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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2012AP1818-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAMON G. GONZALEZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING DIRECT POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE WILLIAM W. BRASH, III, PRESIDING AT TRIAL; HONORABLE DAVID A. HANSHER, PRESIDING ON POSTCONVICTION REVIEW

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

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

DISTRICT I

Case No. 2012AP1818-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAMON G. GONZALEZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING DIRECT POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE WILLIAM W. BRASH, III, PRESIDING AT TRIAL; HONORABLE DAVID A. HANSHER, PRESIDING ON POSTCONVICTION REVIEW

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did Gonzalez waive appellate review of his challenge to the form of the trial court's decision denying his postconviction motion by not objecting or seeking reconsideration when it was issued?

The trial court issued a written Decision and Order denying Gonzalez's postconviction motion in which it

adopted the reasoning set forth in the state's brief as its own. Gonzalez did not object or seek reconsideration of the court's decision on the ground that the court should have provided its own rationale.

2. Did the trial court compel Gonzalez to become a witness against himself when it ordered him to show his platinum teeth to the jury?

The court ordered Gonzalez to show his platinum teeth to the jury after the victim testified that one of the inmates who attacked him had platinum teeth and went by the nickname, "Platinum." The court overruled Gonzalez's objection, based on the Fifth Amendment, that this order compelled him to become a witness against himself.

3. Did the prosecutor's closing argument shift the burden of proof from the state to the defense?

The trial court held that the prosecutor's argument, to the effect that defense counsel had the same subpoena power as did the state, was in reasonable response to defense counsel's closing argument that the state failed to call any of the other 62 inmates who were in proximity to the attack. This did not shift the burden of proof from the state to Gonzalez, the court held.

4. Did the trial court properly exercise its discretion when it allowed the state to introduce prior inconsistent statements made by the victim to a detective regarding the attack?

The trial court allowed the state to introduce prior statements made by the victim to a detective regarding the attack after the victim, who expressed a strong desire not to testify at trial, claimed he could not remember who attacked him.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument or publication. This case involves the application of firmly established principles of law to the facts. The briefs of the parties should adequately address the legal and factual issues presented.

STATEMENT OF THE CASE

Gonzalez appeals (49) from a judgment of conviction dated July 24, 2008 (24; A-Ap. 101-02), and from a Decision and Order denying direct postconviction relief dated July 26, 2012 (48; A-Ap. 103), the Honorable William W. Brash, III, presiding at trial, and the Honorable David A. Hansher, presiding at the postconviction stage.[1]

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).[2] 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; A-Ap. 101-02).

After many delays and having been granted a number of extensions by this court, Gonzalez finally filed a motion for direct postconviction relief, pursuant to Wis. Stat. § (Rule) 809.30, June 4, 2012 (44). The parties filed briefs on the motion (44; 46; 47). The trial court,

[1]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.

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

Honorable David A. Hansher now presiding, issued a Decision and Order denying the motion without an evidentiary hearing July 26, 2012 (48; A-Ap. 103). 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; A-Ap. 104-118). Gonzalez did not object or move for reconsideration of that decision.

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

ARGUMENT

I. GONZALEZ WAIVED ANY RIGHT TO APPELLATE REVIEW OF HIS OBJECTION TO THE FORM OF THE TRIAL COURT'S DECISION DENYING POST-CONVICTION RELIEF BY NOT OBJECTING OR SEEKING RECONSIDERATION BELOW.

Gonzalez argues for the first time in this court that it was wrong for the trial court, in denying postconviction relief, to adopt as its rationale the arguments set forth in the state's brief. He insists the court should have provided its own independent reasoning.

Gonzalez did not object, ask the trial court for an explication of reasons or move for reconsideration of what he now insists was an inadequate decision. He now asks this court to "remand this case to the circuit court to independently address the issues and set forth its reasoning in the court's own words." Gonzalez's brief at 8.

Gonzalez does not explain in his brief why he did not first ask the circuit court "to independently address the issues and set forth its reasoning in the court's own

words" by way of a written objection to, or motion for reconsideration of, its decision. If, as Gonzalez believes, the trial court erred in adopting the state's arguments as its decisional rationale, then it behooved him to point out that legal error to the trial court so that it could immediately correct the error by providing a statement of its own reasons for denying the motion.

