STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I I

Case No. 2010AP2516 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LESHURN HUNT,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Order Denying Post-Conviction Relief, Entered in Kenosha County Circuit Court, Honorable Bruce E. Schroeder, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State Fails to Acknowledge and Analyze the Facts Showing that Mr. Hunt's Waiver of his Right to Testify was Involuntary and Unknowing.

The State fails to confront, and should thus be considered to concede, the fundamental features of the process in which Mr. Hunt was dissuaded from exercising his right to testify: "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." ***State ex rel. Blank v. Gramling***, 219 Wis. 196, 199, 262 N.W.2d 614 (1935), *quoted with approval,* ***Charolais Breeding Ranches v. FPC Securities***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

At the core of Mr. Hunt's protest is that, after a significant colloquy with the trial court, in which Mr. Hunt announced his intention to exercise his right to testify, the court proceeded to chip away at his resolve, allowing the prosecutor to join in, and that Mr. Hunt's waiver came about only after a protracted, systematic series of threats in which downside risks were emphasized, elevating the judge's and prosecutor's advice above Mr. Hunt's ability to make his decision personally and with his attorney.

The sequence of events is laid out in detail in Mr. Hunt's brief and it need not be repeated in light of the State's effective concessions. The State seems to focus, like the post-conviction court did, on the apparent reasons for raising so many potential downsides to testifying, such as a claimed desire to obtain something akin to informed consent. But this focus misses the points that (1) the risks of testifying or not testifying are supposed to be weighed by defendants and their

counsel, with the court merely confirming that they did so; and (2) coercing the relinquishment of a fundamental right is improper regardless of judicial or prosecutorial motive.

Because it ignores the troubling sequence in which Mr. Hunt was advised of his right to testify, announced his intention to exercise it, and was then dissuaded from doing so, the State is unable to explain why the law, including the harmless error standard, can excuse what happened.

II. The State has not Met its Burden of Proof that Harmless Error Analysis Applies or that the Systematic Coercion of Mr. Hunt's Waiver Constitutes Harmless "Error."

The State argues that "[a]ny error in the trial court's colloquy was harmless." (State's brief at 17). The State does not explicitly acknowledge that it would bear the burden of proving harmless error, beyond a reasonable doubt, if the standard applied. However, the State does argue "[t]here is no reasonable doubt that the verdict[s] would have been the same had Hunt testified." (State's Brief at 17). With this argument, however, the State gets ahead of itself: it fails to show why harmless error applies both in general to violations of the right to testify and particularly to this case, despite the purposeful and protracted tactics of the trial court, with the assistance of the prosecutor. This court should conclude the State has failed to meet its burden of showing that harmless error analysis is even applicable and appropriate under the particular facts and circumstances of this case.

Mr. Hunt's brief emphasized that "***State v. Weed***, 2003 WI 85, ¶41, 263 Wis. 2d 434, 464, 666 N.W.2d 485, requires 'a simple and straightforward exchange' where the court verifies the defendant's decision whether to testify. ***Weed*** recognizes the exchange should not run afoul of 'valid

concerns' about interfering with 'trial strategy and the integrity of the attorney-client relationship.' ***Id***. This case raises those concerns, and whether Mr. Hunt's decision was knowing and voluntary." (Hunt's Brief at 2-3).

The State has not really claimed, much less has it shown, that the trial court engaged in the "simple and straightforward," colloquy envisioned by ***Weed***. Arguably, the colloquy preceding Mr. Hunt's decision *to testify* met that standard. *See*, Hunt's Brief at 4-6. However, no fair-minded reading of what followed allows a conclusion that the trial court and the prosecutor pursued a "simple, straightforward" approach, much less one that, consistent with ***Weed's*** mandate, respected Mr. Hunt's right to make his decision personally and on the advice of counsel rather than in reaction to the various pressures the court and the prosecutor brought to bear. *See*, Hunt's brief at 6-9.

The State cites federal cases for its general proposition that harmless error analysis applies to "[p]roven violations of the right to testify." State's brief at 17. The State's argument is incomplete.

The State does not explain whether these federal cases mean, as the State seems to assume, that harmless error analysis is categorically available. In the first case the State cites, the court apparently did not think so. The State cites ***Ortega v. O'Leary***, 843 F.2d 258 (7th Cir. 1988). (State's brief at 17). There the court held that:

> Although the evidence in this habeas corpus case compels a finding of harmless error, we strongly emphasize that a defendant's request to testify should never be summarily dismissed by a trial court. *Indeed, were this issue before us on direct review of a federal criminal case another outcome might obtain.* When

> waiver of such an important right is at issue, a trial court should carefully ascertain through a methodical inquiry whether this right has been voluntarily and intelligently forfeited. The trial court in this case erred in failing to determine whether or not Ortega had voluntarily and intelligently waived his right to testify and improperly failed to permit the full exercise of this right. In the habeas context, however, our review is limited to whether this error undermined the fundamental fairness of the trial. On the facts and procedural posture of this appeal we are forced to conclude that the error was harmless. ... [***Id***. at 263. (Emphasis added).]

