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.

REPLY BRIEF

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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ARGUMENT[1]

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

The State argues that Mr. Gonzalez waived his challenge to the circuit court's wholesale adoption of the prosecutor's postconviction brief as its decision because he did not move for reconsideration in the circuit court. (State's brief at 4-6).

Mr. Gonzales was not required, however, to move for reconsideration in the circuit court. The State attempts to

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[1]The Assistant Attorney General's Statement of the Case remarks that 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." (State's brief at 3, n.1). Not only is this statement irrelevant to the issues raised, but the delay was by no means the fault of the defendant. On July 25, 2008, a notice of intent to pursue postconviction relief was timely filed and Attorney Donald Dudley was appointed as postconviction counsel. (25). Attorney Dudley subsequently undertook no court action and closed his file on May 27, 2009, without having any personal contact with Mr. Gonzalez. On April 17, 2011, Mr. Gonzalez wrote to the State Public Defender's office inquiring why no action had been taken on his case. After an investigation of the facts, the SPD appointed Attorney Michael Gould, who petitioned this court for a writ of habeas corpus pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). The petition sought reinstatement of Mr. Gonzalez's direct appeal rights under Wis. Stat. §809.30 on the grounds that Attorney Dudley improperly closed Mr. Gonzalez's case without communicating with him. In a written response, the Attorney General advised this court that the State did not object to reinstatement of Mr. Gonzalez's direct appeal rights. On August 3, 2011, this court granted the writ, reinstating Mr. Gonzalez's direct appeal rights and setting the Rule 809.30(2)(h) deadline for October 4, 2011. (35). Undersigned counsel were subsequently appointed as substitute counsel, and this court has granted, for good cause, several extension requests of the Rule 809.30(2)(h) and briefing deadlines.

support its waiver argument by citation to cases that involved inadequate objections or lack of contemporaneous objections during trial court proceedings, rather than any failure to request reconsideration of a postconviction ruling. *See* ***State v. Agnello***, 226 Wis. 2d 164, 170-76, 593 N.W.2d 427 (1999) (no waiver because trial counsel's objection during ***Miranda-Goodchild*** hearing was adequate); ***State v. Davis***, 199 Wis. 2d 513, 515, 517-19, 545 N.W.2d 244 (Ct. App. 1996) (waiver because no contemporaneous objection at trial); ***State v. Edelburg***, 129 Wis. 2d 394, 400-01, 384 N.W.2d 724 (Ct. App. 1986) (waiver because no objection at trial); ***State v. Huebner***, 2000 WI 59, ¶26, 235 Wis. 2d 486, 611 N.W.2d 727 (waiver because no objection at trial). Here, each of the substantive issues raised were preserved by objections at the trial level, challenged in Mr. Gonzalez's postconviction motion, and subsequently decided by the trial court, which adopted the State's postconviction brief as its decision. Thus, no waiver occurred in this case, and if this court agrees with Mr. Gonzalez that the trial court should have issued its own reasoned decision rather than simply adopting the prosecutor's brief wholesale, it should remand the case.

Further, regardless of the State's opinion of the prosecutor's brief as "eminently reasonable and thorough" (State's brief at 7, n.3), the circuit court's wholesale adoption of it as its decision conflicts with the court's duty as a neutral arbiter to issue an independent opinion. (See Defendant's brief at 4-8). The State argues that a circuit court's adoption of a party's brief is permitted, citing this court's authority under its internal operating procedures to adopt a circuit court's decision as its own. (State's brief at 7, n.3). However, while this court's Internal Operating Procedures VI (5)(a) indicate that it may incorporate a circuit court's decision into its opinion, these procedures in no way support adoption of a party's brief by a court. See http://www.wicourts.gov/ca/IOPCA.pdf (last visited March 18, 2013) ("When the trial court's decision was based upon a written opinion or a statement upon the record of its grounds

for decision that adequately express the panel's view of the law, the panel may incorporate the trial court's opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion."). A circuit court's adoption of a party's brief as its decision is significantly different from this court's adoption of a trial court's decision, as a party's brief advocates for a particular position and causes the court to appear as an "advocate's tool" and a "mouthpiece for the winning party." ***DiLeo v. Ernst & Young***, 901 F.2d 624, 626 (7th Cir. 1990); ***Walton v. United Consumers Club Inc.***, 786 F.2d 303, 313 (7th Cir. 1986). A circuit court's wholesale adoption of a party's brief as its decision is inappropriate, and unsupported by this court's internal operating procedures.

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.

Contrary to the State's assertion, the surveillance video did not "confirm" that Mr. Gonzalez attacked Frederick Brown (State's brief at 7), as the video does not clearly show who was involved in the attack on Brown. (67). As defense counsel argued in closing, the video was unclear and did not definitively identify the individual in the middle of the frames, implying that the video did not depict Mr. Gonzalez. (61:20-21,25-26). And, while the prosecutor argued that Mr. Gonzalez was observable in the video, he noted that "the quality of the video, because of the lighting, is not the greatest" and the video snapshots are "grainy." (61:38-39).