It is simply unfair for Gonzalez to come into this court and label Judge Hansher an "'advocate's tool,'" Gonzalez's brief at 5, without first explaining to Judge Hansher what he did wrong and without giving Judge Hansher the first opportunity to correct what Gonzalez now believes was such an erroneous exercise of discretion.

By failing to object to the postconviction court's discretionary decision to rely on the arguments in the state's brief, Gonzalez waived any right to appellate review of his challenge to the form of that court's decision. *See, e.g.*, *State v. Agnello*, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427 (1999); *State v. Davis*, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996); *State v. Edelburg*, 129 Wis. 2d 394, 400-01, 384 N.W.2d 724 (Ct. App. 1986).

Failure to object at the trial court level generally precludes appellate review of a claim, even if it is of constitutional dimension. *See, e.g., State v. Huebner*, 2000 WI 59, ¶¶ 10-11, 235 Wis. 2d 486, 611 N.W.2d 727; *State v. Davis*, 199 Wis. 2d at 517-19; *State v. Edelburg*, 129 Wis. 2d at 400-01.

To properly preserve an objection for review, the litigant must "articulate the specific grounds for the objection unless its basis is obvious from its context[] . . . so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." *State v. Agnello*, 226 Wis. 2d at 172-73 (citations omitted).

The approach taken by Gonzalez is not the most efficient use of scarce judicial resources. This is especially apparent if one agrees with Gonzalez that the postconviction court failed to articulate on which alternative argument in the state's brief it relied to reject his hearsay challenge to the admissibility of statements the victim made to Detective Mohr about the attack. Gonzalez's brief at 7-8. Had Gonzalez pointed this out to Judge Hansher upon receipt of his decision by way of a written objection or motion for reconsideration, presumably Judge Hansher would have amended or rewritten his decision with an explanation whether he was ruling that this was not hearsay; if hearsay, it was admissible; if inadmissible, it was harmless error; or a combination thereof. This clarification would, then, have enabled this court to more effectively review the lower court's decision.

In any event, none of this matters because this court will independently determine the two legal challenges presented, *see* Gonzalez's brief at 6-7 (citing *State v. McDermott*, 2012 WI App 14, ¶ 9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237); and this court may also independently review the record to determine whether there is a reasonable basis to support the trial court's exercise of discretion with respect to the hearsay issue. *State v. Hunt*, 2003 WI 81, ¶ 34, 263 Wis. 2d 1, 666 N.W.2d 771; *State v. Davidson*, 2000 WI 91, ¶ 53, 236 Wis. 2d 537, 613 N.W.2d 606; *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). *See generally McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). For the reasons discussed below, there is ample support in the record for this court to uphold the trial court's rulings on all three issues presented here, and its order denying postconviction relief, even assuming it could have better explicated its underlying rationale.

Therefore, this court should reject Gonzalez's challenge to the form of the trial court's decision denying postconviction relief because (a) he waived any right to

appellate review by not objecting below; and (b) this court is still able to independently review the record and resolve the issues presented.[3]

II. THE TRIAL COURT CORRECTLY HELD THAT ORDERING GONZALEZ TO SHOW HIS PLATINUM TEETH TO THE JURY AT TRIAL WAS NOT SELF-INCRIMINATION.

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).

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[3]Even assuming it is generally preferable for a trial court to provide its own independent reasons for denying a postconviction motion, it is understandable why Judge Hansher chose to rely on the reasoning set forth in the state's postconviction brief here. That brief thoroughly and correctly applied the controlling legal principles to the relevant facts with respect to each issue (46; 48; A-Ap. 104-118). Judge Hansher could reasonably state, as he did, that after reviewing the record and the arguments in the parties' briefs, he has nothing to add to the rationale set forth in the state's brief.

Just as this court has the authority to adopt a reasonable and thorough trial judge's written decision as its own decision on appeal, and has often done so, it would seem reasonable for a trial judge to adopt as his or her own the rationale provided in a brief so eminently reasonable and thorough as the one filed by the prosecutor here. *See* Wis. Ct. App. Internal Operating Procedures VI (5)(a) (2012). Appellate counsel for the state indeed believes the prosecutor's brief is so reasonable and thorough that this court could choose to rely on it in affirming the trial court's decision, rather than on this brief filed by undersigned counsel.

