STATE OF WISCONSIN

IN SUPREME COURT

No. 2012AP1818-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAMON GONZALEZ,

Defendant-Appellant-Petitioner.

ON PETITION TO REVIEW A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE WILLIAM W. BRASH, III, PRESIDING AT TRIAL; HONORABLE DAVID A. HANSHER, PRESIDING AT POSTCONVICTION STAGE

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Did the trial court compel Gonzalez to become a witness against himself in violation of the Fifth Amendment when it ordered him to show his teeth to the jury?

Over defense counsel's objection, the trial court ordered Gonzalez to show his platinum teeth to the jury based on the victim's testimony and statement to police

that he was attacked by a fellow jail inmate with platinum teeth who went by the nickname "Platinum," and the man with platinum teeth was in the courtroom. The court ruled that this did not compel Gonzalez to "testify" or become a witness against himself in violation of the Fifth Amendment.

The Wisconsin Court of Appeals agreed. It held that requiring Gonzalez to show his teeth was not testimonial in nature. It was a proper order for him to display "real or physical evidence" that is not protected from compelled disclosure by the Fifth Amendment.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state assumes that, in granting review, this court has deemed this case appropriate for oral argument and publication.

STATEMENT OF THE CASE

After a trial held June 3-5, 2008, a Milwaukee County jury found Gonzalez guilty of one count of battery by a prisoner, as party-to-the-crime, in violation of Wis. Stat. §§ 940.20(1) and 939.05 (20; 61:56).[1] Gonzalez was sentenced July 22, 2008, to two-and-a-half years of initial confinement in prison, followed by two-and-a-half years of extended supervision, consecutive to any other sentences then being served (62:26). A judgment of conviction was issued July 24, 2008 (24; Pet-Ap. 116-17).

After many delays and having been granted a number of extensions by the court of appeals, Gonzalez finally filed a motion for direct postconviction relief,

[1]Gonzalez was tried jointly with co-defendant Emmanuel Martinez, who was also found guilty of the same offense (61:56).

pursuant to Wis. Stat. § (Rule) 809.30, June 4, 2012 (44).[2] The parties filed briefs on the motion (44; 46; 47). The trial court, Honorable David A. Hansher now presiding, issued a Decision and Order denying the motion without an evidentiary hearing July 26, 2012 (48; Pet-Ap. 115).[3] The court held, after having "reviewed the record as well as the parties' arguments as set forth in their briefs," that it "concurs with the State's analysis as to all issues." It then ordered the motion denied "for the reasons set forth by the State" (*id.; see* 46).

Pertinent to the lone issue Gonzalez presents here, the court on postconviction review rejected Gonzalez's argument that requiring him to show his teeth to the jury violated his Fifth Amendment right to be free from compelled self-incrimination (46:11-13).

Gonzalez appealed, raising a number of issues. The Wisconsin Court of Appeals, District I, affirmed in a Decision issued July 23, 2013. Pertinent to the lone issue Gonzalez presents here, the court of appeals rejected his argument that the trial court violated the Fifth Amendment's proscription against compelled self-incrimination when it ordered Gonzalez to show his teeth to the jury. *State v. Gonzalez*, Appeal No. 2012AP1818-CR, slip op. ¶¶ 17-21 (Wis. Ct. App. July 23, 2013).

Gonzalez filed a petition for review raising the same Fifth Amendment issue. The state opposed review, arguing that the decision was in accord with controlling precedent. This court granted review February 19, 2014.

Additional relevant facts will be developed and discussed in the Argument to follow.

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[2]The inordinate delay of four years from entry of the judgment of conviction to the denial of direct postconviction relief appears to have been caused almost entirely by the defense.

[3] Judge William W. Brash, III, presided over the trial.

ARGUMENT

IT IS BLACK LETTER LAW THAT REQUIRING A DEFENDANT TO SHOW HIS PHYSICAL FEATURES TO THE JURY IS NOT "TESTIMONIAL" IN VIOLATION OF THE FIFTH AMENDMENT'S PROSCRIPTION AGAINST COMPELLED SELF-INCRIMINATION.

