STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2012AP863-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OMAR J. SMITH,

Defendant-Appellant.

ON APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND DENIAL OF A POSTCONVICTION MOTION IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, CASE NO. 2009CF2077, THE HONORABLE DENNIS R. CIMPL, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE SUPPRESSION ISSUE

In responding to Smith's argument on the suppression issue, the State claims, at the outset, that the facts Smith argues are not those that the trial court relied upon in denying the suppression motion. The State points out that Smith, in

his brief, quotes the transcript of his interview with the detectives, but the trial court based its findings of fact on the audio recording of the interview. State's Brief at 4-5.

One might ask, what is the problem? The trial court and the attorneys listened to the same audiotape, which was played during the motion hearing (80:18) The State (Milwaukee County District Attorney) made the transcript from the audiotape (94:16-17). There is no reason to doubt that the transcript accurately reflects what the court and the parties heard on the audiotape. In denying the suppression motion, the trial court was summing up or paraphrasing what it heard on the audiotape.

Based on what it heard on the audiotape, the trial court described Smith's request as "I want to talk to you. I kind of want a lawyer present, but I don't want it to look worse … for me if I ask for a lawyer" (80:23; Ap. 112). Smith's actual words on the audiotape, as captured in the transcript, were "I want to, but I kinda wanna lawyer present, but I don't want it to look like if I wait for my lawyer … I don't want it to look worse for me if I wait for my lawyer" (103:3). In saying this, Smith was responding to the detective's question, "Do you wanna tell us what your part in this was …?" (*id.*)

There is not any significant or practical difference between what the trial court said, in finding facts, and what was actually on the audiotape. It is unrealistic to think that the trial court, some undetermined amount of time *after* listening to the audiotape, would be able to quote it exactly. Yet the trial court listened to and based its decision on the audiotape, which no one can dispute is accurately portrayed in the transcript.

Smith moved to supplement the record in this appeal with the transcript for the sake of accuracy and so that there would be a record of what the trial court heard in deciding the

motion (101:1). The trial court was clearly paraphrasing what it had heard on the audiotape. It would have been inaccurate, perhaps inappropriate, not to include the exact words that the trial court found to be an ambiguous request for counsel.

The State next turns to the recent decision in *U.S. v. Hampton*, 675 F.3d 720 (7th Cir. 2012), in which the federal court of appeals found that the defendant's response to the officers' efforts to clarify whether he was invoking his right to counsel, when he said "I think, I felt like it should have been an attorney here cause that's what I asked for" was not an unambiguous request for counsel. *Id*. at 728. *Hampton*, however, was a very fact-specific decision, as the federal court only found the defendant's request to be ambiguous "under the circumstances." *Id*.

What were the circumstances? The *Hampton* court noted that, given the defendant's previous ambiguous requests for counsel and his attempts to "fish for a deal," a reasonable officer would have been unclear about whether he wanted a lawyer or wanted to proceed without one. *Id*. As the officers pressed the defendant for a decision on whether he wanted counsel, the defendant kept trying to work out a deal, he twice mentioned a lawyer, and asked how a lawyer would "affect his situation" in the context of searching for a deal. *Id*. This is not analogous to Smith's factual situation. Smith's previous request for counsel was strong enough to cause the officers to cease their questioning (79:25), and he was not fishing for a deal.

In Smith's case, the officers had previously ceased their questioning in response to his earlier request for counsel: "Cause I think I do want my lawyer present" (80:9, 15). Even though this court's inquiry is an objective one, *Davis v. U.S.*, 512 U.S. 452, 459 (1994), the officers' earlier action in stopping the interview provides support that a reasonable officer also would have considered Smith's second statement

as an unambiguous request for counsel. *See Abela v. Martin*, 380 F.3d 915, 926 (6th Cir. 2004). The officers saw fit to stop their questioning of Smith when he said, "Cause I think I do want my lawyer present," only to plow ahead when he said "I kind of want a lawyer here but I don't want it to look worse for me …" It is as if the officers, knowing that Smith had already asked for a lawyer, decided, during their second chance to interview him, to split hairs by using the variation in Smith's phrasing to justify their continued questioning of him.

Smith's request for an attorney did not have to be as blunt as "I want a lawyer" to qualify as an unambiguous request. In *U.S. v. Alamilla- Hernandez*, 654 F.Supp.2d 1004, 1010 (D.Neb. 2009), the officer said "If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish." To which the defendant responded, "I cannot afford an attorney." This qualified as an unambiguous request even though the defendant never directly requested an attorney.[1] Likewise, Smith wanted an attorney, but he was not sure whether it would "make it worse for him." He wanted an attorney but only on the condition that it would not worsen his predicament. The officer surely knew that it would not.

