COURT OF APPEALS DECISION DATED AND FILED

November 27, 2007

David R. Schanker
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. 2007AP182-CR

Cir. Ct. No. 2005CF4845

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AKILAH WASHAWND CRITTENDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Reversed and remanded.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 KESSLER, J. Akilah Washawnd Crittenden appeals his judgment of conviction resulting from a jury finding him guilty of three counts of felony bail

jumping, in violation of WIS. STAT. § 946.49(1)(b) (2005-06)[1] and two counts of misdemeanor bail jumping, in violation of WIS. STAT. § 946.49(1)(a). Because we conclude that: (1) the trial court erred when it allowed the admission of Lawrence Gray's testimony, where the State gave no notice prior to trial of Gray being called as a witness and without a finding of good cause; (2) the error was not harmless; and (3) the evidence was sufficient to support the verdict such that a re-trial would not violate Crittenden's double jeopardy rights, we reverse and remand for a new trial.

BACKGROUND

¶2 On August 25, 2005, Crittenden was charged with three counts of felony bail jumping and three counts of misdemeanor bail jumping, all arising out of one incident on August 23, 2005. Each of the bail jumping counts related to a pending case where Crittenden was out on bail.[2] In the criminal complaint, all six counts related to City of Milwaukee Police Officer Dean Newport's observation of Crittenden talking with his older brother, Antione Crittenden (Antione), and other individuals that Newport identified as either members or affiliates of the Murda Mobb gang. The conversation occurred in the backyard of Crittenden's grandmother's residence (where he was living at the time). Prior to trial, the State dismissed one of the misdemeanor bail jumping counts.[3]

---

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The felony counts related to Case Nos. 04CF4935, 04CF5454 and 05CF3757. The misdemeanor counts related to Case Nos. 04CM3707, 04CM5121 and 04CT8939.

[3] Prior to trial, the misdemeanor bail jumping count relating to the criminal traffic case, 04CT8939, was dismissed.

¶3 The conditions of bail associated with the five underlying cases, as pertinent to this case, included Crittenden not committing a new crime, and for Case No. 05CF3757, that Crittenden actually reside at the residence he claimed, i.e., his grandmother's house at 2712 West Clarke Street in the City of Milwaukee. Further, Crittenden was to have no contact with Murda Mobb members or "associates." As to the residence, the court ordered the police to check and ensure that Crittenden was actually living at this address.

¶4 As to the no-contact order, at the bail hearing in Case No. 05CF3757, portions of which were made part of this record through testimony at the preliminary hearing and at trial, the court commissioner ordered that Crittenden have no contact with any members or "associates" of the Murda Mobb. When Crittenden's attorney[4] objected to this condition on the ground of vagueness and asked that persons be specifically identified, the court commissioner responded that Crittenden could stay in jail until the State or/and the police put together a list of these individuals, or could determine for himself who the members and "associates" were. Crittenden's attorney respectfully declined this invitation and the court commissioner then ordered:

> there's probably a gang composite somewhere in the Police Department which every one of [the Murda Mobb] are listed there by photo…. I will let [the no contact order] stand, you want to appeal it, maybe by then [the prosecutor] and Officer Lutz or Officer Newport can have a written no contact ordered drafted. We'll do it that way.

[4] Crittenden was originally represented in this case by a different attorney who was also representing him in some of the underlying cases. However, Crittenden asked for and received new counsel prior to this case going to trial.

This written order was never provided to the defendant as of the time of the trial in this matter.

¶5 A preliminary hearing was held on September 19 and 28, 2005. On September 19, Antione testified that the Murda Mobb was a rap (music) group, not a criminal gang; that he had terminated his membership in the Murda Mobb while he was in prison (he was released on supervision on August 9, 2005, because "[he] didn't want to be associated with what they say the Murder – Murder Mob has become," but what the Mob had become, Antione testified he had "really no knowledge"; and that the two other men present, Deon Cowser and Antonio Hibbler, were not associated with the Murda Mobb).

¶6 Newport testified at the continued preliminary hearing held on September 28, 2005. Newport testified that Crittenden was with four men in his backyard on August 23, 2005: his brother Antione, Hibbler, Cowser and a fourth man that Newport did not recognize. Newport testified that based on statements he had received from informants and other arrests he had made in connection with his investigation of gangs in Milwaukee, Hibbler and Cowser were in gangs affiliated with the Murda Mobb and based upon his prior contact with Antione, it was his belief that on August 23, 2005, Antione was a member of the Murda Mobb.

