STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2012AP1818-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAMON GONZALEZ,

Defendant-Appellant.

On Appeal From a Judgment of Conviction, the Honorable William W. Brash III Presiding, and From an Order Denying the Postconviction Motion, the Honorable David A. Hansher Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026
E-mail: lambk@opd.wi.gov

ANDREA TAYLOR CORNWALL
Assistant State Public Defender
State Bar No. 1001431
E-mail: cornwalla@opd.wi.gov

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
Telephone: (414) 227-4805

Counsel for Defendant-Appellant

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ISSUES PRESENTED

1. Did the circuit court erroneously exercise its discretion when it adopted the State's analysis as its postconviction decision?

Without providing any independent analysis, the circuit court's decision simply stated that it "concurs with the State's analysis as to all issues," and was denying Mr. Gonzalez's motion "for the reasons set forth by the State." The circuit court did not provide any reasoning or analysis in its own words.

2. Did the circuit court err by ordering Mr. Gonzalez to open his mouth and reveal his platinum teeth to the jury, despite his assertion of the right not to testify?

The circuit court denied relief in postconviction proceedings, adopting the State's analysis.

3. Did the prosecutor's closing remarks shift the burden of proof to the defense?

The circuit court denied relief in postconviction proceedings, adopting the State's analysis.

4. Did the circuit court erroneously admit hearsay testimony from one of the State's key witnesses?

The circuit court denied relief in postconviction proceedings, adopting the State's analysis.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is not warranted, as the issues raised in this case are determined by established law. While undersigned counsel anticipates the parties' briefs will sufficiently address the issues raised, the opportunity to present oral argument is welcomed if this court would find it helpful.

STATEMENT OF THE CASE AND FACTS

On September 27, 2006, a fight broke out among several inmates in the Milwaukee County Jail. Inmate Frederick Brown was physically attacked in his cell by other inmates, resulting in a fight that spilled out into a common area. Ramon Gonzalez was alleged to have participated in the fight, and the State charged him, along with inmate Emmanuel Martinez, with one count of battery by a prisoner as a party to a crime, contrary to Wis. Stat. §§940.20 and 939.05. (2).

In June 2008, a three-day jury trial took place before the Honorable William W. Brash III, at which Mr. Gonzalez was tried with co-defendant Martinez. The central issue at trial was the identity of the inmates who attacked Frederick Brown. (57:94-101). The State called several witnesses, including Frederick Brown, Paul Szymborski, Sergeant James Criss, and Detective Kenneth Mohr. (58:69-103; 59:11-78; 60:13-34). The State also played a surveillance tape that reflected portions of the fight. (59:45-58).

On the stand, Mr. Brown testified that he had no specific recollection of Mr. Gonzalez being involved in the attack. (58:91-92, 97). Sergeant Criss and Detective Mohr testified regarding statements Mr. Brown made subsequent to

the attack. (59:41-42, 77-78; 60:20-25, 28-34). During Detective Mohr's testimony, at the State's request and over defense objection, the circuit court ordered Mr. Gonzalez to open his mouth and display his platinum teeth to the jury. (60:32-33).

Mr. Gonzalez did not testify, the defense presented no witnesses, and trial counsel argued in closing that Mr. Gonzalez was not involved in the fight. (61:18-28). In rebuttal, the prosecutor repeatedly noted that the defense had not called any witnesses, asserting that defense counsel "has the same subpoena power that I do." The circuit court overruled trial counsel's objection to these remarks. (61:40-41, 46-49).

The jury returned guilty verdicts for both Mr. Gonzalez and Mr. Martinez. (61:55-58). On July 22, 2008, Judge Brash sentenced Mr. Gonzalez to a five-year bifurcated prison term consecutive to any other sentence. (62:26; App. 101).

On June 4, 2012, Mr. Gonzalez filed a postconviction motion seeking a new trial on the grounds that: (1) the circuit court's order that Mr. Gonzalez display his teeth to the jury violated his right against self-incrimination and his right not to testify; (2) the prosecutor improperly shifted the burden of proof to the defense in his closing argument; and (3) the circuit court erroneously admitted prejudicial hearsay testimony. (44).

