STATE OF WISCONSIN

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

DISTRICT I

Appeal No. 2010AP000394-CR
(Milwaukee County Circuit Court Case No. 2008CF003168)

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DEMONE ALEXANDER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE CARL ASHLEY PRESIDING

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I. ALEXANDER'S CLAIM CONCERNING HIS ABSENCE FROM THE JURY TRIAL WHILE THE COURT WAS COMMUNICATING WITH THE JURY IS A DIRECT CHALLENGE AND NOT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

The state correctly points out that under State v. Anderson, 2006 WI 77, ¶¶ 60-64, 291 Wis. 2d 673, 705-06, 717 N.W.2d 74, a complaint about the defendant's absence from a substantive step in the trial should be treated as a direct challenge instead of a claim of ineffective assistance of counsel where defense counsel failed to object to the defendant's absence. Id. The state wrongly concludes, however, that counsel made a "conscious tactical waiver of that right." State's Brief at p. 3.

The state seizes upon an isolated comment by defense counsel: "Just so the record is clear, I'm going to object to my client making any statements on the record." From this comment, the state argues that "Alexander has failed to prove not only that his absence was not voluntary, but also that his attorneys' presumed advice not to attend the hearings regarding

the reexamination of the jurors was not reasonable." State's Brief at p. 6

Defense counsel's statement was made in response to a request made by the trial court to defense counsel to speak with the defendant about what he knew about Juror Jolanda, and whether he felt comfortable with her serving on the jury (84:63-64). It cannot be "presumed" that counsel advised the defendant to absent himself from the proceeding. Rather, defense counsel simply advised the court that she would object to the defendant answering any of the court's questions or making any statements on the record.

The state further argues that while a defendant's right to be present at proceedings where the jury is being selected cannot be waived, "a different rule applies once the jury has been selected and sworn, and the trial has begun," and that "[a] defendant who is present at the beginning of the trial may voluntarily absent himself once the trial has started." The cases cited by the state are distinguishable from the instant case. Both Miller and Koopmans involved defendants who were not in custody and intentionally absconded. See

State v. Miller, 197 Wis. 2d 518, 519-20, 541 N.W.2d 153 (Ct. App. 1995)(defendant present on first day of trial during jury selection and opening statements, but failed to show on the second day of trial)(See also sec. 971.04(3)), and State v. Koopmans, 210 Wis. 2d 670, 563 N.W.2d 528 (1997)(defendant failed to show at her sentencing hearing, court ruled that a defendant must be present for sentencing, but may be absent during the trial and the return of the verdict under sec. 971.04(3), if the defendant voluntarily absents herself from the trial without leave of court). Id. at 677-80.

In the instant case, Alexander was in custody and had no control over his comings and goings from the courtroom. He was under police escort and in shackles throughout the entire trial. Alexander did not voluntarily absent himself from the proceedings, and we cannot "presume" that defense counsel advised him to do that.

Finally, a postconviction hearing in this matter would have clarified that Alexander did not consent or voluntarily absent himself from the courtroom. Further,

a hearing would have negated the extensive "presumptions" the state utilizes in its brief. See State's Brief at pp. 5–6.

II. IF DEFENSE COUNSEL KNEW THAT BENSON'S TESTIMONY WAS FALSE DEFENSE COUNSEL WOULD NOT HAVE ASKED BENSON WHETHER HIS TESTIMONY WAS CONSISTENT WITH HIS STATEMENTS TO THE DEFENSE INVESTIGATOR

The state argues:

> **Here, Alexander's attorneys had to know that Benson's testimony, which was so obviously contrary to the statements he had previously given to the defense investigator, was false. And one reasonable way of remedying their presentation of false evidence would have been providing the prosecutor with the means to show that the evidence was false, even if that meant disclosing information about Benson's prior statements they would not otherwise been required to reveal.**

State's Brief at p. 11.

What the state overlooks is that defense counsel turned the notes over to the prosecutor the day <u>before</u> Benson testified. See Defendant's Brief–in–Chief at pp. 19–20. Had defense counsel looked at the notes before giving them to the prosecutor, they would have realized that Benson had told Kanack that he (Benson) had seen the shooter, but not Alexander, when the shots were

fired. On the following day when questioning Benson, defense counsel would not have asked Benson if his testimony was consistent with his statement to the investigator, because defense counsel knew it was not.

Undersigned counsel suspects that when defense counsel asked Benson the question about whether his testimony was consistent with his statement to Kanack, defense counsel did not in fact know what Benson had told Kanack (even though defense counsel was present during the interview). Undersigned counsel had hoped to explore this matter further at a Machner hearing, but the trial court declined counsel's request for a hearing.

The state also argues that even if counsel's performance was deficient, Alexander has failed to demonstrate he was prejudiced thereby because the other evidence of the defendant's guilt presented by the state was strong and overwhelming. See State's Brief at pp. 12-14. However, counsel believes there is a reasonable probability of a different result at a new, error-free trial, without the Benson mishap and coupled with the presentation of the defendant's new evidence.

III. THE DEFENDANT'S NEWLY DISCOVERED EVIDENCE CHANGES THE FACTUAL PICTURE SO SIGNIFICANTLY THAT A JURY WOULD LIKELY HAVE A REASONABLE DOUBT ABOUT THE DEFENDANT'S GUILT

The defendant agrees with the state that Alexander's new evidence does qualify as newly discovered. State's Brief at p. 15. The defendant also agrees with the state that whether the new evidence would have a sufficient impact on the other evidence that a jury would have a reasonable doubt about the defendant's guilt is a question of law. State's Brief at p. 16.

The defendant disagrees with the state's argument that the new evidence would not change the result of the trial. The reasons why this evidence would change the result of his trial are self-evident. Bicannon Harris' statement clearly identifies someone else besides the defendant as the shooter. If the defendant did not shoot the victim, then he is not guilty of homicide. The state's argument concerning about how human memory works is contrary to what we all know. It would not be surprising at all for a person not familiar with Milwaukee to be unable to give a precise

street address of where he witnessed a startling event. Harris did indicate that it occurred near Glendale and Teutonia Avenues. It would actually be unusual if a person were able to give a precise street address unless the person lived in the neighborhood for a substantial period of time. Likewise, Harris recalled that the incident occurred in early June. That is how memory works. It would actually be unusual if he were able to give a precise date and time.

Further, the fact that Harris gave a reasonably good description of the suspect is also not unusual. It actually surprises counsel that the state would make this argument, because counsel has heard it from the state on so many occasions, where the state is attempting to rehabilitate a sexual assault victim/witness who is able to identify the perpetrator, but cannot be precise about dates, times, locations, etc.

CONCLUSION

For all of the foregoing reasons Alexander should be granted a new trial.

Dated this 5th day of September, 2010.

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CERTIFICATIONS

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a reply brief produced with a monospaced font. The brief is 8 pages and contains 1,684 words.

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Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

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

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

_____

Hans P. Koesser, Bar No. 1010219