¶7 Crittenden's counsel first objected to the State now including Hibbler and Cowser as part of the support for the bail jumping charges, arguing that Crittenden had not been given notice that the State would be attempting to establish probable cause based on Crittenden's contact with anyone other than Antione. The court commissioner overruled the objection, noting that it "do[es]n't bind over based on the criminal complaint, [it] bind[s] over based on what's being

testified from now and the evidence of this [preliminary] hearing." Crittenden's counsel also objected to Newport's testimony regarding criminal activities that the Murda Mobb gang was supposed to have engaged in on the ground of hearsay and the court commissioner allowed the testimony "for this hearing only." At the conclusion of the hearing, the court commissioner found probable cause and bound Crittenden over for trial.

¶8 On December 19, 2005, the State filed its witness list which included only Newport and two other City of Milwaukee Police officers.

¶9 On January 11, 2006, the first day of trial, the State moved the trial court to allow Newport to testify as an expert witness under WIS. STAT. § 907.03 regarding gang membership. The State at that time also disclosed, for the first time, that it intended to call Lawrence Gray, under a concession and immunity deal, to testify regarding his affiliations with the Murda Mobb prior to his current incarceration which began in February 2005, approximately eleven months earlier. Trial counsel objected to the State's new witness, Gray, on the ground that Gray's testimony would be hearsay.

¶10 The trial court ruled that Newport could not testify as to "his opinion as to who is or is not a member of the Murda Mobb gang [because] under 907.03, case law indicates that while opinion evidence may be … based upon hearsay, the underlying hearsay data may not be admitted unless it is otherwise admissible under a hearsay exception." The court concluded that Newport's "conclusions are based solely upon hearsay based upon individuals that he has arrested and who have acknowledged being members of the gang. The State had every opportunity to bring those specific individuals in and to testify, but chooses not to."

¶11 As to Gray, the trial court granted the State's motion, ruling that:

> Mr. Gray will be allowed to testify based upon things that he has foundation, personal knowledge of. Again, he may not base any opinions that he may have based upon hearsay statements of others. But looking at the prelim testimony, there was testimony to the fact that there was a party in October of 2000. Mr. Gray was present; that he was there for the conspiracy to distribute cocaine; that Ronald Crittenden [Crittenden's uncle] was there; the – Decarlos Young [a founder of the Murda Mobb] was also there. And at this party, the individuals were chanting, "Murda, Murda."
>
> To the extent that he's attended functions, he's attended activities that he can describe how it is known that, or even his opinion that he was there to participate in activities of the Murda gang, that it's appropriate for him to identify who was present for those events and what transpired, although not what was said specifically at those events.
>
> Unless those statements are by the defendant, of course.

The remainder of the first day of trial was dedicated to voir dire and selection of the jury.

¶12 On January 12, 2005, prior to the jury hearing Gray's testimony, trial counsel again objected to Gray, arguing that Crittenden had not received the required statutory notice. Additionally, trial counsel objected that all of the activities which the State had indicated it was going to have Gray testify to—drug transactions, shootings, weapons possession—were outside the scope of this bail jumping case, where the

> only issue is whether or not the individuals, Mr. Hibbler and Cowser and Antione Crittenden were members of the Murda Mobb, and whether Mr. Akilah Crittenden associated with them [and] to introduce all this other evidence would definitely be unfairly prejudicial toward Mr. Crittenden and way outside the scope of anything the jury needs to consider to determine [whether] Mr. Crittenden's guilt or … not.

¶13 The State never addressed Crittenden's objection based on lack of statutory notice. The trial court ruled that Gray could testify regarding his own personal knowledge, without citing WIS. STAT. § 971.23 or finding that the State had good cause for not timely disclosing Gray. The trial court did not make Gray available to Crittenden to interview at any time prior to his testimony at trial.