The State cites ***Ortega*** but fails to address the above passage or explain why a harmless error finding in a habeas case, where the court says it might not so find in a direct appeal is nevertheless available in this case—a direct appeal. It is difficult to imagine how ***Weed's*** mandates, quoted above, can be taken seriously if appellate courts condone the actions taken by the prosecutor and trial court in this case, merely by usurping a fact-finder's role and holding that defendants can be subjected to this sort of pressure without recourse unless they can later demonstrate to a reviewing court that a jury might have been persuaded by their testimony.

The trial court's actions in this case did not equal the careful "methodical inquiry" referred to above in ***Ortega***. In that case, the defense had rested without calling any witnesses and with no colloquy between the court and the defendant, but the defendant had interrupted the prosecutor's closing arguments to demand that he be allowed to testify. ***Ortega***, 843 F.2d at 259-60. The trial court rejected his request without conducting any inquiry at all. ***Id***. at 260.

Thus, the ***Ortega*** court had no colloquy to assess. However, in ***Arredondo v. Huibregtse***, 542 F. 3d 1155 (7th Cir. 2008), the trial court did conduct a colloquy. Agreeing

with this court's conclusion in the direct appeal, the Seventh Circuit found that the trial court's colloquy was "extensive" and sufficient to show the defendant's informed waiver of his right to testify. *Id*. at 1171. The entire colloquy is set forth in the Seventh Circuit's opinion. *Id*. at 1157-1158.

The State relies on the district court's habeas denial in ***Arredondo*** (*sub nom* ***Arredondo v. Pollard***, 498 F. Supp. 2d 1113, 1127-28 (E.D. Wis. 2007)) to support its conclusory argument that "[p]roven violations of the right to testify" are subject to harmless error analysis. However, the above discussion of the Seventh Circuit's opinion shows that ***Arredondo*** is not relevant here: there was no error, harmless or otherwise, in the colloquy during which Arredondo confirmed a decision to not testify.

The issue in ***Arredondo*** was not an erroneous forfeiture of the right to testify: instead, the issue was whether the defendant should have been re-examined because he waived his right prior to testimony by two defense witnesses, and tried to reverse course before closing arguments. The reviewing courts held that the trial court was not required to re-visit the valid waiver, and that the defendant failed to prove a right to revoke it. The State fails to explain why ***Arredondo*** supports any of its arguments. This court should find that the State has failed to prove that harmless error analysis applies, and has failed to apply that analysis to the purposeful colloquy that the trial court with the prosecutor's assistance conducted in this case.

III. The State Fails to Refute the Core Claim that the Trial Court's Suppression Rulings are Unreliable, so as to Require a New Trial.

The State explains in a footnote that it chose not to address "the merits" of the argument presented in Mr. Hunt's brief in section II, pp. 31-32. (State's brief, p. 20, note six).

While Mr. Hunt's argument is brief, that is because it straightforward, consisting of two essential points the State seems to grasp but seems to seek to skate around:

1. The State seems to realize that Mr. Hunt argues here, as he did in his post-conviction motion (59:22-23) that pictures were available to corroborate Mr. Hunt's claims that police beat him, and that counsel rendered ineffective assistance of counsel when he failed to introduce them. The State faults Mr. Hunt for failing to explain "why [his trial] counsel did not introduce the photos of [Mr. Hunt's] supposed injuries caused by police brutality." (State's Brief, p. 20, n. 6). The critical failure-to-explain here is the State's: what law requires a defendant to allege not only deficient performance and prejudice, but why they occurred? There is none. Prejudice resulted because, as Mr. Hunt explained, the trial court made it clear it would only believe testimony from Mr. Hunt that was corroborated, and the pictures were corroborative. (Hunt's brief at 32). If the police beat Mr. Hunt

in order to obtain his statements, and if counsel failed to introduce photographs corroborating that claim, Mr. Hunt is entitled to relief. This court should reject the State's proposal to avoid "the merits" of this claim on the ground that Mr. Hunt's post-conviction motion or brief was required to speculate on "why" his counsel omitted to introduce the photos.

2. The second core claim in section II of the argument is that the proceedings were so fragmented and confused that, "[t]he [trial] court could not even determine at the close of the State's case when Mr. Hunt gave his statements in connection with when he claimed he was beaten. (76:21-26, App. 133-138)."(Hunt's Brief at 31). Once again, the State cannot refute the factual "merits" and obvious legal significance of the claim, so it resorts to imposing a standard not imposed by law: the State faults Mr. Hunt because he "does not explain why his attorney did not object to how the hearing was conducted..." (State's Brief at 20, n. 6). The State fails to explain why Mr. Hunt was required to explain this. Speculation as to why counsel went along with the joint trial/motion proceedings is irrelevant to the problems created by those proceedings.

CONCLUSION

Mr. Hunt asks this court to reverse the judgment of conviction, and the order denying post-conviction relief, and remand this case for a new trial. In the alternative, he asks this court to reverse the order denying post-conviction relief and remand for an evidentiary hearing.

Dated this 9th day of May, 2011.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,398 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 9th day of May, 2011.

Signed:

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