RECEIVED
07-08-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

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

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2014AP702-CR

MIGUEL MUNIZ-MUNOZ,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE MILWAUKEE COUNTY CIRCUIT COURT
HONORABLE RICHARD J. SANKOVITZ, PRESIDING

APPELLANT'S REPLY BRIEF

TIM PROVIS
Appellate Counsel
Bar No. 1020123

123 East Beutel Road
Port Washington, WI 53074
(414) 339-4458

Attorney for Appellant
MUNIZ-MUNOZ

STATE OF WISCONSIN

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

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2014AP702-CR

MIGUEL MUNIZ-MUNOZ,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE MILWAUKEE COUNTY CIRCUIT COURT
HONORABLE RICHARD J. SANKOVITZ, PRESIDING

APPELLANT'S REPLY BRIEF

Argument in Reply

1. It was prejudicial error to refuse *voir dir*e of the sleeping juror.

Along the way to making primarily a factual argument, the State points out in a footnote, see respondent's Brief at 8, n.4 (hereinafter RB), the prosecutor's comment "Purple was sleeping" was meant to refer to Juror Brunner, the first juror brought to the trial court's attention, not the second. Reexamining the record, the State is quite correct and counsel thanks it.

This correction, however, simply points out the problem with the State's argument. Both parties reported juror Brunner was sleeping (107:8 [line 5, defense: "he looked like he was sleeping to me"])(108:74 [line 16, State: "Purple was sleeping."]); the court below described him as "snoozing" (107:73 [lines 7-8]); yet it denied the request to *voir dire*. *Id.*

The State argues counsel has taken the court's use of "snoozing" to describe the juror out of context. RB at 6-7. Yet, the court's language "He wasn't snoozing very much at all to begin with," *id*., is very much the same as the trial court's language in *State v. Hampton*, 201 Wis.2d 662, 671, 549 N.W.2d 756 (Ct.App.1996)("he was not dozing for a time as long as ten minutes . . .") wherein this Court found denial of *voir dire* reversible error. See Appellant's Brief at 7-8 (hereinafter AB) following *Hampton*, *supra*, 219 Wis.2d 668, n.1 (dictionary definition of "snoozing" includes a form of sleep).

The court below's refusal to *voir dire* was not the "careful inquiry" into the matter required by law, *State v. Lehman*, 108 Wis.2d 291, 300, 321 N.W.2d 212 (1982), and relief is justified on this ground.

2. The Surrogate doctor's testimony violated the Confrontation Clause.

Relying heavily on the very recent decision in *State v. Griep*, 2015 WI 40, 361 Wis.2d 657, 863 N.W.2d 567, the State argues the surrogate pathologist's testimony, based on his review of the autopsy report and the other contents of the autopsy file, including the investigative reports (109:15-17), was consistent with the Confrontation Clause.

a. *State v. Griep* was wrongly decided.

Confrontation Clause jurisprudence of the highest Court has yet to formally resolve the constitutional issue here, which is, as formulated by Justice Sotomayor, "the constitutionality of allowing an expert witness to discuss other's testimonial statements if the testimonial statements were not themselves admitted as evidence." *Bullcoming v. New Mexico*, 564 U.S. ___ , 131 S.Ct. 2705, 2722 (2011) (conc. opn.).

(Counsel notes that in *Williams v. Illinois*, 567 U.S. ___ , 132 S.Ct. 2221 (2012), five justices found such surrogate testimony unconstitutional. See 132 S.Ct. at 2272 (dis.opn.: "five justices reject") & 132 S.Ct. 2263-64 & n.6 (conc.opn. per Thomas, J. agreeing with the four dissenters on this

point).

A number of courts of other states have adopted this rule, see, *e.g.*, *State v. Navarette*, 2013-NMSC-003, ¶5, ___ N.M. ___, 294 P.3d 435, 437 (autopsy report not admitted, surrogate testimony unconstitutional); *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶38, 241 P.3d 214, 229 (same); *Commonwealth v. Avila*, 454 Mass. 744, 759-763 & n.16, 912 N.e.2d 1014 (2009)(same), and counsel submits it is the correct one. Understanding this Court cannot overrule *Griep*, this discussion is presented to preserve the issue for further review.

b. *Griep* is distinguishable.