¶14 Gray was called as the State's first witness. He testified as follows: He was a member of the 2-7 gang which was a part of the City of Milwaukee Clarke Street gangs, which in turn were a part of the Folks nation (which included in its membership the Gangster Disciples, a Chicago gang). One of the other Clarke Street gangs was the Murda Mobb, which Gray knew, from personal knowledge, was started by Crittenden and Decarlos Young. Gray testified that Crittenden and some of his Murda Mobb members were not Folks. For the nine to ten years that Gray was aware of the Murda Mobb, he never knew it to be a musical group. Rather, he knew it was a gang because he was affiliated with it, meaning that he ran drugs between Chicago and Milwaukee for the Murda Mobb. Gray testified that Antione was present during at least one occasion when these drugs were being split between the various Clarke Street gangs.

¶15 As to Hibbler, Gray testified that while he had never seen Hibbler "directly do anything that tied to Murda Mobb," he had observed Hibbler attending meetings of Murda Mobb members and affiliates. He has never seen Hibbler "throw down" the gang sign of Murda Mobb, but has seen Hibbler throw down the gang sign of the Clarke Street Most Wanted gang, which Gray testified is, from his personal knowledge, affiliated with the Murda Mobb.

¶16 As to Cowser, Gray testified that he has seen Cowser "throw down" the sign of the Murda Mobb in a manner which would show Cowser's affiliation

with the Mobb. Gray recognized this sign because he himself has "thrown down" the Murda Mobb gang sign in the same way to show his affiliation with the Mobb, even though he is not a member of the Murda Mobb, but is a member of the 2-7 gang.

¶17 On cross-examination, Gray admitted that he had not seen Cowser since February of 2005, and that he did not recall when he had last seen Hibbler, but that it was longer ago than 2005. Gray also admitted that in the photos shown to him by the State during his direct examination, he had incorrectly identified an individual present in the photo as Antione (Antione was not in the photo), and also noted on that same photo that Hibbler, while in the photo, was not "throwing" any gang signs.

¶18 Antione was called as the State's second witness. He also testified under an agreement of immunity. Antione testified that the Murda Mobb had been created as a rap group and that before he left prison on August 9, 2005, he had determined that he was no longer going to be associated with it as its reputation had changed during the four years he was in prison. Antione also testified that while he had been a member of the Gangster Disciples, a Chicago gang, for nineteen years, he was no longer a member of that group when he left prison in August 2005. Antione testified that the Department of Corrections, in June 2005, had mailed orders to him in prison that they had cleared him to live at his grandmother's house at 2712 West Clarke Street, and that he was expected to live there upon his release from prison on August 9, 2005. Antione admitted that he had not informed his parole agent prior to his brother's August 25, 2005 arrest that both he and his brother were living in their grandmother's house. He stated he was told after Crittenden's arrest he could not live with his brother.

¶19 As to Hibbler and Cowser being present at his grandmother's house on August 23, 2005, Antione testified that they were old friends of his and that they were there to see him and "catch up" since he had just gotten out of prison. Antione testified that neither of these men were members of the Murda Mobb and that he did not know if they were involved in any gangs. Antione stated that their seeing Crittenden that day was just a coincidence because Crittenden was at the house when Hibbler and Cowser came over to socialize with him. When asked about his own Murda Mobb tattoos, and the timing and reason for covering them up with new, filigree tattoos, Antione testified that he had planned on covering them while he was still in prison and had discussed doing so with his probation agent in August 2005. Antione testified that his getting the new tattoos shortly before the preliminary hearing in this case was only because it took until that time for him to have the funds to pay for the new tattoos.

¶20 Newport was the third and final State witness. Newport testified that he has been with the City of Milwaukee Police Department for eleven years, and that prior to that, with some overlap, he was a federal law enforcement officer with the United States Coast Guard. Newport testified relating to his training, both with the United States Coast Guard on drug interdiction and with the City of Milwaukee Police Department, including State and Federal training he received and courses he attended on recognizing gang and drug trafficking activities. Newport's current assignment is with the vice squad of the major case unit out of the State Street precinct. Newport testified that, based on his training and experience, Milwaukee does have gangs and that he has personally witnessed some of the gang activities, particularly in District 3 where Crittenden's residence is located, which included:

> Distribution of narcotics, both cocaine, marijuana, heroin, and now Ectasy [sic], homicide[,] recklessly endangering safety which is shootings, shootings of other people, kidnappings, armed robberies, intimidation of witnesses and victims and the public officials, firearm violations, both federal and State violations regarding firearms, the illegal purchases of them, the possession of felons of illegal firearms, the straw purchasing of non felons giving firearms to felons.

