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). This court will not disturb a circuit court's findings of fact unless they are clearly erroneous, but

reviews the circuit court's legal conclusions as to deficiency and prejudice for errors of law. *Id.* at 127-28.

C. Trial counsel was not ineffective because the jury instructions were adequate.

On appeal, Ballenger again complains that the instructions that (1) Ballenger should be found guilty if he assisted "in the commission of armed robbery" and (2) use of the phrase "defendant or another person" in describing the elements of the crime could have misled the jury to a guilty verdict (Ballenger's brief at 20-22) (emphasis omitted).

Ballenger cannot demonstrate deficient performance or prejudice based on counsel's handling of the jury instructions because there was nothing wrong with the instructions. The primary problem with his argument is that it isolates the challenged portions of the instructions while ignoring the context in which they were presented to the jury. Challenged jury instructions are not to be evaluated in isolation, but rather, they "'must be viewed in the context of the overall charge.'" *State v. Ellington*, 2005 WI App 243, ¶7, 288 Wis. 2d 264, 272, 707 N.W.2d 907 (quoted sources omitted). Accordingly, a jury instruction cannot be deemed erroneous unless the court is "'persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury.'" *Id.*

"Thus, jury instructions that, considering the 'proceedings as a whole,' adequately give to the jury the appropriate legal principles will be upheld even though they may not be phrased with the precision of a mathematical formula or with the elegance of an Edward Gibbon." *State v. Sanders*, 2011 WI App 125, ¶13, 337 Wis. 2d 231, 806 N.W.2d 250 (cited sources omitted).

Here, taken in the context of the trial as a whole and the other jury instructions, it was clear that the jury was considering whether Ballenger was party to the crime of the Delavan Domino's armed robbery. As an initial matter, it—armed robbery of the Delavan Domino's on June 12, 2009—was the only crime charged in the information (11). At trial, the State presented evidence relevant to the Delavan robbery, including testimony by an employee who was present at the restaurant during the robbery and police who followed up at the Domino's immediately after (47:95-102, 103-12, 113-15).

The jury instructions also focused purely on the Delavan Domino's robbery: The jury was instructed on each element of armed robbery with the named victims being the Delavan Domino's employees and owners (48:40-43; A-Ap. B:4-7). The court further instructed the jury that evidence of Ballenger's involvement in other armed robberies has been presented, and cautioned the jury that it was to only consider that evidence "on the issue of motive, opportunity, intent, preparation or plan, knowledge, absence of mistake or accident, and context or background" (48:45). Finally, the verdict form stated that the jury found Ballenger guilty of armed robbery as a party to the crime "as charged in the information," which, again, referred specifically to the Delavan Domino's robbery (18).

In addition, taken in the context of the trial and other instructions, the jury understood that "another person" referred to someone within the group that Ballenger either agreed to either aid and abet or conspire with. There was no evidence presented at trial that the persons who either walked into the Delavan Domino's with a gun or who drove the getaway car could have been third parties whom Ballenger did not know. Ballenger himself said that Walker robbed the Domino's and Boyle drove the getaway car.

Rather, the entire dispute in the case was not *whether*, but *when* Ballenger knew about the robbery: His defense was that he did not know about the robbery until after it occurred. The proposition that the jury could have believed that someone unknown to Ballenger committed the robbery and that Ballenger was a party to that person's crime is insensible.

Moreover, the court instructed the jury on the meaning of party to a crime, the definition of aiding and abetting, and the definition of being part of a conspiracy (48:37-40; A-Ap. B:1-4). Those instructions informed the jury that a finding under those definitions required agreement and knowledge on Ballenger's part.

For the jury to have been misled by the instructions as Ballenger suggests, its members would have had to ignore the trial and other instructions and instead paid attention to only those two instructions that Ballenger isolates. Taken in the context of the trial and other instructions, they were not confusing or misleading. Accordingly, counsel was not ineffective for declining to object to the instructions. *See State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel is not deficient for failing to pursue a meritless argument).

CONCLUSION

The evidence was sufficient to sustain the jury's verdict of guilty. Further, Ballenger forfeited his challenge to the jury instructions. Nevertheless, the jury instructions were proper and trial counsel was not ineffective for declining to object to them.

For the foregoing reasons, the State respectfully asks that this court affirm the judgment of conviction.

Dated this 19th day of December, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4998 words.

_____
Sarah L. Burgundy
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of December, 2012.

_____
Sarah L. Burgundy
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