STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP000971-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA BERRIOS,

Defendant-Appellant.

Appeal From a Judgment of Conviction, Honorable Charles F. Kahn, Jr., Presiding, and an Order Denying Postconviction Relief, Honorable J.D. Watts, Presiding, Entered in Milwaukee County Circuit Court

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DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. This Court has Discretion to Reverse in the Interest of Justice.

A. The cases it cites do not support the State's argument that discretionary reversal would be "improper."

The State does not dispute the power of the Wisconsin Supreme Court to reverse in the interest of justice. Nor does it question that circuit courts have this power. Oddly though, it contends it would be "improper" for this court to exercise the same authority.

At page 23, footnote 7, of his brief-in-chief, citing ***State v. Henley***, 2010 WI 97, ¶64, 328 Wis. 2d 544, 787 N.W.2d 350, Mr. Berrios noted that circuit courts have the power to reverse convictions in the interests of justice. This court reviews such rulings to ensure that discretion was properly exercised. ***State v. Randall***, 197 Wis. 2d 29, 36, 539 N.W.2d 708 (Ct. App. 1994). Similarly, the supreme court reviews this court's interest-of-justice rulings under the erroneous-exercise-of-discretion standard. ***State v. Johnson***, 149 Wis. 2d 418, 428-29, 439 N.W.2d 122 (1989).

The State seems to argue that this court has lesser power to do justice in individual cases than does the supreme court (and, presumably, circuit courts), and that the restriction stems from ***State v. Schumacher***, 144 Wis. 2d 388, 424 N.W.2d 672 (1988). (Resp. Br. at 4). The State ignores how ***Schumacher*** was placed into perspective by ***Vollmer v. Luety***, 156 Wis. 2d 1, 456 N.W.2d 797 (1990).

"…[T]he court of appeals and the supreme court have the identical discretionary power to reverse judgments based on waived error under secs. 752.35 and 751.06, respectively…" ***Vollmer***, 156 Wis. 2d at 13. ***Vollmer*** explained that ***Schumacher*** did not restrict the power of the court of appeals to do justice in individual cases. Instead, the differences in the authority of the court of appeals and supreme court reflect the supreme court's need to review errors for broader purposes. The supreme court must be able to review alleged error that "has some substantial significance in our institutional law-making responsibility." ***Vollmer***, 156 Wis. 2d at 14. The State's supreme court-versus-court of appeals distinction does not apply to any claims raised in this case.

The State further claims that interest-of-justice relief is not available as a substitute for establishing ineffective assistance of counsel. For this proposition, the State cites ***State v. Ndina***, 2007 WI App 268, 306 Wis. 2d 706, 743 N.W.2d 722 and ***State v. Flynn***, 190 Wis. 2d 31, 527 N.W.2d 343 (Ct. App. 1994). (Resp. Br. at 4). Those cases offer no support for the State's argument. They merely hold that a failure to object forfeits a claim unless the forfeiture amounts to ineffective assistance of counsel: in other words, they enforce the rules requiring contemporaneous objections. These cases say nothing to restrict this court's authority to reverse in the interest of justice.

B. Discretionary reversal is frequently, and quite properly, considered under circumstances that arguably suggest ineffective assistance of counsel as well.

In ***State v. Watkins***, 2002 WI 101, ¶¶86-87, 255 Wis. 2d 265, 647 N.W.2d 244, the court granted a new trial in the

interests of justice. The court's concern about possible ineffective assistance of trial counsel was cited among five reasons for its decision to provide this relief.

The State accuses Mr. Berrios of "giv[ing] short shrift to his arguments about his counsel's alleged ineffectiveness…" while arguing "at length that he should receive a new trial in the interests of justice because the real controversy has not been fully tried…" (Resp. Br. at 5).

Mr. Berrios is no more guilty of giving "short shrift" to analyzing ineffective assistance of counsel than was the supreme court in ***Watkins***. It is not at all surprising that ineffectiveness-related proceedings, including an evidentiary hearing, become unnecessary when additional facts, cognizable under the discretionary reversal standard, dictate the outcome.

"…[A]n argument that can be framed under ineffective assistance of counsel may also support a motion for a new trial because the real controversy was not fully tried." ***State v. Williams***, 2006 WI App 212, ¶17, 296 Wis. 2d 834, 723 N.W.2d 719, citing ***State v. Hicks***, 202 Wis. 2d 150, 152-53, 549 N.W.2d 435 (1996).

II. Far from Conclusively Establishing that Mr. Berrios Received Effective Assistance, the Record Shows the State Forfeited the Claims it Asserts on Appeal: Trevino's In-Court Identification was Improper, and all that Remains is to Assess the Damage Caused by its Admission and the Surrounding Circumstances.

The State seems to argue that the record conclusively shows it was not improper for Trevino to make an in-court identification of Mr. Berrios as the shooter. The State fails to

explain why it may disregard the contrary position it has repeatedly taken.

Before the court made its pretrial ruling, it invited the State to show why, despite suggestive circumstances, it should be allowed to introduce Trevino's identification. The prosecutor indicated the State would not seek to introduce this evidence. (48:28, A-Ap. 115).

After the prosecutor nevertheless asked Trevino to testify to an in-court identification, the circuit court stated that the prosecutor clearly violated the court order. The prosecutor did not disagree. (50:65).

Mr. Berrios filed a post-conviction motion alleging that the in-court identification was improper. In its post-conviction response brief, the State agreed that the prosecutor violated the pretrial order by seeking an in-court identification. (36:2).

Thus, the record shows that the prosecutor initiated the problematic in-court identification. It shows that, rather than rectifying the problem, defense counsel worsened it.

The record also shows that, after defense counsel made these errors, he did not object when the circuit court, answering a question from the jury, reiterated the excuses that Detective Glidewell had already been allowed to make (during testimony) for Trevino's inconsistent accounts. After highlighting the testimony, the court instructed the jury to "consider" it when it considered the detective's inconsistent report. (55; A-Ap 106). Neither defense counsel, the prosecutor, nor the court, informed the jury that Trevino's in-court identification had been tainted by suggestive circumstances on the day of trial—when Trevino and Sada had seen Mr. Berrios in custody.

As explained in Mr. Berrios' brief, all the witnesses except Mr. Berrios's sister were from Trevino's family/group. Yet, their accounts were not consistent. Mr. Berrios might well be innocent. The real controversy was not fully tried.

CONCLUSION

Mr. Berrios asks this court to reverse the judgment of conviction and order denying post-conviction relief, and remand for a new trial. In the alternative, Mr. Berrios asks this court to reverse the order denying postconviction relief, and remand for a ***Machner*** hearing.

Dated this 17th day of November, 2014.

Respectfully submitted,

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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 1,065 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 17th day of November, 2014.

Signed:

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