¶21 Newport next testified to various graffiti that is identified as gang signs. Newport also testified regarding rap artists in or from the area of the City of Milwaukee who advertised as rappers or who had their music played on the radio or videos on television, and stated that none of the individuals mentioned during the trial were included in this group. Additionally, Newport noted that he did find, using a Google computer search, that there was a rap group called Murda Mobb, but that it was a group from another state and that the search did not reveal any of the individuals mentioned during trial as members of this group.

¶22 Newport testified to photos which he personally took of Antione Crittenden on the porch of his grandmother's house at 2712 West Clarke Street, at the end of August, beginning of September 2005, which showed Antione's Murda Mobb tattoos still intact. Newport testified regarding a photo he had taken of the retaining wall of the Clarke Street Elementary School showing that someone had painted the words "Murda Mobb" on the wall. Newport testified that this had significance in gang investigations, namely, that "[t]his is to mark their territory or to let other gangs know that this territory has been claimed by[,] in this particular one[,] the Murda Mobb." This school is four to five houses away from Crittenden's grandmother's house.

¶23 Newport then testified as to photos that had been retrieved forensically by the Milwaukee police from Carmen Price's[5] cell phone. These photos included photos of Crittenden and his tattoos, which included Murda Mobb tattoos on his forearms.

¶24 Newport testified that on August 23, 2005, at approximately 6:00 p.m., he personally observed Crittenden in the backyard of his grandmother's Clarke Street residence in the presence of four other men, including Antione, Hibbler and Cowser. Newport noted that he made this observation while sitting in an unmarked squad car in a restaurant parking lot and observing the residence with mini-binoculars. Newport testified that he called for back-up officers so that he could conduct a field interview in order to identify the fourth man present. However, after meeting with the officers and returning to the residence, none of the five individuals were still present outside the residence. Newport testified that because he ended up working until 5:00 a.m. the next morning, he did not attempt to arrest Crittenden on bail jumping charges until the following day, August 25, 2005.

¶25 Newport testified that he has been aware of the existence of the Murda Mobb since 1999, but has been officially investigating the Murda Mobb only since approximately May of 2003. Newport estimated that he has logged over 300 personal man hours investigating the Murda Mobb. As to Antione's covering up of his Murda Mobb tattoos, Newport testified that in his experience,

[5] Carmen Price was identified as Crittenden's girlfriend and her daycare was one address from which Crittenden was restricted as a condition of bail.

he has never known gang members to continue gang activity after they have covered their gang-related tattoos.

¶26 As to the testimony provided by Gray, Newport testified that the testimony given at this trial was consistent with statements Gray had made to him, except for the exact address of his house, which Gray testified was 1003 West Hadley, when in fact, Newport testified, the house number was actually 1007.

¶27 Newport then testified as to booking photos taken of Hibbler and Cowser. As to Cowser, Newport testified that, based upon his training and experience, the C.M.W. tattoo on Cowser's arm stood for Clarke's Most Wanted, a group that Newport considered to be a gang. As to Hibbler, Newport testified regarding two booking photos. The first one showed Hibbler with a tattoo of a "C" which, based upon his training and experience, Newport testified signified "Clarke Street." An earlier booking photo showed the same tattoo to be a "G" which Newport identified, based upon his training and experience, signified the Gangster Disciples gang. Newport testified that he had personally seen the "G" tattoo on Hibbler, and that based on his personal experience of getting tattoos, the "G" had been done "nonprofessionally, probably in prison," that it appeared from the photo that the "C" tattoo was done professionally on top of the "G" tattoo.

¶28 Newport testified that between August 23, 2005, and January 12, 2006, he had contact with both Hibbler and Cowser. As to Cowser, that contact was only a conversation after a funeral the previous week and during that conversation Cowser's arm was covered such that Newport did not see if the tattoo was still present. As to Hibbler, Newport testified that he encountered Hibbler entering a drug house that was being searched by police, pursuant to a warrant, on December 27, 2005. Newport testified that he searched Hibbler but found no

drugs on his person and after checking and finding no outstanding warrants, released Hibbler. Newport did not testify as to whether he observed any tattoos on Hibbler during that stop.