Similarly, in *Kyger v. Carlton*, 146 F.3d 374, 376, 379 (6th Cir. 1998), the defendant statement that "I'd just as soon have an attorney" was unambiguous despite the use of the subjunctive.

Smith's statement that he kind of wanted a lawyer present but did not want it to look worse for him was an invocation of the right to counsel that would have been unambiguous to the reasonable officer.

[1] The *Alamilla-Hernandez* decision noted that although both the officer and the defendant spoke in Spanish, they spoke different dialects.

The trial court, therefore, should have granted Smith's motion to suppress his statements.

II. THE CONFRONTATION VIOLATION COULD NOT BE CURED BY A JURY INSTRUCTION AND WAS NOT HARMLESS.

The State argues that jurors are presumed to follow the trial court's instruction to disregard error, and that should be the presumption in this case. State's brief at 16-17. Here, the trial court instructed the jury during trial to disregard the questions posed to Treadwell and again when giving the jury its predeliberation instructions (95:21-22; 96:94-95). The State attempts to distinguish the cases relied upon by Smith: *Bruton v. United States*, 391 U.S. 123 (1968) and *Cruz v. New York*, 481 U.S. 186 (1987). State's brief at 17-18.

The basis of the State's distinction of *Bruton* is that the extrajudicial statements came from a codefendant who stood "accused side-by-side with the defendant" in a joint trial. State's brief at 18, *quoting Bruton*, 391 U.S. 135-36. This distinction, as the State recognized, was obviated in *Cruz*, where a nontestifying codefendant's confession was used against the defendant in a joint trial. State's brief at 18. Here, of course, Smith and Treadwell were not codefendants. But the practical effect was the same: the jury heard the confession of an obvious coactor implicating the defendant.

To overcome *Cruz*, the State turns to *Richardson v. Marsh*, 481 U.S. 200 (1987). But the holding of *Richardson* is quite narrow. In *Richardson*, the U.S. Supreme Court held that a jury instruction was sufficient when the codefendant's confession was redacted to eliminate any reference to the defendant. *Id*. at 208-209. Because of the redaction, the codefendant's confession "was not incriminating on its face,

and became so only when linked with evidence introduced later at trial (the defendant's own testimony)." *Id.* at 208.

Unlike the defendant in *Richardson*, Smith did not testify. Treadwell's statement, as read by the prosecutor, was not redacted to exclude any mention of Smith. Treadwell's statement directly implicated Smith as being at the scene of the crime with a gun and shooting at the victims (93:70-75), and was therefore, in contrast to *Richardson*, facially incriminating.

The State next turns to the harmless error doctrine. State's brief at 19. In doing so, the State primarily relies upon Smith's confession and the testimony of Harold Conner. State's brief at 20-22. Smith's confession is at issue in this appeal, and Conner only testified that he drove Smith and two others to 21st and Vliet (93:106).

The factors relevant to a harmless error analysis include (1) the frequency of the error, (2) the importance of the erroneously admitted evidence, (3) the presence or absence of evidence contradicting the erroneously admitted evidence, (4) whether the erroneously admitted evidence duplicates properly admitted evidence, (5) the nature of the defense, (6) the nature of the state's case, and (7) the overall strength of the state's case. *State v. Mayo*, 2007 WI 78, ¶ 48, 301 Wis. 2d 642, 734 N.W.2d 115. Here, the error was prolonged, covering 17 pages of the jury trial (93:61-77). It was important and impossible to ignore, as it corroborated and magnified Smith's confession from which he wanted to distance himself (96:123-124). The improper questioning of Treadwell placed Smith at the scene of the crime with a gun in his hand, shooting until it was empty of bullets (93:73-75). A motive was also attributed to Smith: a few days earlier his mother's house had been shot at by members of the so-called Deuce Squad (93:64, 71-72). The trial court's instruction to disregard the questioning of Treadwell was undermined soon

after it was given, when a letter purportedly written by Smith to Treadwell, telling Treadwell not to testify, was introduced through the testimony of a police detective (95:75-78).

For these reasons, the Confrontation violation cannot be considered harmless.

CONCLUSION

For the reasons set forth in this reply brief and his brief-in-chief, Mr. Smith respectfully asks this court to vacate the judgment of conviction. Resting on his brief-in-chief, Mr. Smith asks, in the alternative, that this court remand the case for resentencing.

Dated: June 1, 2013

Respectfully submitted,

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CERTIFICATION OF LENGTH AND FORM

I certify that this brief conforms to the rules for a brief produced using a proportional serif font. The length of this brief is 2,012 words.

Dated: June 1, 2013

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that pursuant to Wisconsin Statutes (Rule) 809.19(12), I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and form 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: June 1, 2013

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