The issue in *Griep* involved a laboratory report of the accused's blood alcohol concentration. 2015 WI 40, ¶1. An autopsy is an entirely different forensic procedure, calling for considerably more professional skill and judgment than the simple measurement of quantities. It generates data which is not objective but rather an attempt to record a skilled physician's judgment. See generally, Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports, etc.*, 74 La.L.Rev. 117, 168-170 (2013), hereinafter Ginsberg. That is to say, different doctors examining the same body will come to different conclusions depending on their individual skill and judgment. See, *e.g.*, *Simpson v. State*, 993 So.2d 400, 404-405, ¶12- ¶14 (Miss.Ct.App.2008)(3 pathologists provide different opinions as to nature of wound). "Neither forensic pathologists nor forensic autopsy reports are fungible." Ginsberg at 168. Because autopsies, in contrast to simpler laboratory tests, require professional skill and judgment, counsel submits no general rule applying to experts who just generate numbers is properly applied to pathologists conducting autopsies.

c. The *Griep* test was not met here.

The *Griep* court found if a surrogate expert could testify to an "independent opinion," the Confrontation Clause would not be violated. *Griep*, ¶57. Unfortunately, its decision provides little guidance as to what constitutes an "independent opinion." It found only

> when a nontestifying analyst documents the original tests "with sufficient detail for another expert to understand, interpret and evaluate the results," that expert's testimony does not violate the Confrontation Clause.

Griep, ¶40, citation omitted.

But here, as noted above in 2.b., an autopsy is not simply the performance of quantitative tests generating objective data.

> The crux of the confrontation issue – the need to confront and cross-examine the attending pathologist – is that forensic pathologists are physicians. Physicians exercise judgment and make mistakes, whether they treat living, breathing patients or perform forensic autopsies. Courts that have adopted the view that forensic autopsy reports simply memorialize objective data are misinformed.

Ginsberg at 168. An autopsy is guided by an ineffable quality, *i.e.*, the skill and judgment of the individual physician, which is not captured in written records and so cannot meet the *Griep* test. "Medical decision-making and medical judgment cannot be cross-examined if the examining pathologist is not a witness at trial." Ginsberg at 171.

d. The error is not harmless.

Respondent State argues the error was harmless because the cause of death was not disputed and notes defense cross-examined Dr. Peterson to disclose he could not identify the weapon causing the victim's wounds. RB 14. But Dr. Teggatz may have had a different opinion on this question. Pathologists are sometimes able to give specific opinions about the caliber of weapons making wounds. See, *e.g.*, *State v. Green*, 261 Conn. 653, 804 A.2d 810, 815 (2002)(pathologists testifies .44 caliber made wound); *King v. State*, 89 So.3d 209, 218 (Fla.2012)(medical examiner testifies either 9 mm. or .38 caliber made wound). Furthermore, where pathologists have differing opinions, a court will credit the opinion of a doctor who actually performed the autopsy over doctors who only examine records. *Martin v. Unknown U.S. Marshals*, 965 F.Supp.2d 502, 529 (D.N.J.2013)("Dr. Feigin actually conducted the

autopsy."). So here, Dr. Teggatz who actually conducted the autopsy may have had an opinion about the caliber of the weapon inflicting the wounds or as to other aspects of the nature of the wound which would have tended to show Mr. Muniz-Munoz weapon was not the one causing the victim's wounds. But, since Dr. Teggatz could not be cross-examined, Mr. Muniz-Munoz could not explore this issue at trial. So, the error was not harmless.

3. Trial counsel's request for a jury instruction on unrecorded interrogations substantially complied with §972.115, *Wis. Stats*.

The State argues the trial court's decision not to give any instruction on unrecorded interrogation was proper because the instruction, Wis JI-Criminal 180, was not amended until after the interrogations here took place. RB 16-17.