¶29 The defense presented no witnesses. The jury returned a verdict of guilty on all five counts. Crittenden moved for dismissal, directed verdict or judgment notwithstanding the verdict. The trial court denied the motions and sentenced Crittenden to sentences of six years' imprisonment (three years' initial confinement and three years' extended supervision) on counts one through three, with counts one and two consecutive to each other and any other sentence, and count three concurrent with counts one and two, but consecutive to any other sentence. As to misdemeanor counts four and five, the court sentenced Crittenden to nine months in the House of Correction on each count, "concurrent with counts one through three and each other, but consecutive to any other sentence." Crittenden appealed.

DISCUSSION

Standard of review

¶30 Our review in this case requires that we apply Wisconsin statutes. "Application of a statute to facts is a question of law, subject to our independent review." ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. We also review as a question of law whether the evidence presented to a jury is sufficient to sustain its verdict. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶31 We review evidentiary rulings with deference, limiting our analysis to whether the trial court properly exercised its discretion based upon the facts and

accepted legal standards. ***State v. Mayo***, 2007 WI 78, ¶31, __ Wis. 2d __, 734 N.W.2d 115. We will uphold a trial court's decision to admit or exclude evidence if the court "examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." ***Id.***

I. Nondisclosure of potential witness

¶32 WISCONSIN STAT. § 971.23[6] governs criminal discovery. To the extent that the State has the materials and information specified in the statute in its possession, custody or control, it must disclose it to the defense, "within a reasonable time before trial." Section 971.23(1). This duty includes listing any witnesses whom the State plans to call to testify at trial. Section 971.23(1)(d). This is a continuing duty. Section 971.23(7).[7] The sanction for noncompliance

[6] WISCONSIN STAT. § 971.23 provides, in pertinent part:

> **(1)** WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> ….
>
> (d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

[7] WISCONSIN STAT. § 971.23(7) provides:

> **(7)** CONTINUING DUTY TO DISCLOSE. If, subsequent to compliance with a requirement of this section, and prior to or during trial, a party discovers additional material or the names of additional witnesses requested which are subject to discovery, inspection or production under this section, the party shall

(continued)

with this statute is that the trial court "*shall exclude* any witness not listed … unless good cause is shown for failure to comply." Section 971.23(7m)(a)[8] (emphasis added). "If good cause is not shown, exclusion of the witness is mandatory." ***State v. Long***, 2002 WI App 114, ¶33, 255 Wis. 2d 729, 647 N.W.2d 884. Even if good cause is shown, however, the trial court "may exclude the evidence or may grant other relief such as a recess or continuance." ***State v. DeLao***, 2002 WI 49, ¶51, 252 Wis. 2d 289, 643 N.W.2d 480. The State has the burden of proving that good cause existed for the failure to provide timely notice to the defendant. ***Id.***

¶33 On the first day of trial, the State moved the trial court to allow Gray to testify regarding gang activities in the City of Milwaukee. It is undisputed that the State had not previously disclosed Gray to the defendant as a potential witness. At that time, Crittenden's counsel objected only on the grounds that Gray's testimony was hearsay. However, prior to the State calling Gray to testify as its first witness, Crittenden's counsel objected on the ground that the State had

---

> promptly notify the other party of the existence of the additional material or names.

[8] WISCONSIN STAT. § 971.23(7m) provides:

> **(7m)** SANCTIONS FOR FAILURE TO COMPLY. (a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.
>
> (b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3), advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m).

provided no notice prior to trial. The trial court allowed Gray to testify, but failed to find that the State had shown good cause for its failure to timely notify the defendant, as required by WIS. STAT. § 971.23(7m). We have reviewed the entirety of the record to determine if good cause was shown for allowing Gray's testimony without prior notice to Crittenden and have not found facts which support an implied finding of good cause. Accordingly, the trial court erred in allowing Gray to testify.

¶34 However, this does not end our inquiry. *See* ***DeLao***, 252 Wis. 2d 289, ¶59. If the error was harmless, i.e., if Crittenden was not prejudiced by the error, then he is not entitled to a new trial.

II. The trial court's failure to find good cause for the State's failure to disclose Gray as a witness prior to trial was not harmless error

¶35 In determining whether a constitutional error was harmless, our inquiry is: "'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" ***Mayo***, 734 N.W.2d 115, ¶47 (citing ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189) (one set of quotation marks omitted). The harmless error test has also been described in ***State v. Anderson***, 2006 WI 77, ¶114, 291 Wis. 2d 673, 717 N.W.2d 74, as: "the error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (Citation omitted.)