Subsequently, the circuit court ordered briefing. (45). In its response, the State argued that: (1) ordering Mr. Gonzalez to display his teeth did not implicate the fifth amendment right against self-incrimination (46:11-13; App. 114-116); (2) the prosecutor's remarks were permissible in the context of the entire record (46:8-11; App. 111-114); and

(3) the hearsay testimony was admissible as a prior inconsistent statement and even if inadmissible, was harmless error (46:13-14; App. 116-117).

The circuit court issued an order and decision denying Mr. Gonzalez's postconviction motion. (48; App. 103). The circuit court's order simply stated:

> The court has reviewed the record as well as the parties' arguments as set forth in their briefs and concurs with the State's analysis as to all issues. Accordingly, for the reasons set forth by the State, the defendant's motion for a new trial is denied.

(48; App. 103).

Mr. Gonzalez appeals. (49). Additional relevant facts are referenced below.

ARGUMENT

I. The Circuit Court's Blanket Adoption of the State's Analysis as Its Decision Was an Erroneous Exercise of Discretion.

A. Introduction.

As the Seventh Circuit Court of Appeals admonished in ***DiLeo v. Ernst & Young***, 901 F.2d 624 (7th Cir. 1990), courts should utilize their own words in judicial decisions:

> A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises

> the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views. Unvarnished incorporation of a brief is a practice we hope to see no more.

DiLeo, 901 F.2d at 626 (citation omitted) (emphasis added). When a court merely adopts a party's brief as its decision, its reasoning is obscured and it fails to exercise independent discretion to reach a neutral conclusion.

Moreover, as ***DiLeo*** also noted, adopting a party's brief portrays the court as an "advocate's tool." ***DiLeo***, 901 F.2d at 626. The judge appears to be "a mouthpiece for the winning party…rather than a disinterested evaluator" and may lead a party to conclude that "they did not receive a fair shake from the court." ***Walton v. United Consumers Club, Inc.***, 786 F.2d 303, 313 (7th Cir. 1986).

In this case, the circuit court's order denying Mr. Gonzalez's postconviction motion lacked any reasoning or analysis in the court's own words. The court's order simply stated that it "concurs with the State's analysis as to all issues," and was denying Mr. Gonzalez's motion "for the reasons set forth by the State." (48; App. 103). The court's order failed to provide any explanation or analysis of the issues, nor did it identify which of the State's arguments it found persuasive or on what basis it rejected Mr. Gonzalez's arguments.

The circuit court's blanket adoption of the State's analysis was an erroneous exercise of discretion. The court's wholesale adoption of the State's brief as its decision prevented the development of an adequate record for

appellate review and deprived Mr. Gonzalez of an independent and neutral analysis of the issues challenged in his postconviction motion.

B. The circuit court erroneously exercised its discretion.

In ***State v. McDermott***, this court considered whether the circuit court erred by its "wholesale" adoption of the State's brief as its decision on the postconviction motion. ***McDermott***, 2012 WI App 14, ¶9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237. In that case, the sum total of the circuit court's analysis was as follows:

> "For all of the reasons set forth in the State's excellent brief, which the court adopts as its decision in this matter, the court denies the defendant's motion as well as the evidentiary hearing he requests."

McDermott, 339 Wis. 2d at ¶9 n.2.

Although Wisconsin does not have a specific rule that requires circuit courts to state their reasoning, in ***McDermott*** this court found that the circuit court's decision was "inappropriate," noting that "judges must not only make their independent analyses of the issues presented to them for decision, but *should also explain their rationale* to the parties and to the public." ***Id.*** (citation omitted) (emphasis added); *see also*, ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 544, 504 N.W.2d 433 (Ct. App. 1993) (noting that if a circuit court accepts the rationale and conclusions presented in one party's brief, the court "must indicate the factors which it relied on in making its decision and state those on the record"). Nonetheless, ***McDermott*** ultimately decided that because the issue involved a question of law which is reviewed *de novo* on appeal, the circuit court's failure to give

its reasons was of no consequence. ***McDermott***, 339 Wis. 2d at ¶9 n.2.