Brown testified that he knew Gonzalez by the nickname, "Platinum" (58:83). A reluctant witness for the state at trial, 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 believed Gonzalez is nicknamed "Platinum" because he has platinum teeth. 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 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, the trial court ordered Brown to show his platinum teeth to the jury, and he did as ordered by smiling for the jury (60:32-33). Gonzalez did not testify at trial.

The court on postconviction review rejected Gonzalez's argument that this violated his Fifth Amendment right to be free from compelled self-incrimination (46:11-13; A-Ap. 114-16). The court was correct.

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).

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. 757, 764 (1966). *See United States v. Wade*,

[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).

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). 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*, 384 U.S. 757 (1966)).

The Fifth Amendment specifically protects an individual from being "'compelled in any criminal case to be a *witness* against himself'" (emphasis added). 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) (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).

When asked to show his teeth, Gonzalez was not asked to do anything that was "testimonial" in character. He was simply asked to show physical evidence, his teeth. There was no Fifth Amendment violation here because Gonzalez was not "compelled" as a "witness" to "testify" against himself. He just smiled.

This court recently held that it did not violate the Fifth Amendment for the trial court to order a defendant on trial for drunk driving, who claimed 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 outside the presence of the jury at trial while sober. The defendant passed the HGN test this time and the result was used by the state to discredit his "diabetes" defense at trial. This was properly admitted physical, not testimonial, evidence this court held. *State v. Thomas E. Schmidt*, No. 2012AP64-CR, 2012 WI App 137, ¶¶ 6-9 (ordered published Dec. 19,

2012). The trial court properly held there was no Fifth Amendment violation here.

Finally, Gonzalez argues that, even if relevant, having him show his teeth to the jury was unfairly prejudicial because it is apparently common knowledge to the average juror that drug dealers and gang members have platinum teeth. Gonzalez's brief at 12. This argument is unsubstantiated. Gonzalez offers nothing to show that the average juror would associate platinum teeth with drug dealing or gang activity.

Regardless, the jury already knew 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" 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). That status alone put him "in a negative light." Gonzalez's brief at 12. Moreover, the state never mentioned drug dealing or gang affiliation at trial. Even if the jury on its own and contrary to the court's instructions improperly equated platinum teeth with drugs and gangs during deliberations, that would have added little to the already existing prejudice from the undisputed and established 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, Brown.[5]

[5]Gonzalez argues that ordering him to show his platinum teeth to the jury was unnecessary to establish whether Gonzalez participated in the attack on Brown. Gonzalez's brief at 11-12: "Compelling Mr. Gonzalez to reveal his teeth was not required to identify him." *Id.* at 12. This argument makes no sense because Gonzalez's identity as one of the 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. Moreover, this argument is defeated by an argument made several pages later in Gonzalez's own brief. In explaining why introduction of Brown's hearsay statements (footnote continued)

III. THE TRIAL COURT PROPERLY HELD THAT THE PROSECUTOR'S CLOSING ARGUMENT DID NOT SHIFT THE BURDEN OF PROOF TO GONZALEZ; IT WAS A REASONABLE RESPONSE TO DEFENSE COUNSEL'S ARGUMENT ASKING WHY THE STATE DID NOT PRODUCE 62 OTHER INMATES AT TRIAL.

Counsel for Gonzalez argued to the jury in closing that the state produced only two eyewitnesses – Brown and Deputy Szymborski – even though there were 62 other inmates in the vicinity (61:18). This, coupled with the fact that Brown testified he could not recall who attacked him, amounted to reasonable doubt, defense counsel argued (61:21-22).

---

to Detective Mohr identifying Gonzalez as one of his attackers was not harmless error, 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.

Id. at 20 (record citations omitted). So, 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." *Id.*

In his rebuttal argument, the prosecutor asked the jury not to accept defense counsel's invitation to "search for doubt" based on "speculation." The prosecutor then pointed out that defense counsel has the same power to subpoena witnesses as does the state. There is no reason to bring in 62 witnesses "who have nothing to say," he argued (61:40-41). The trial court overruled defense counsel's objection that the prosecutor's argument shifted the burden of proof from the state to Gonzalez (61:40, 46-49). The trial court was correct. The prosecutor's closing argument did not deny Gonzalez a fair trial because, as the trial court held, it was an entirely reasonable and proper response to defense counsel's argument. The post-conviction court properly so held as well (46:8-11; A-Ap. 111-14).