Gonzalez claims that the Fifth Amendment to the United States Constitution prevented the trial court from ordering him to show his teeth to the jury. His argument flies in the face of all controlling state and federal precedent.

A. The relevant facts.

Frederick Brown, an inmate in the Milwaukee County Criminal Justice Facility, was attacked by other inmates shortly after 3:00 p.m. September 27, 2006, in a dispute over a radio and suffered injuries (58:35-47, 76, 93, 95-96; 59:45-58). An eyewitness, Milwaukee County Sheriff Deputy Szymborski, testified that Gonzalez "stomped" Brown while Brown was on the ground (58:42, 66-67). Surveillance video confirmed that Gonzalez, along with another inmate named Alva, attacked Brown (59:55-56).

Brown was an unabashedly reluctant witness for the state. He repeatedly stated at trial, "I don't want to be here, Man," "I don't want to do this," and "I just want to do my time" (58:70-71, 81-82, 100). Not surprisingly, while he recalled some details of the fight, Brown claimed he was unable to recall who attacked him (58:76, 78, 92-93, 96-97).

Brown testified that he knew Gonzalez by the nickname, "Platinum" (58:83). The reluctant Brown testified he could not remember whether he told Detective Mohr that the "guy with the platinum teeth" was one of

the inmates who beat him (58:92). Brown nonetheless testified that he believed Gonzalez is nicknamed "Platinum" because he has platinum teeth. Finally, Brown testified at trial that "the dude" with the "platinum teeth" was in court (*id.*).

Detective Mohr confirmed that Brown told him in the jail infirmary later on that day, September 27, 2006, that the guy "with the platinum teeth" from Cell No. 10 was one of the inmates who beat him (60:22-23).[4]

At the prosecutor's request, and over defense counsel's objection, the trial court ordered Brown to show his platinum teeth to the jury during Detective Mohr's testimony recounting Brown's statement to him. Gonzalez did as ordered by smiling for the jury (60:32-33). Gonzalez did not testify at trial.

B. The Fifth Amendment does not bar trial courts from ordering criminal defendants to show their physical characteristics to the jury.

According to Gonzalez, the trial court was constitutionally barred from ordering him to show his teeth to the jury. Taken to its logical conclusion, Gonzalez's argument would prevent a trial court from telling a bald defendant to remove his cap to reveal a distinctive birth mark described by a witness; telling a defendant to roll up his shirt sleeve to reveal a distinctive tattoo described by a witness; or telling a defendant to open his eyes so the jury could see whether they were the distinctive green described by a witness. Gonzalez cites no authority for that sweeping proposition because there is none.

[4] Brown also told Milwaukee County Sheriff Sergeant Criss, who arrived moments after the fight, that he was beaten by inmates from Cell Nos. 4, 10, 14 and 31. Gonzalez was housed in Cell No. 10 at that time (59:41-42, 77-78). Co-defendant Martinez was housed in Cell No. 14 (59:43).

For this court to adopt his position, it would have to make a radical change in the law (presumably under the Wisconsin Constitution) directly contrary to controlling United States Supreme Court and Wisconsin precedent. But Gonzalez does not request such a radical change in the law. He just hopes that this court will ignore that controlling precedent as he has.

The Fifth Amendment privilege against self-incrimination does not protect a suspect from being compelled to produce "'real or physical evidence.'" *Pennsylvania v. Muniz*, 496 U.S. 582, 588-89 (1990) (quoting *Schmerber v. California*, 384 U.S. 757, 764 (1966)).

The Fifth Amendment "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Schmerber v. California*, 384 U.S. at 764. *See United States v. Wade*, 388 U.S. 218, 222-23 (1967); *State v. Hubanks*, 173 Wis. 2d 1, 14-16, 20, 496 N.W.2d 96 (Ct. App. 1992) (court ordered voice samples for the purpose of voice identification permitted). Nor does the Fifth Amendment protect a defendant from being compelled to provide a blood sample to police. *United States v. Hubbell*, 530 U.S. 27, 35 (2000) (citing *Schmerber v. California*).