The circuit court's order in this case is strikingly similar to the order in ***McDermott***. As in ***McDermott***, the circuit court here adopted the State's analysis in its entirety, without providing any analysis or reasoning in its own words. This prevented the development of an adequate record for appeal and deprived Mr. Gonzalez of an independent and neutral review of his postconviction motion, because it is unknown whether the circuit court utilized the correct legal standards in evaluating the postconviction claims, which of the State's arguments it found persuasive on each issue, and why it rejected the defense arguments.

The deficiency in the appellate record due to the circuit court's wholesale adoption of the State's analysis as its opinion is particularly evident with regard to the issue of whether hearsay testimony from Detective Mohr was erroneously admitted at Mr. Gonzalez's trial. *See*, *supra* Section IV. When reviewing an evidentiary decision, the standard on appeal is:

> … whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. A proper exercise of discretion requires that the circuit court rely on facts of record, the applicable law, and, using a demonstrable rational process, reach a reasonable decision…

State v. Manuel, 2005 WI 75, ¶ 24, 281 Wis.2d 554, 697 N.W.2d 811(citations omitted). As the circuit court's decision denying the postconviction motion provided no independent reasoning addressing the specific issues, it is impossible to evaluate on appeal whether the circuit court correctly relied on facts of record, the applicable law, and used a

"demonstrable rational process" in concluding whether the hearsay testimony was erroneously admitted.

Moreover, the State presented two "alternative" arguments regarding the admissibility of Detective Mohr's hearsay testimony. The State argued that Detective Mohr's hearsay testimony was admissible as a prior inconsistent statement. (46:13-14; App. 116-117). Alternatively, the State argued that even if Detective Mohr's hearsay testimony was found to be inadmissible, it would constitute harmless error. (46:14; App. 117). Consequently, because the circuit court simply adopted the State's analysis, it is unknown on what basis the circuit court denied relief on this issue, as it is unclear whether or not the circuit court found Detective Mohr's hearsay testimony was admissible. This uncertainty renders impossible appellate review of the circuit court's decision on this issue under the applicable standard.

While the other two issues Mr. Gonzalez raises, *see supra* Section II & III, present constitutional issues that are reviewed *de novo* on appeal, this court could still have benefitted from the circuit court's discussion and analysis of these issues and which arguments it found persuasive. *See, generally,* ***State v. MacArthur***, 2008 WI 72, ¶8, 310 Wis. 2d 550, 750 N.W.2d 910 (noting that while the case presented questions of law that are reviewed *de novo*, the court benefits from the analyses of the lower courts).

And, at minimum, if the circuit court's reasoning was put to paper so that it was known, this could have been helpful to the parties in drafting appellate briefs that focused specifically on the circuit court's analysis and reasoning.

For these reasons, this court should remand this case to the circuit court to independently address the issues and set forth its reasoning in the court's own words.

II. The Circuit Court's Order that Mr. Gonzalez Open His Mouth and Reveal His Platinum Teeth to the Jury Violated His Constitutional Right Against Self-Incrimination and His Right Not to Testify.

A. Introduction.

The right against self-incrimination is a constitutional protection of the Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution. This right "'protects an accused … from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.'" ***State v. LaPlante***, 186 Wis. 2d 427, 437, 521 N.W.2d 448 (Ct. App. 1994) (citing ***Pennsylvania v. Muniz***, 496 U.S. 582, 589 (1990)). An act is considered testimonial when it explicitly or implicitly relates to a factual assertion or discloses information. ***Pennsylvania v. Muniz***, 496 U.S. at 594. Testimonial conduct can be both verbal and nonverbal. ***Id.*** at 595 n.9.

In this case, despite having asserted his constitutional right not to testify, Mr. Gonzalez was ordered by the circuit court to open his mouth and reveal his platinum teeth to the jury. (59:90-95; 60:32-33). This was testimonial conduct and violated his constitutional right against self-incrimination and right not to testify. A new trial should be ordered.

Constitutional questions, both state and federal, are reviewed *de novo* on appeal. *See, e.g.*, ***State v. Schaefer***, 2008 WI 25, ¶17, 308 Wis. 2d 279, 746 N.W.2d 457 (citation omitted).