A. The applicable law and standard for review of a challenge to the prosecutor's closing argument.

The prosecutor is given considerable latitude in closing argument, subject only to the rules of propriety and the trial court's discretion. *State v. Burns*, 2011 WI 22, ¶ 48, 332 Wis. 2d 730, 798 N.W.2d 166; *State v. Bergenthal*, 47 Wis. 2d 668, 681, 178 N.W.2d 16 (1970). Prosecutors are permitted to argue their cases with vigor and zeal. They may strike hard blows, but not foul ones. *See United States v. Young*, 470 U.S. 1, 7 (1985). *See also Hoppe v. State*, 74 Wis. 2d 107, 119-20, 246 N.W.2d 122 (1976); *State v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983).

A conviction is not to be reversed for erroneous prosecutorial argument unless it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *State v. Burns*, 332 Wis. 2d 730, ¶ 49. *See Lieberman v. Washington*, 128 F.3d 1085, 1097-98 (7th Cir. 1997). *Also see United States v. Young*, 470 U.S. at

11, 16. This court must evaluate the prosecutor's remarks in light of the entire trial record to determine whether they denied the defendant a fair trial. *See State v. Burns*, 332 Wis. 2d 730, ¶ 49; *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995); *United States v. Hall*, 165 F.3d 1095, 1115-16 (7th Cir. 1999).

The allegedly improper argument must be viewed in context and in light of the entire trial record to determine whether it adversely affected the fairness of the trial. *United States v. Hall*, 165 F.3d at 1115-16.

> Generally, counsel is allowed latitude in closing argument and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury. *State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). We will affirm the court's ruling unless there has been a misuse of discretion which is likely to have affected the jury's verdict. *See State v. Bjerkaas*, 163 Wis. 2d 949, 963, 472 N.W.2d 615, 620 (Ct. App. 1991).
>
> The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784, 789 (1979). The constitutional test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Wolff*, 171 Wis. 2d at 167, 491 N.W.2d at 501 (quoted source omitted). Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. *Id.* at 168, 491 N.W.2d at 501. Thus, we examine the prosecutor's arguments in the context of the entire trial.

State v. Neuser, 191 Wis. 2d at 136.

A defendant also cannot be heard to claim prejudicial error caused by a prosecutor's reasonable response to his own argument. *See United States v.*

Young, 470 U.S. at 11-13; *State v. Patino*, 177 Wis. 2d 348, 380-83, 502 N.W.2d 601 (Ct. App. 1993); *State v. Wolff*, 171 Wis. 2d 161, 168-69, 491 N.W.2d 498 (Ct. App. 1992). An advocate is permitted considerable latitude in responding to the arguments of his opponent. *United States v. Nowak*, 448 F.2d 134, 141 (7th Cir. 1971). *Also see United States v. Hedman*, 630 F.2d 1184, 1199 (7th Cir. 1980).

Even when a prosecutor's closing argument is improper, a trial court's instruction to the jury that the arguments of counsel are not evidence places the closing arguments in their proper perspective. *State v. Hoffman*, 106 Wis. 2d 185, 220, 316 N.W.2d 143 (Ct. App. 1982); *State v. Draize*, 88 Wis. 2d 445, 455-56, 276 N.W.2d 784 (1979). The jury is presumed to have followed those instructions. *State v. Johnston*, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994); *State v. Olson*, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998).

B. The trial court properly exercised its discretion in holding that the prosecutor's argument was not improper.

The outcome of this appeal is controlled by *State v. Jaimes*, 2006 WI App 93, 292 Wis. 2d 656, 715 N.W.2d 669. Mr. Jaimes was convicted of two counts of delivery of cocaine. In his closing argument, defense counsel questioned the lack of testimony from two collaborators in the alleged drug deals – Velazquez and Albiter. The prosecutor in rebuttal pointed out that these people were not likely to come into court and admit their involvement in the drug deals. *Id.* ¶ 18. The prosecutor also pointed out that "they have the same rights as he [Jaimes] does," and "he's got subpoena power the same way I do to ask people to come here." *Id.* ¶ 19.

This court upheld the trial court's determination that the prosecutor's rebuttal argument "was a proper

response to defense counsel's argument." *Id.* ¶ 20. This court reasoned:

> Rather, the prosecutor's comment was a fair response to the defense counsel's argument that failure on the part of alleged collaborators Velazquez and Albiter to testify should be held against the State. Specifically, defense counsel prompted jurors to speculate that Velazquez and Albiter did not testify because they would not corroborate the accusations of the undercover officer. In response, the prosecutor fairly suggested that the pair had the right not to testify in accordance with their Fifth Amendment right against self-incrimination.