The Fifth Amendment specifically protects an individual from being "'compelled in any criminal case to be a *witness* against himself.'" As the United States Supreme Court has explained, use of the word "'witness'" in the Fifth Amendment "limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character." *United States v. Hubbell*, 530 U.S. at 34. *See State v. Mallick*, 210 Wis. 2d 427, 431-35, 565 N.W.2d 245 (Ct. App. 1997) (holding: It is well-established that the state may at trial prove and comment on a defendant's failure to produce physical evidence in whatever form).

"It is the 'extortion of information from the accused'; the attempt to force him 'to disclose the contents of his own mind' that implicates the Self-Incrimination Clause." *Doe v. United States,* 487 U.S. 201, 211 (1988) (quoted sources omitted).

"'Unless some attempt is made to secure a communication – written, oral or otherwise – upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one.'" *Id.,* at 210 (citation omitted).

As this court stated over a century ago:

> Of course, the physical appearance of one, his obvious physical characteristics and his attire, are things usually open to observation by others, and from time immemorial testimony by those who have observed them has been received and has been considered in no wise [sic] to invade the privacy of the person observed.

Thornton v. State, 117 Wis. 338, 342-43, 93 N.W. 1107 (1903). All subsequent decisions of this court are in full accord. *See State v. Wilks*, 121 Wis. 2d 93, 105, 358 N.W.2d 273 (1984); *State v. Doe*, 78 Wis. 2d 161, 172-75, 254 N.W.2d 210 (1977); *State v. Kroenig*, 274 Wis. 266, 269-71, 79 N.W.2d 810 (1956); *Green Lake County v. Domes*, 247 Wis. 90, 93-94, 18 N.W.2d 348 (1945).

When asked to show his teeth, Gonzalez was not asked to say or do anything that was "testimonial" in nature. He was simply asked to show physical evidence observable by anyone—his teeth—to help identify him as Brown's assailant. There was no Fifth Amendment violation here because Gonzalez was not "compelled" as a "witness" to "testify" against himself, to expose anything secret, or to reveal what he was thinking. He just smiled. There was nothing "private" about the teeth his smile revealed. *See Sholler v. Commonwealth*, 969 S.W.2d 706, 711 (Ky. 1998); *State v. Square*, 433 So. 2d 104, 109 (La.

1983); *State v. Gilmer,* 604 So. 2d 117, 120 (La. Ct. App. 1992); *Huff v. State,* 452 So. 2d 1352, 1353-54 (Ala. Crim. App. 1984) (all holding that compelling the defendant to show his teeth to the jury did not violate the Fifth Amendment). *See also* cases cited at Timothy E. Travers, J.D., Annotation, *Propriety of Requiring Criminal Defendant to Exhibit Self, or Perform Physical Act, or Participate in Demonstration, During Trial and in Presence of Jury,* 3 A.L.R 4th 374, § 10(a), at 415-20 (1981). *Compare United States v. Greer*, 631 F.3d 608, 612-13 (2d Cir. 2011) (using the content of what the defendant wrote inside his tattoo as evidence of guilt, rather than using the tattoo merely as physical evidence to identify him, was "testimonial"; but there was no Fifth Amendment violation because the voluntarily obtained tattoo "was not compelled by the government." Nor was Gonzalez's acquisition of platinum teeth compelled by the state).

The Wisconsin Court of Appeals has held that it did not violate the Fifth Amendment for the trial court to order a defendant on trial for drunk driving, who claimed that he failed the horizontal gaze nystagmus (HGN) test at the time of his arrest because he had diabetes and not because he was drunk, to take another HGN test during trial outside the presence of the jury while sober. This time, the defendant passed the HGN test and the result was used by the state to discredit his "diabetes" defense at trial. This, the court held, was properly admitted physical and not testimonial evidence. *State v. Schmidt,* 2012 WI App 137, ¶¶ 6-9, 345 Wis. 2d 326, 825 N.W.2d 521.