B. Revealing his platinum teeth to the jury violated Mr. Gonzalez's right against self-incrimination and right not to testify.

The State's request that the trial court order Mr. Gonzalez to display his teeth transpired as follows:

> ASST. DISTRICT ATTORNEY [ADA]: Now, in terms of the one of the details, Mr. Brown recalled that one of the individuals who struck him was or had platinum teeth?
>
> DET. MOHR: That's correct.
>
> ADA: Do you know whether or not Mr. Ramon Gonzalez has any feature or specific dental work that is consistent with that?
>
> DET. MOHR: I believe he does.
>
> ADA: Have you seen his teeth?
>
> DET. MOHR: Not personally, no.
>
> ADA: I would ask that, for the jury's sake, that we show Mr. Gonzalez'[s] dental work at this point and time so the witness can describe whether or not he has particular dental work.
>
> GONZALEZ'S COUNSEL: I would object to that.
>
> ADA: It's a physical feature. It's an attribute much like height, eye color, hair.
>
> THE COURT: All right. Side bar. Let's go this way.
>
> [Discussion off record].
>
> THE COURT: All right. At this point in time based on the discussion we had in chambers, I'll overrule

> counsel's objection and ask Mr. Gonzalez at this point to display his teeth.
>
> GONZALEZ'S COUNSEL: Okay. Show him your teeth.

(60:32-33). It was subsequently noted for the record that defense counsel objected on the grounds that compelling Mr. Gonzalez to display his teeth to the jury violated his Fifth Amendment right to remain silent and also prejudiced him, as his platinum teeth looked "fierce." (60:35-38).

As defense counsel argued, the circuit court's order that Mr. Gonzalez reveal his teeth to the jury violated his constitutional right against self-incrimination. The act of opening his mouth and displaying his teeth to the jury was nonverbal conduct that contained a testimonial component. *See generally*, ***Pennsylvania v. Muniz***, 496 U.S. at 595 n.9. The court's order that Mr. Gonzalez reveal his platinum teeth to the jury forced him to disclose information that implicated him in the assault of Frederick Brown. Thus, ordering Mr. Gonzalez to display his teeth to the jury compelled him to provide evidence against himself and violated his constitutional right against self-incrimination.

While in some instances it is permissible for identification purposes to compel a defendant to reveal a physical attribute, like handwriting or voice, this case is distinguishable. In ***State v. Hubanks***, the court held that compelling the defendant to provide a voice sample did not violate the right against self-incrimination. ***Hubanks,*** 173 Wis. 2d 1, 14-16, 496 N.W.2d 96 (Ct. App. 1992). However, in ***Hubanks***, the voice sample was required for the purpose of witness identification. ***Id.*** at 16.

In contrast, here, the forced display of teeth was not required for the purpose of identifying Mr. Gonzalez.

Frederick Brown identified Mr. Gonzalez in court as the person he knew as "Platinum." because he had platinum teeth. (58:83, 92). Consequently, there was no issue or dispute over who Mr. Gonzalez was or whether he had platinum teeth. Rather, the issue was whether or not Mr. Gonzalez had participated in the attack on Frederick Brown. Compelling Mr. Gonzalez to reveal his teeth was not required to identify him, and in this case such a forced show of teeth unfairly prejudiced him.

Platinum teeth are commonly associated with drug-dealing and gang affiliation. *See e.g.,* http://www.urbandictionary.com; http://www.goldtoothgrill.com (both last visited December 19, 2012). The trial court's order requiring Mr. Gonzalez to display his teeth to jurors cast him in a negative light, and allowed the jury to potentially impermissibly infer that he was a drug dealer or gang member, and thus more likely to have participated in the attack on Frederick Brown. Such impermissible inferences negatively impacted the jury's view of Mr. Gonzalez and infringed upon his right to a fair trial, necessitating a new trial.