¶36 Gray was the first witness to testify at trial. Gray was allowed to testify regarding his personal contacts with Crittenden, and regardless of whether Crittenden was present with Crittenden's brother Antione, and with Hibbler and Cowser. Gray testified that he had seen Antione present during at least one drug

transaction, which directly contradicted Antione's later testimony. The trial court ruled that Newport could not testify to any of this criminal activity because his knowledge was based on hearsay. Antione's testimony that he was no longer in the Murda Mobb, along with Newport's testimony that he had never known a gang member to associate with a gang after covering up his tattoos, could have led the jury to conclude Crittenden did not believe that he was prohibited from associating with his brother, especially in light of the testimony and evidence that both brothers were ordered (one by the court, one by the Department of Corrections) to live at their grandmother's house.

¶37 Newport was unable to testify as to Crittenden's role in the Murda Mobb, or to the Mobb's illegal activities. Newport could testify as to tattoos and signs, and perhaps as to gang hand signs. However, without Gray's testimony that Gray had been ordered by Crittenden personally to pick up drugs from Chicago for him, or had been asked by Crittenden personally to "cook" cocaine, or that Gray had seen Crittenden ordering members of the Murda Mobb to do other illegal activity, none of this information would have been before the jury.

¶38 Based upon our review of the record, we cannot conclude that the trial court's error was harmless. The State has not proven "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *See* ***Anderson***, 291 Wis. 2d 673, ¶114 (citation omitted).

¶39 Before we may reverse and order a new trial, however, we must determine whether the evidence presented was sufficient to convict Crittenden. ***State v. Zimmerman***, 2003 WI App 196, ¶23, 266 Wis. 2d 1003, 669 N.W.2d 762. If it was not sufficient, we are precluded from remanding for a new trial under the double jeopardy clauses of the United States and Wisconsin Constitutions. ***State***

v. Perkins, 2001 WI 46, ¶47, 243 Wis. 2d 141, 626 N.W.2d 762. If the evidence presented at trial is insufficient, we must direct that a judgment of acquittal be entered. *See* ***id.***

Sufficiency of the evidence

¶40 Crittenden argues that the evidence presented was insufficient to prove the third element of the bail jumping charges, i.e., that he intentionally associated with members or affiliates of the Murda Mobb, because the State had not proven that Crittenden knew that Antione, Cowser or Hibbler were Murda Mobb members or affiliates on August 23, 2005. The Wisconsin Supreme Court recently noted, in discussing sufficiency of the evidence:

> Evidence is insufficient to support a conviction only if the evidence, when viewed most favorably to the State, "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." As the court of appeals recently noted in *State v. Searcy*, 2006 WI App 8, 288 Wis. 2d 804, 709 N.W.2d 497, the defendant bears a heavy burden in attempting to convince a reviewing court to set aside a jury's verdict on insufficiency of the evidence grounds.

Booker, 292 Wis. 2d 43, ¶22 (citations omitted). In reviewing the evidence,

> we must keep in mind that the credibility of the witnesses and the weight of the evidence is for the trier of fact, and we must adopt all reasonable inferences which support the jury's verdict. The test is not whether this court is convinced of [the defendant]'s guilt beyond a reasonable doubt, but whether this court can conclude that the trier of fact could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.

Searcy, 288 Wis. 2d 804, ¶22 (citations omitted). In addition, it is the jury's duty to determine the credibility of the witnesses and the weight of the evidence. ***Poellinger***, 153 Wis. 2d at 506.

¶41 Crittenden was charged under WIS. STAT. § 946.49(1)[9] with felony and misdemeanor bail jumping. Under § 946.49(1), the State is required to prove three elements. *See* WIS JI—CRIMINAL 1795 (2006). First, that Crittenden was charged with a felony, § 946.49(1)(b), or a misdemeanor, § 946.49(1)(a). WIS JI—CRIMINAL 1795 (2006). Second, that Crittenden was released from custody under a bail bond. ***Id.*** And third, that Crittenden intentionally failed to comply with the conditions of his bail. ***Id.*** Crittenden had stipulated to the first two elements of the bail jumping statute. The State, therefore, was only required to prove the final, third element at trial, i.e., that Crittenden knew that one of the conditions of his bail was to have no contact with members or associates of the Murda Mobb and knowing this, he intentionally had contact with such persons. *See* ***id.*** This third element requires that the State prove beyond a reasonable doubt that Crittenden knew the conditions imposed on his bail and knew that his actions did not comply with those conditions. ***Id.***