The trial court properly held there was no Fifth Amendment violation here. The court of appeals properly upheld that decision as follows:

> ¶18 The Fifth Amendment specifically protects an individual from being "compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. As the United States Supreme Court has explained, use of the word "'witness'" in the Fifth Amendment "limits the relevant category

> of compelled incriminating communications to those that are 'testimonial' in character." *United States v. Hubbell*, 530 U.S. 27, 34.
>
> ¶19 The Fifth Amendment privilege does not protect a suspect from being compelled "to produce 'real or physical evidence.'" *Pennsylvania v. Muniz*, 496 U.S. 582, 588–89 (1990) (citation omitted). That is, the privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Schmerber v. California*, 384 U.S. 757, 764 (1966). Nor does the Fifth Amendment protect a defendant from being compelled to provide a blood sample to police. *Hubbell*, 530 U.S. at 35.
>
> ¶20 Here, the trial court's request that Gonzalez reveal his teeth to the jury falls squarely within the category of "'real or physical evidence'" that is not protected by the Fifth Amendment. *See Muniz*, 496 U.S. at 589 (citation omitted). Like a fingerprint, a photograph, or a blood sample, Gonzalez's revelation of his platinum teeth to the jury was not testimonial but merely a showing of physical evidence.

State v. Gonzalez, slip op. ¶¶ 18-20. As this court observed over a century ago:

> That a man's head is bald is a fact ordinarily observed and known by many who come in contact with him. Does it not thereby cease to be one of those private, secret facts which it is an invasion of his right to have observed against his will? May he not, when in custody, be required to remove his hat and thus give the opportunity of observation which has commonly existed for those coming in contact with him? It seems that this must be so.

Thornton v. State, 117 Wis. at 343. The same can be said about one's smile.

C. Having Gonzalez display his distinctive teeth produced relevant and not unfairly prejudicial identification evidence.

1. This court should not review Gonzalez's relevance argument because he failed to properly preserve that statutory challenge to the order to display his teeth.

The gist of Gonzalez's argument now seems to be primarily that requiring him to show his teeth was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice. Gonzalez's general objection at trial did not, however, specify that this would produce irrelevant evidence (60:32-33; Pet-Ap. 137-38). It violated the constitution, he argued, even if relevant (60:35-38; Pet-Ap. 140-43). *See* Wis. Stat. § 904.02 (all relevant evidence is admissible except as provided in the state and federal constitutions). Gonzalez subsequently argued that it would also be unfairly prejudicial because his teeth would make him look "fierce" (60:35; Pet-Ap. 140). Finally, Gonzalez argued that it was "unnecessary" because "the jury had plenty of opportunity to observe Mr. Gonzalez here in court" (60:36-37; Pet-Ap. 141-42).

Gonzalez failed to argue to the trial court that this evidence did not have any tendency to prove the consequential fact of his identity as Brown's assailant. Wis. Stat. § 904.01. His general objection, therefore, failed to state this "specific ground[] of objection," as required by Wis. Stat. § 901.03(1)(a). [5]

[5] Gonzalez does not cite, let alone discuss, § 904.01 in his brief.

To this very day, Gonzalez's primary objection is not to the lack of relevance. His objection remains only that having him display his teeth, even assuming it would produce relevant and not unduly prejudicial evidence, violated the Fifth Amendment. Gonzalez summarized his argument at the end of his brief to this court as follows: "In sum, compelling Mr. Gonzalez, who exercised his constitutional right to remain silent, to reveal his platinum teeth to the jury violated his right against self-incrimination." Gonzalez's brief at 12. As discussed above, the argument flies in the face of all legal authority for over a century. Therefore, Gonzalez failed to properly preserve any statutory relevance objection to having him display his teeth under Wis. Stat. § 904.01.[6]

2. Having Gonzalez display his teeth produced relevant identification evidence.

Gonzalez's inadequate objection aside, this was obviously relevant physical evidence. Displaying his platinum teeth had at least some tendency to prove that Gonzalez was the inmate in Cell No. 10 with platinum teeth who attacked inmate Brown; the same man with platinum teeth who, Brown said, was now in court. Wis. Stat. § 904.01.

Gonzalez blithely insists that this was not relevant to proving his identity as Brown's assailant. He argues that showing his teeth was not "'material'" because "it was not for purposes of identification or comparison." Gonzalez's brief at 9. Simply saying something is so does not, however, make it so.