III. The Prosecutor's Closing Remarks Improperly Shifted the Burden of Proof to the Defense.

A. Introduction.

In a criminal case, the State bears the burden of proving all elements of a crime beyond a reasonable doubt. *See generally*, ***State v. Schulz***, 102 Wis. 2d 423, 427, 307 N.W.2d 151 (1981). This burden remains with the State throughout the trial and cannot be shifted to the defense. ***Id.***

In this case, the prosecutor improperly shifted the burden of proof to the defense during closing argument, as his

remarks suggested that the defense had the burden to present witnesses supporting Mr. Gonzalez's innocence. This violated Mr. Gonzalez's fundamental due process rights, *see generally*, ***Schulz***, at 426-27, and entitles him to a new trial.

Constitutional questions are reviewed *de novo* on appeal. *See, e.g.*, ***State v. Schaefer***, 2008 WI 25, ¶17, 308 Wis. 2d 279, 746 N.W.2d 457 (citation omitted).

B. The prosecutor's remarks improperly shifted the burden of proof to the defense.

In his closing argument, trial counsel emphasized the lack of proof against Mr. Gonzalez:

> You heard some witnesses. I am going to talk about those witnesses. I am also going to mention, though, what is instructive about this case is what you have not heard and not seen.
>
> You heard testimony that there were 62 inmates in that pod back on that autumn day in 2006. 62 people.
>
> In fact, [the State's] presentation you saw a good number of them mill about. Some of them congregating around that cell where the ruckus occurred, and yet the only eye witness, the only people who have been produced that you have seen who were actually in that room, the only people who have been produced as witnesses, was Fred Brown and an Officer Szymborski.
>
> …

(61:17-18).

In rebuttal, the prosecutor asserted:

> ASST. DISTRICT ATTORNEY [ADA]: And the one instruction that the judge gave you, which is one of the important things in terms of the search for the truth, not

> engaging in speculation, you know*, he has the same subpoena power that I do*.
>
> I could march 61, 62, 63, how many other people on the floor, and if they have nothing to offer in terms of testimony saying, well, this is what I say, or, I don't remember, or, I don't remember, it doesn't do me any good.
>
> MARTINEZ'S COUNSEL: That's objectionable, Judge.
>
> ADA: Sidebar. As a matter of fact, we may have to go back for a second.
>
> THE COURT: Sure.
>
> (In chambers conference, off the record.) (3:10 p.m.)
>
> THE COURT: All right, Counsel, go ahead.
>
> ADA: As I was saying, *the ability to subpoena individuals, such as other inmates*, who have something germane to offer, *Mr. Tanz has that same power*, as does the State, and it doesn't do any good to call witnesses who don't want to talk, who have nothing to say.

(61:40-41) (emphasis added). The parties subsequently confirmed on the record that during the off-the-record sidebar, Mr. Gonzalez's attorney had joined in the objection on the basis that the prosecutor's remarks constituted a Fifth Amendment violation. (61:46-49).

The prosecutor's closing remarks improperly shifted the burden of proof to the defense by suggesting that Mr. Gonzalez was required to present witnesses in his defense. In contrast to other cases where the prosecutor has commented on the defense's ability to subpoena witnesses, here the prosecutor failed to join this remark with a clarification that the defense need not present any witnesses. For example, in

United States v. Aldaco, the prosecutor explicitly informed the jury that the defense had no burden of proof. ***Aldaco,*** 201 F.3d 979, 988-90 (7th Cir. 2000). The prosecutor in ***Aldaco*** remarked:

> Now, let me say this too, ladies and gentlemen, because counsel raised this point about who the government brought in or-and that we only brought in police officers and we only brought in these police officers, that there were other people in the building.
>
> *The defense has subpoena power just like the government. They don't have any burden of proof.*

Aldaco, 201 F.3d at 988 n.14 (emphasis added). The court found that the prosecutor's comments did not improperly shift the burden of proof, noting that it was "very clear to the jury that, of course, Aldaco did not bear the burden of proof." ***Id.*** at 989.

Similarly, in ***United States v. Sblendorio*** and ***United States v. Jones***, the prosecutor also explicitly informed the jury that the defense did not bear the burden of proof. ***Sblendorio***, 830 F.2d 1382 (7th Cir. 1987); ***Jones***, 188 F.3d 773 (7th Cir. 1999). In ***Sblendorio***, the prosecutor asserted:

> You heard every defense attorney ask about, "Where is this witness, where is that witness, where is this witness?" *The defendants don't have a burden, ladies and gentlemen. They don't have to prove anything*, but they have subpoena power just like the government….