Id. ¶ 24. With respect to the prosecutor's argument about the equal ability of the defense to subpoena witnesses, this court held:

> The prosecutor simply stated that Jaimes has "got subpoena power the same way I do to ask people to come here." Thus, the prosecutor was pointing to the ability of both the State and Jaimes to subpoena witnesses. *See Elam v. State*, 50 Wis. 2d 383, 389, 184 N.W.2d 176 (1971). It has been held previously that "it is not improper for a prosecutor to note that the defendant has the same subpoena powers as the government, 'particularly when done in response to a defendant's argument about the prosecutor's failure to call a specific witness.'" *United States v. Hernandez*, 145 F.3d 1433, 1439 (11th Cir. 1998) (citation omitted).

Id. ¶ 26.

In asking the jury to speculate why the state did not call the other 62 inmates supposedly in proximity to the fight, Gonzalez was asking the jury to improperly speculate that their testimony would have been unfavorable to the state; otherwise the prosecutor would have called them all to testify. Gonzalez was thereby asking the jury to search for doubt based on matters outside the evidence rather than search for the truth based only on the law and the evidence presented in court. The

prosecutor was not required to take this sitting down. It was entirely proper for the prosecutor to respond to the effect that he had no duty to call witnesses who "have nothing to say," and that defense counsel had the same subpoena power as does the prosecutor to call those witnesses if he so desired (61:40-41).

In any event, these closing arguments were all put in their proper context. The jury was repeatedly instructed by the trial court that Gonzalez is presumed innocent and the state bears the burden of proving Gonzalez guilty of Battery by Prisoners as party-to-the-crime beyond a reasonable doubt; and the jury must acquit if the state fails to meet that burden (57:91-93; 60:58-60, 62-64). The jury was instructed that Gonzalez has the "absolute constitutional right" not to testify, his decision not to testify may not be considered by the jury, and it may not influence the verdict "in any manner" (60:69-70). The court also properly instructed, consistent with the prosecutor's argument, that the jury is to decide this case based only on the evidence presented in court and the law as provided in the instructions (60:57, 65-66). The jury is not to search for doubt; it is to search for the truth (60:64). Finally, the court instructed the jury that the remarks of counsel are not evidence (60:66-67) and, more specifically, that the closing arguments of counsel are not evidence (60:67). The jury presumably followed these instructions. *State v. Johnston,* 184 Wis. 2d at 822; *State v. Olson,* 217 Wis. 2d at 743.

The prosecutor's closing argument was not, therefore, erroneous because it was a reasonable response to defense counsel's call for the jury to speculate based on matters not in evidence. Even if it was erroneous, the prosecutor's argument did not so infect the trial with unfairness as to deny Gonzalez a fair trial because the jury instructions put that argument in its proper context. The jury knew it had to decide the case based only on the law and evidence presented in court. And, the jury knew it had to acquit unless the state proved beyond a reasonable doubt, again based only on the law and evidence presented

in court, that Gonzalez was a party to the beating of fellow jail inmate Brown.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE BROWN'S PRIOR INCONSISTENT STATEMENTS TO DETECTIVE MOHR IDENTIFYING GONZALEZ AS ONE OF HIS ATTACKERS.

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).

A. The trial court properly exercised its discretion in ruling that Brown's statements to Detective Mohr were admissible non-hearsay prior inconsistent statements.

The prosecutor argued that Brown's prior statements to Detective Mohr identifying Gonzalez as one of his attackers were inconsistent with his persistent denials of recall at trial, rendering them admissible as non-hearsay prior inconsistent statements (59:22-23). The trial court agreed and allowed the state to introduce Brown's prior inconsistent statements through Detective Mohr at trial (60:11-12, 20).[6] The trial court properly exercised its

[6]The court also allowed the state to introduce excited utterances Brown made at the scene to Sergeant Criss identifying Gonzalez as one of his attackers (59:36-38, 41-42, 77-78). (footnote continued)

discretion. The postconviction court agreed (46:13-14; A-Ap. 116-17).