Gonzalez's relevancy argument makes no sense. Gonzalez insists that having him display his teeth "was

[6] In his petition for review, Gonzalez framed the issue as follows: "Whether Ordering a Defendant to Open His Mouth and Reveal His Platinum Teeth to the Jury Violates the Fifth Amendment Right Against Self-Incrimination." Petition for Review at 1.

not for identification or evidentiary purposes." Gonzalez's brief at 8. Of course it was. His identity as one of Brown's attackers was the central issue at trial. This was especially so after the reluctant Brown testified at trial he could no longer recall who beat him, but one of them had platinum teeth.

Gonzalez also maintains that because Brown had already testified his assailant had platinum teeth, "there was no need for the jury to determine whether Mr. Gonzalez in fact had platinum teeth." Gonzalez's brief at 9. Of course there was. The identity of the assailant remained the central issue in dispute. The jury still had to decide whether to believe the reluctant Brown who now claimed not to recall much. The state still had to prove its case beyond a reasonable doubt with all of the relevant evidence at its disposal. *See State v. Veach*, 2002 WI 110, ¶¶ 120-21, 125, 255 Wis. 2d 390, 648 N.W.2d 447. And, just think what would have happened had Gonzalez smiled as ordered by the court but did not have platinum teeth. Would Gonzalez have conceded that the absence of platinum teeth was irrelevant to disproving his identity as Brown's assailant? Of course not. He would have forcefully argued to the jury that the absence of platinum teeth proves Brown was mistaken or the state failed to prove its case beyond a reasonable doubt. The presence of platinum teeth, at least to some extent, corroborated Brown's account as given to police and, more reluctantly, in court.

Moreover, this claimed lack of relevance is defeated by an argument made by Gonzalez in his brief to the court of appeals. In explaining why introduction of Brown's hearsay statements to Detective Mohr identifying Gonzalez as one of his attackers was inadmissible hearsay and not harmless error (arguments not repeated here), Gonzalez argued:

> In contrast, Det. Mohr's testimony about Mr. Brown's statements provided additional detail about the fight and the relative involvement of the various attackers . . . . This additional detail included

> Det. Mohr's testimony that Mr. Brown described one of his attackers as "an individual that he referred to as having platinum teeth" in Cell 10, who Det. Mohr testified was Ramon Gonzalez . . . . Moreover, as noted in Section II *infra*, the State then used this testimony in support of its request that Mr. Gonzalez be ordered to "show his teeth" to the jury, in the State's effort to link Mr. Gonzalez's platinum dental work to Mr. Brown's statement to Det. Mohr regarding his attackers.

Gonzalez's brief to the court of appeals at 20 (record citations omitted).

These words neatly encapsulate the state's theory of relevance. As Gonzalez acknowledged, the whole point of having him show his teeth to the jury was to support Brown's identification of him to Detective Mohr as one of his attackers: the man "having platinum teeth" from Cell No. 10 whom Brown knew by the nickname "Platinum," and who, Brown said, was in court.

> 3. The probative value of having Gonzalez display his teeth was not substantially outweighed by the danger of unfair prejudice.

Finally, Gonzalez argues that even if relevant, having him smile for the jury was unfairly prejudicial because it put him in a bad light by making him look like a gangster or a drug dealer. Wis. Stat. § 904.03.[7] Gonzalez believes, but offers no proof, that it is within the common knowledge of the average juror that drug dealers and gang members have platinum teeth. Or, perhaps, it is common knowledge that only drug dealers and gang members have platinum teeth. Gonzalez's brief at 10. Gonzalez did not at trial or on appeal offer any evidence to support his baseless claim that the average juror would associate

[7] Gonzalez does not, however, discuss or even cite § 904.03.

platinum teeth with drug dealing or gang activity. It is rank speculation upon rank speculation.[8]

Gonzalez never asked the trial court to give a cautionary instruction directing the jury to consider his display of teeth only for the purpose of determining the identity of Brown's assailant, and for no other purpose.

Regardless, the jury already knew that Gonzalez was an inmate in the county jail (as was the victim, Brown). The jury was required to know that fact because Gonzalez's status as a jail inmate was an element of the offense of "BATTERY BY PRISONERS" that the state had to prove beyond a reasonable doubt. Wis. Stat. § 940.20(1). More specifically, the state had to prove Gonzalez was a person "confined to a county detention facility" (60:59).