But the statute requiring such an instruction on request is prospective and applies "if a statement made by a defendant during a custodial interrogation is admitted in a trial for a felony . . .." §972.115(2)(a), *Wis. Stats*. There could be no dispute this statute was on the books when Mr. Muniz-Munoz was tried or that he was on trial for a felony when his unrecorded custodial statement was admitted. (109:26-27, 44, 49, 72). Legislation is presumed to be prospective, *State v. Chrysler Outboard Corp.*, 219 Wis.2d 130, 162, ¶53, 580 N.W.2d 203 (1998), so §972.115 governed this trial.

The issue raised in Appellant's Brief was, given the requested special instruction was too broad and properly refused, whether the court should have given the jury the portion of Wis JI-Criminal 180 referring to unrecorded interrogations. AB 12-13. The statute requires the court to give the instruction "upon a request made by the defendant as provided in s. 971.10(5)" Subsec. (2)(a). The record here contains just such a written jury instruction request, see (43:1 [asking for Wis JI-Criminal 180]), and there is no question trial counsel was asking for an instruction on unrecorded interrogations. (110:90 ["I know it was not the policy of the state to record interrogations at the time this interrogation occurred. But nonetheless, I think it would be appropriate to

bring this instruction to the attention of the jurors."]).

Therefore, the court below abused its discretion by failing to give the standard instruction on unrecorded interrogations in Wis. JI-Criminal 180.

4. The refusal to permit discovery denied Due Process.

The litany of precedents the State presents undermining *U.S. v. Toscanino*, 500 F.2d 267 (2d Cir.1974), see RB 20, fn.10, represent the current state of the law. These rulings would be unimpeachable if the law of torture was meant to remain static.

But, considering we as a Nation have condemned torture since the Founding, *Gregg v. Georgia*, 428 U.S. 153, 170 & n.17, 96 S.Ct. 2904 (1976)(noting purpose of 8th Amendment was to prevent torture); that our law has evolved to eliminate torture from important parts of criminal procedure, *Gregg*, *supra*, 428 U.S. at 170-173 (punishment); *Miranda v. Arizona*, 384 U.S.436, 445-448, 86 S.Ct. 1602 (1966)(eliminating third degree from interrogations); *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205 (1952)(seizure of evidence from the body); and that, indeed, this law was not meant to remain static, 428 U.S. at 173 ("Eighth Amendment has not been regarded as a static concept."), 384 U.S. at 460 ("a noble principle often transcends its origins" [re: 5th Amendment]), one day the State's precedents themselves may be undermined.

Counsel understands the law to be an accused is entitled to make any "good faith argument for an extension, modification or reversal of existing law." §809.25(3)(c), *Wis. Stats*. But by refusing trial counsel an opportunity to discover facts which could support their argument, the court below cut off Mr. Muniz-Munoz' ability to bring his claim to a higher court to try to convince it a modification or reversal of existing law is justified. *Cf. U.S. v. White*, 980 F.2d 836, 843 (2d Cir.1992)(due process prohibits application of civil frivolousness rules in criminal cases). This effectively eliminated his right to appeal the issue. Therefore, basic Due Process was denied by the discovery denial.

Conclusion

Counsel respectfully submits the foregoing demonstrates the State's arguments are without merit and prays the Court to reverse the judgment of the court below.

Dated: July 7, 2015

Respectfully submitted,

_____

Tim Provis
Bar No. 1020123
Attorney for Appellant
MUNIZ-MUNOZ

STATE OF WISCONSIN

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

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2014AP702 CR

MIGUEL MUNIZ-MUNOZ,

Defendant-Appellant.

CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 1, 821 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated: July 7, 2015 So Certified,

Signature: _____

Timothy A. Provis

Bar No. 1020123

STATE OF WISCONSIN

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

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2014AP702-CR

MIGUEL MUNIZ-MUNOZ,

Defendant-Appellant.

CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on July 7, 2015. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: July 7, 2015 So Certified,

Signature: _____

Timothy A. Provis

Bar No. 1020123