Further, the State asserts that Mr. Gonzalez's argument that the display of his teeth was not required for the purposes of his identification makes "no sense." (State's brief at 10-11 n.5). As previously asserted, compelling Mr. Gonzalez to open his mouth and display his teeth was unnecessary to identify him for the jury, as Frederick Brown had already identified Mr. Gonzalez during trial as "Platinum" due to his platinum teeth. (Defendant's brief at 11-12; 58:83, 92). The

dispute in this case was whether Mr. Gonzalez was involved in the attack, not whether he had platinum teeth.

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

The State appears to ignore Mr. Gonzalez's assertion that the prosecutor's comments improperly shifted the burden of proof at trial, an issue requiring *de novo* review on appeal. Instead, the State incorrectly focuses on whether the prosecutor's closing argument was improper, and attempts to apply an erroneous exercise of discretion standard of review. (State's brief at 12-14).

Relying on ***State v. Jaimes***, 2006 WI App 93, 292 Wis. 2d 656, 715 N.W.2d 669, the State argues that the circuit court did not erroneously exercise its discretion. ***Jaimes***, however, does not specifically address whether comments about the ability to subpoena witnesses improperly shifts the burden of proof to the defense. (Defendant's brief at 16). Moreover, ***Jaimes*** is distinguishable because there, defense counsel specifically questioned the State's failure to call two specific witnesses. ***Id.***, ¶18. Here, trial counsel's comment was comparatively vague, with counsel simply noting that there were 62 inmates in the jail pod during the fight, and that the jury heard only from Frederick Brown and the officer on duty. (61:17-18; *see* Defendant's brief at 13). Moreover, the State merely speculates that trial counsel was "asking the jury to improperly speculate that [the testimony of the 62 people] would have been unfavorable to the state; otherwise the prosecutor would have called them all to testify." (State's brief at 15). The jury could just as easily have interpreted trial counsel's non-specific remark about 62 inmates to mean that other inmates besides Mr. Gonzalez may have been involved in the attack on Frederick Brown.

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

The State argues that the circuit court properly exercised its discretion in admitting Frederick Brown's infirmary remarks to Detective Mohr as prior inconsistent statements. (State's brief at 17-19). The circuit court, however, made no specific finding that Mr. Brown's testimony lacked good faith, as required by ***State v. Lenarchick***, 74 Wis. 2d 425, 436, 247 N.W.2d 80 (1976), and this court is not in a position to make such a determination, as it did not observe Mr. Brown's testimony. *See* ***State v. McCallum*****,** 208 Wis. 2d 463, 488, 561 N.W.2d 707 (1997) (Abrahamson, CJ., concurring)("[T]he circuit court is in a much better position than an appellate court to resolve whether the witness is inherently incredible."). This court should therefore decline the State's invitation to uphold the circuit court's admission of Det. Mohr's hearsay testimony as a prior inconsistent statement of Frederick Brown.

Moreover, the evidence of Mr. Gonzalez's participation in the attack on Mr. Brown was not "overwhelming," as the State claims. (State's brief at 20). On the stand, Mr. Brown testified that he had no specific recollection of Mr. Gonzalez being involved in the attack. (58:91-92, 97). Mr. Gonzalez had no scrapes, bruises, or other injuries, unlike other individuals alleged to have participated in the fight. (58:15, 17-21). Officer Szymborski was a new employee at the time of the fight and did not observe the fight continuously. (*See, e.g.*, 58:41, 50-51, 54, 64-65). Further, as trial counsel suggested at closing, the testimony implicating Mr. Gonzalez was questionable. (61:23-28). Sixty-two inmates were present in the pod when the fight occurred, and as Officer Szymborski testified, "there [was] a lot happening at that point." (58:54, 61). Finally, the jail video snapshots of the altercation were unclear, hampered by poor lighting and "grainy" images. (61:20-21, 25-26, 38-39).

Given the questionable evidence, the admission of Det. Mohr's testimony regarding Frederick Brown's statements about the fight, combined with the other errors raised by Mr. Gonzalez, was not harmless beyond a reasonable doubt, and a new trial should be granted. *See*, *e.g.*, ***State v. Harris***, 2008 WI 15, ¶¶109-111, 307 Wis. 2d 555, 745 N.W.2d 397.

CONCLUSION

For the reasons stated, Mr. Gonzalez respectfully requests that this court remand this case to the circuit court for a decision that sets forth its independent reasoning, or grant a new trial.

Dated this 19th day of March, 2013.

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 1,720 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 19th day of March, 2013.

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