Most important, the state never mentioned drug dealing or gang affiliation at trial. Even if the jury on its own, and directly contrary to the court's instructions, improperly equated platinum teeth with drugs and gangs based on extrinsic information learned outside the trial evidence, that would have added little to the already existing prejudice from the undisputed fact that Gonzalez was in jail for an unspecified offense. The jury would still have to decide whether this particular jail inmate was involved in the attack with other jail inmates on yet another jail inmate. Gonzalez's smile, whether benign or "fierce" in appearance, did not likely convict him under these circumstances.

The court of appeals easily disposed of this hopelessly conclusory prejudice argument as follows:

[8] Gonzalez maintains that displaying his teeth to the jury somehow made him look "fierce." He does not explain how smiling makes one look fierce. The fierce-looking "dudes" with the platinum "grills" displayed at p. 10 of Gonzalez's brief were not smiling; they were trying to look fierce.

> ¶21 We also reject Gonzalez's argument that requiring him to show his teeth to the jury was unfair and prejudiced him because he alleges that platinum teeth are commonly associated with drug dealing and gang affiliation and cast him in a bad light. His arguments in that regard are entirely conclusory. Furthermore, Gonzalez was charged with battery while incarcerated. It was already clear to the jury that Gonzalez had a criminal history based upon his status as an inmate in the Milwaukee County Jail. Even if the jurors did associate Gonzalez's platinum teeth with drug dealing or gang affiliation, any such association was harmless in view of Gonzalez's obvious status as a convicted person.

State v. Gonzalez, slip op. ¶ 21.

Finally, as Gonzalez's attorney conceded at trial, "the jury had plenty of opportunity to observe Mr. Gonzalez here in court," so having him show his teeth was "unnecessary." (60:36-37; Pet-Ap. 141-42). Presumably, this concession means that counsel was aware Gonzalez smiled or at least opened his mouth in the jury's presence at other points during the trial.

D. It is clear beyond a reasonable doubt that any error was harmless.

Even if Gonzalez never showed his teeth to the jury, it is clear beyond a reasonable doubt that the jury would still have found him guilty of participating in the beating of Frederick Brown based on all of the other evidence presented. *State v. Harvey*, 2002 WI 93, ¶ 44, 254 Wis. 2d 442, 647 N.W.2d 189.

Eyewitness Deputy Szymborski testified he saw Gonzalez "stomp[ ]" on Brown while Brown was on the floor. Brown gave an excited utterance to Sergeant Criss identifying the inmate from Cell No. 10 as one of his assailants. Sergeant Criss, who arrived moments after the

fight, testified that Brown told him he was beaten by inmates from Cell Nos. 4, 10, 14 and 31. Gonzalez was housed in Cell No. 10 at that time (59:41-42, 77-78). Co-defendant Martinez was housed in Cell No. 14 (59:43). The surveillance video of the fight shown to the jury included footage of Gonzalez attacking Brown (59:55-56; *see* 61:16, 39-40). Detective Mohr confirmed that Brown told him in the jail infirmary later on September 27, 2006, that the guy "with the platinum teeth" from Cell No. 10 was one of the inmates who beat him (60:22-23).

Finally, although the reluctant witness Brown claimed at trial he was unable to recall who attacked him, he positively identified Gonzalez as one of the inmates in his pod at the time of the fight (58:73-75); he knew Gonzalez by the nickname "Platinum" (58:83); and he acknowledged that the "dude" with the "platinum teeth" was in court (58:92).

The evidence of Gonzalez's guilt was overwhelming even had Gonzalez kept his mouth shut tight for the entire trial and never once showed his teeth to the jury. Any error was, therefore, harmless beyond a reasonable doubt.

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the decision of the court of appeals be AFFIRMED.

Dated at Madison, Wisconsin, this 8th day of April, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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 4,363 words.

Dated this 8th day of April, 2014.

_____
DANIEL J. O'BRIEN
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 8th day of April, 2014.

_____
DANIEL J. O'BRIEN
Assistant Attorney General