¶42 Antione testified that: (1) he was with his brother Crittenden, Hibbler and Cowser in the backyard of his grandmother's house on August 23, 2005; (2) the Murda Mobb was a rap group, not a gang; (3) he had once been a member of the Murda Mobb and both he and Crittenden had tattoos put on their

---

[9] WISCONSIN STAT. § 946.49, "Bail jumping," states in pertinent part:

> **(1)** Whoever, having been released from custody under ch. 969 ["Bail and Other Conditions of Release"], intentionally fails to comply with the terms of his or her bond is:
>
> (a) If the offense with which the person is charged is a misdemeanor, guilty of a Class A misdemeanor.
>
> (b) If the offense with which the person is charged is a felony, guilty of a Class H felony.

forearms that stated Murda on the right arm and Mobb on the left arm; (4) while in prison he decided to no longer be a member of the Murda Mobb because of the reputation it now had (which reputation he really had no knowledge); (5) Hibbler and Cowser were not members of the Murda Mobb; (6) he did not believe any of the groups identified, such as the Clarke's Most Wanted or the 2-7, were gangs because they were not organized with leaders and hierarchy like the Gangster Disciples gang of Chicago; (7) because he did not believe these groups were gangs he, therefore, did not believe associating with Hibbler and Cowser meant that he was associating with gang members; (8) because Hibbler and Cowser were not gang members and were not members of the Murda Mobb, it was okay to associate with them; (9) he never told his parole officer prior to Crittenden's arrest that they were both living together at the grandmother's address; and (10) getting his Murda Mobb tattoos covered just prior to his testifying at Crittenden's preliminary hearing was a coincidence because he had planned to do this while in prison, but had to wait until he had the funds.

¶43 Newport first testified as to his background and to the fact that he had been investigating gangs and gang activity in this area of the City of Milwaukee since May of 2003. Newport then testified specifically to the facts of this case. He testified that: (1) he personally observed Crittenden, Antione, Hibbler and Cowser talking together over several minutes in his backyard on August 23, 2005; (2) when he arrested Antione later that same day on an unrelated matter, that Antione admitted that he had once been a member of the Murda Mobb, was no longer, but that he continued to associate with members of the Murda Mobb; (3) he photographed Antione at the end of August, early September, on the front porch of the grandmother's house, and the photo showed that Antione had Murda Mobb tattoos on his forearms at that time; (4) Hibbler and Cowser

were in gangs affiliated with the Murda Mobb, based in part on his knowledge of gang tattoos and on the tattoos Hibbler and Cowser displayed in past booking photos that signified local gang membership in Clarke Street (Hibbler) or Clarke's Most Wanted (Cowser); (5) he had done a Google search and found a Murda Mobb rap group, but that the members listed of that group did not include anyone mentioned at the trial; and (6) he had personally taken a photo of the retaining wall of the Clarke Street Elementary School (located four to five houses away from the grandmother's house) that showed that someone had painted the words "Murda Mobb" on the wall and that this signified a gang "mark[ing] its territory … to let other gangs know that this territory has been claimed by in this particular one the Murda Mobb."

¶44 In a new trial, the jury will again have the ability to observe and weigh the credibility of both Antione and Newport. Based upon our review of the record, we conclude that the evidence presented was sufficient, when viewed in the light most favorable to the State, for the trier of fact, acting reasonably, to find Crittenden guilty "beyond a reasonable doubt" as to the third element of WIS. STAT. § 946.49—that Crittenden knew that a condition of his bail was to have no contact with members of the Murda Mobb; he knew that Antione, Hibbler and/or Cowser were members or associates of the Murda Mobb; and that Crittenden intentionally had such contact. *See* ***Booker***, 292 Wis. 2d 43, ¶22; ***Searcy***, 288 Wis. 2d 804, ¶22. Accordingly, we determine that retrial would not violate Crittenden's double jeopardy rights.

By the Court.—Judgment reversed and remanded.

Not recommended for publication in the official reports.