Sblendorio, 830 F.2d at 1390-91 (emphasis added).

And, in ***Jones***, the prosecutor noted:

> Ladies and gentlemen, *defendants in criminal cases have absolutely no obligation to present any evidence to you*, but they have subpoena power, the same as the

> [g]overnment has, and they can bring in expert witnesses if they want, if they think it would help their case.

Jones, 188 F.3d at 779; *see also*, ***United States v. King***, 150 F.3d 644, 647-49 (7th Cir. 1998).

In contrast, here the prosecutor's closing remarks failed to clarify for the jury that the State, not the defense, carried the burden of proof. (61:40-41). Thus, the prosecutor's comments improperly shifted the burden of proof to the defense, as the prosecutor failed to clarify that the defense had no burden to present any witnesses or evidence.

In denying the defense's objection to the prosecution's comments at trial in this case, the court relied on ***State v. Jaimes***, 2006 WI App 93, 292 Wis. 2d 656, 715 N.W.2d 669. (61:46-49). ***Jaimes***, however, does not specifically address whether comments about the ability to subpoena witnesses improperly shifts the burden of proof to the defense. Instead, ***Jaimes*** addressed whether such comments constituted an improper reference to the defendant's constitutional right not to testify or misstated the law and facts regarding the absence of two co-defendants. ***Jaimes***, 292 Wis. 2d at ¶¶16-28. Thus, this court in ***Jaimes*** did not address the distinct issue presented here—whether such remarks improperly shifted the burden of proof to the defense.

Moreover, in its determination that the prosecutor's remarks in ***Jaimes*** were not improper, this court relied on ***United States v. Hernandez***, 145 F.3d 1433 (11th Cir. 1998). In ***Hernandez***, the circuit court in fact *sustained* defense counsel's objections to the prosecutor's burden-shifting remarks, and the court there noted that any possible prejudice from the remarks was diminished by the prosecution's further statement noting that the burden of proof belonged to the

government and the court's explicit instruction of the jury. ***Id***. at 1439.

In sum, because the prosecutor's remarks here did not clarify for the jury that the defense had no burden to present witnesses and that the prosecution carried the burden, the prosecutor's comments improperly shifted the burden of proof to the defense, and Mr. Gonzalez is entitled to a new trial.

IV. The Circuit Court Erroneously Admitted Detective Mohr's Hearsay Testimony.

A. Introduction.

At trial, Detective Mohr testified regarding statements Frederick Brown made to him about his assailants while in the jail infirmary, more than three hours after the fight. (Tr. 60:20-25). As discussed below, this testimony was inadmissible as a prior inconsistent statement under Wis. Stat. §908.01(4)(a) and prejudiced Mr. Gonzalez.

The review of an evidentiary decision on appeal is whether the circuit court erroneously exercised its discretion. *See, e.g.,* ***State v. Manuel***, 2005 WI 75, ¶ 24, 281 Wis.2d 554, 697 N.W.2d 811 (citations omitted).

B. Detective Mohr's hearsay testimony was inadmissible.

The circuit court admitted Detective Mohr's testimony regarding statements Mr. Brown made to him three hours after the fight, over trial counsel's hearsay objection:

> ASST. DISTRICT ATTORNEY [ADA]: At the time the altercation began, did Frederick Brown state who was present in his cell?

DETECTIVE MOHR: Yes, he did.

ADA: And who was present in his cell at that point in time?

GONZALEZ'S COUNSEL: Objection. Hearsay.

THE COURT: Counsel? Do you have any position, [Martinez's Counsel]?

MARTINEZ'S COUNSEL: No.

THE COURT: Overruled. It was his testimony with regards to information based on Mr. Brown's statements and prior testimony. Overruled. Go ahead.

…

ADA: Once outside the cell, did he identify anyone else who had struck him?

DET. MOHR: Yes, he did.

ADA: Who did he identify?