Brown's prior statements to Detective Mohr were admissible non-hearsay prior inconsistent statements. Wis. Stat. § 908.01(4)(a)1. Brown was a "declarant" who testified at trial, was subject to cross-examination by the defense concerning his statements, and his statements to Detective Mohr were inconsistent with his testimony at trial.

The introduction of Brown's statements to Detective Mohr was also authorized by Wis. Stat. § 972.09 which provides:

> Where testimony of a witness at any preliminary examination, hearing or trial in a criminal action is inconsistent with a statement previously made by the witness, the witness may be regarded as a hostile witness and examined as an adverse witness, and the party producing the witness may impeach the witness by evidence of such prior contradictory statement.

It is also well established that the state may use these prior inconsistent statements both for their impeachment value and as substantive evidence of the defendant's guilt. *See Vogel v. State*, 96 Wis. 2d 372, 379-86, 291 N.W.2d 838 (1980).

Wisconsin case law since *Vogel* firmly underscores its holding that prior inconsistent statements, even by a party's own witness, may be introduced as substantive evidence of the defendant's guilt. *See State v. Moffett*, 147 Wis. 2d 343, 355, 433 N.W.2d 572 (1989); *State v. Horenberger*, 119 Wis. 2d 237, 246-47, 349 N.W.2d 692 (1984); *Haskins v. State*, 97 Wis. 2d 408, 421, 294 N.W.2d 25 (1980); *State v. Whiting*, 136 Wis. 2d 400, 420-21, 402 N.W.2d 723 (Ct. App. 1987). Furthermore,

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Gonzalez does not challenge the admissibility of those excited utterances on appeal.

there will normally be no confrontation clause problem if the declarant testifies at trial and is subject to cross-examination regarding the inconsistent statement. *See Vogel*, 96 Wis. 2d at 388-90. *See also Robinson v. State*, 102 Wis. 2d 343, 348-53, 306 N.W.2d 668 (1981); *State v. Lenarchick*, 74 Wis. 2d 425, 436-44, 247 N.W.2d 80 (1976).

Brown's claimed lack of recall at trial rendered his prior statements to Detective Mohr, when he had clear recall, inconsistent with his trial testimony.

> Our supreme court has held that where a witness denies remembering a prior statement, the trial court is within its discretion to declare the denial of memory "inconsistent" testimony if the trial court doubts the good faith of the witness's professed memory loss. *Lenarchick*, 74 Wis. 2d at 435-36, 247 N.W.2d at 86.

State v. Whiting, 136 Wis. 2d at 421. *Also see Vogel*, 96 Wis. 2d at 378, 386 (prior inconsistent statements admissible where the witness claimed lack of recall due to intoxication).

The trial court properly exercised its discretion here. Brown had become by the time of trial a reluctant, if not recalcitrant, witness for the state with respect to identifying who attacked him. His claimed loss of memory was not in good faith, a trial court could reasonably determine. Therefore, this court should hold that the trial court properly exercised its discretion to declare Brown's prior statements to Detective Mohr, identifying all of his attackers including Gonzalez, as admissible non-hearsay prior inconsistent statements. *See State v. Hunt*, 263 Wis. 2d 1, ¶ 34; *State v. Davidson*, 236 Wis. 2d 537, ¶ 53; *State v. Pharr*, 115 Wis. 2d at 343. *See generally McCleary v. State*, 49 Wis. 2d at 282.

B. Any error was harmless.

Even if the trial court erroneously exercised its discretion, it is clear beyond a reasonable doubt that the jury would still have found Gonzalez guilty of participating in the beating of Frederick Brown. *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. Gonzalez was housed in Cell No. 10 at that time (59:41-42). The surveillance video of the fight shown to the jury included footage of Gonzalez attacking Brown (59:55-56; *see* 61:16, 39-40). Finally, although the reluctant witness Brown claimed at trial he was unable to recall who attacked him, he positively identified Gonzalez at trial 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); he acknowledged that the "dude" with the "platinum teeth" was in court (58:92); and Gonzalez displayed his platinum teeth to the jury (60:33). The evidence of Gonzalez's guilt was, therefore, overwhelming even without Brown's prior inconsistent statement to Detective Mohr.

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction and order denying postconviction relief be AFFIRMED.

Dated at Madison, Wisconsin this 22nd day of January, 2013.

Respectfully submitted,

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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 5,731 words.

Dated this 22nd day of January, 2013.

_____
DANIEL J. O'BRIEN
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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 22nd day of January, 2013.

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