DET. MOHR: He identified an individual that he referred to as having platinum teeth.

ADA: And did he indicate what cell number that individual was in?

…

DET. MOHR: He said it was Cell 10.

ADA: And who is in cell 10 at that point in time?

DET. MOHR: That particular person assigned to Cell 10 with the platinum teeth would have been Mr. Gonzalez.

...

> ADA: Did Mr. Brown indicate whether or not he was struck by any other person besides Mr. Gonzalez, Mr. Alva, or Mr. Martinez?
>
> DET. MOHR: Yes, he did.
>
> …
>
> MARTINEZ'S COUNSEL: And from talking to Mr. Brown, he indicated to you that he was repeatedly kicked and punched by Alva, Martinez, Gonzalez, and Jackson outside of his cell. Is that what he told you?
>
> DET. MOHR: That's what he told me, yes, sir.

(60:20, 22-25, 30-32).

The trial court's basis for overruling counsel's hearsay objection is not entirely clear, as it made only a vague reference to "his testimony with regards to information based on Mr. Brown's statements and prior testimony." (60:20).

Contrary to the State's postconviction assertion (46:13-14; App. 116-117), a determination that Detective Mohr's testimony was a "prior inconsistent statement" under Wis. Stat. §908.01(4)(a)1, based upon Mr. Brown's testimony that he could not recall some of the details of his statement to Mohr (58:84-92, 98), is incorrect. In ***State v. Lenarchick***, the Supreme Court held that, "where a witness denies recollection of a prior statement, and where the judge has reason to doubt the good faith of such a denial, he may in his discretion declare such testimony inconsistent and permit the prior statements admission into evidence." ***Lenarchick***, 74 Wis. 2d 425, 436, 247 N.W.2d 80 (1976). Here, the court made no finding that it doubted the good faith of Mr. Brown's testimony that he could not recall some of the details of his statement, nor did the court declare Mr. Brown's trial testimony inconsistent, thus laying the foundation for the

admission of his statement to Detective Mohr. Consequently, lacking a proper foundation, the circuit court erred by admitting Mr. Brown's statements to Detective Mohr.

Further, the admission of Detective Mohr's testimony regarding Mr. Brown's statements to him about the fight was not harmless error, as the State suggested in its postconviction brief (46:14; App. 117), as this testimony was not merely cumulative to Sgt. Criss's testimony about Mr. Brown's earlier statements, which reflected only that Mr. Brown told Criss that he was attacked by inmates from Cells 4, 10, 14 and 31. (59:41-42, 77-78). 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. (60:20-25, 30, 32). 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. (60:22-23, 32). 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. (60:32-33).

Thus, the circuit court's error in admitting Detective Mohr's hearsay testimony regarding Mr. Brown's statements was not harmless error, as it contributed to the verdict against Mr. Gonzalez and entitles him to a new trial. *See*, *e.g.*, ***State v. Harris***, 2008 WI 15, ¶¶42-43, 307 Wis. 2d 555, 745 N.W.2d 397 (citation omitted). Without this testimony, the only statement from Frederick Brown implicating Mr. Gonzalez in the attack was through Sgt. Criss's brief testimony, as Mr. Brown's testimony did not implicate Mr. Gonzalez. (59:41-42, 77-78; 58:91-92, 97).

CONCLUSION

For the reasons stated, Mr. Gonzalez respectfully requires that this court remand this case for the circuit court to issue a decision setting forth its reasoning in its own words, or grant a new trial.

Dated this 20th day of December, 2012.

Respectfully submitted,

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026
E-mail: lambk@opd.wi.gov

ANDREA TAYLOR CORNWALL
Assistant State Public Defender
State Bar No. 1001431
E-mail: cornwalla@opd.wi.gov

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
Telephone: (414) 227-4805

Counsel for Defendant-Appellant

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 4,724 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 20th day of December, 2012.

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
Telephone: (414) 227-4805
E-mail: lambk@opd.wi.gov

Counsel for Defendant-Appellant

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of December, 2012.

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
Telephone: (414) 227-4805
E-mail: lambk@opd.wi.gov

Counsel for Defendant-Appellant

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