STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYMOND L. NIEVES,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Appeal No. 2014AP1623-CR

Trial Case No. 2010CF5111 (Milwaukee Co.)

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION AND ORDERS DENYING THE DEFENDANT'S POSTCONVICTION MOTIONS, IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE RICHARD J. SANKOVITZ PRESIDING.

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ARGUMENT

I. THE TRIAL COURT SHOULD HAVE GRANTED A MACHNER HEARING.

The State asserts that the defendant's allegations lacked the specificity required by law to justify a circuit court holding a ***Machner*** hearing. The State argues that the defendant's motion did not explain how the evidence gave him an alibi. The State is incorrect. The defendant's motion indicated that the defendant had an alibi.

The State independently discusses three pieces of evidence that the State says Nieves claims provides him an alibi. Those three items of evidence are Nieves' pretrial monitoring records, his cell phone records, and affidavits from Nieves' grandmother and brother. We believe focusing on those items in isolation is a mistake. Those items of evidence must be viewed in context.

In this case Mr. Nieves did not, at trial, have available to him the evidentiary material submitted with his post-conviction motion because that material had not been obtained by trial counsel. Not only was the material unavailable, Mr. Nieves himself was not allowed to testify regarding an alibi because the defense had not filed a notice of alibi (R.91:76,77). It is the combination of those factors that entitled him to a ***Machner*** hearing.

The thrust of the arguable defense was "... Nieves' claim that he was living with his grandmother, reporting regularly to pretrial services, and not in Milwaukee the night of the alleged homicide and attempted homicide" (R. 50:17-18). Common sense dictates that to establish that alibi Nieves, as he had requested at trial, would need to testify. Mr. Nieves' intent to testify regarding his alibi was stated in an affidavit filed by Attorney Zell with the post-conviction court. In that affidavit Attorney Zell indicated that he expected Mr. Nieves to testify to having his phone when the shootings occurred (R. 65:21-22).

It is clear that trial counsel's failure in the first instance to file a notice of alibi, and failure to obtain corroborating information regarding the alibi defense, could be found to constitute ineffective assistance of counsel. There would be no strategic reason for not pursuing such a defense, and, if believed, the defense would change the outcome of the trial. The defendant should have been afforded a post-conviction hearing to properly evaluate his claim.

The State also argues that the attachments to Nieves' motion are not to be considered a part of his motion. On that point the State cites ***State v. Allen,*** 2004 WI 106, 274

Wis.2d 568, ¶ 27. In ***Allen*** however the Supreme Court was drawing a distinction between arguments set forth in a defendant's post-conviction motion and arguments contained for the first time in briefs. In that case the defendant alleged various errors by trial counsel. The Supreme Court noted that the court of appeals categorized the claims as a claim that counsel did not adequately prepare for trial. It noted that Allen pursued that claim in his supreme court briefs. The court stated that it would not review the additional allegation made in his brief. ***Id.*** at ¶ 27. ***Allen,*** therefore, does not support an argument that attachments are not part of a post-conviction motion.

The State also dismisses the defendant's expert's opinion that Mr. Nieves' phone was not in Milwaukee at the time of the shooting because the motion does not explain how the expert arrived at that conclusion. Curiously, the State cites the dissent in ***State v. Love,*** 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62, to support its argument. To the contrary, the majority opinion in ***Love*** makes clear that the motion was sufficient. In ***Love***, the State argued that the defendant's post-conviction motion did not establish how a witness knew what he said he knew. To that argument, the Supreme Court stated:

> It is clear that Love asserts that Veasley has knowledge that can exculpate Love. Whether Veasley's information is ultimately admissible, however, is not a matter to be decided from the face of the motion papers. Accepting the statements as true, which we must, the question is whether there are sufficient objective material factual assertions that would entitle Love to relief.

Love at ¶37.

II. SEVERANCE SHOUOLD HAVE BEEN GRANTED.

The State argues that the defendant "...forfeited appellate review of his claim beyond that of the circuit court's pretrial decision not to sever because he did not object to Trinidad's testimony when it was introduced." By this statement the State is conceding that the question of whether the defendant's severance motion should have been granted is properly before the court.

Regarding the propriety of the court's denial of the defendant's motion, it must be remembered that ***Bruton*** and sec. 971.12(3) Wis. Stats., as a general rule require severance if the State intends to use a co-defendant's statement. See ***Bruton v. United States,*** 391 U.S.123, 88 S.Ct.1620, 20 L.Ed.2d 476.

The State argues however that the court was justified in accepting the State's assurance that it could present Trinidad's testimony without creating a ***Bruton*** problem by

questioning him in such a way that Mr. Nieves would not be referenced. The State finds support in ***Richardson v. Marsh*** for the strategy pursued at trial; however, ***Richardson*** is distinguishable, and does not sanction the questioning allowed in this case.

In **Richardson**, a written statement of a co-defendant was used at trial. The Supreme Court sanctioned the use of the statement when, not only the defendant's name, but any reference to his existence, was redacted, and a proper limiting instruction was given. ***Richardson*** hardly sanctions protecting a defendant's constitutional right to confrontation by relying on the oral testimony of a jail house snitch; a snitch whose answers were to be guided by the questions asked by the State. The problems of such a procedure are evident. In ***Richardson*** the statement was transcribed by police and redacted prior to trial. A limiting instruction was also given. No such procedure was followed here. No limiting instruction was given.

Because the procedure followed in this case was not sanctioned by ***Bruton*** and ***Richardson***, the trial court erred at the outset when it denied the defendant's motion.

The Testimony of Trinidad.

The State argues that the defendant has forfeited the right to rely on the testimony of Trinidad in support of his severance argument. We believe it would be more appropriate to hold that the State has forfeited its right to rely on the substance of Trinidad's testimony to support its harmless error argument. Crafting questions for a jail house snitch, hoping to elicit answers that do not acknowledge the existence of the co-defendant, is a procedure fraught with peril. In this case, when answers were given that were arguably not appropriately responsive to the State's questions, the State should have, or at least could have, moved to strike the testimony and could have asked for a limiting instruction. The State never did so. The State and trial court allowed this questionable procedure. It is disingenuous to argue that it was the defendant's responsibility to ensure it worked smoothly.

Also, the State does not cite any law holding that a defendant waives his ***Bruton*** challenge because the statements the defendant sought to keep out were allowed into evidence. ***State v. Nelson***, cited by the State, is not on point. ***Nelson*** was a case in which the defendant sought to sever counts against him. There was no codefendant. He

was said to have forfeited an argument because he had never moved for severance on the ground he asserted, and because he did not object at trial when the witnesses' testimony was offered. ***Nelson*** was not a ***Bruton*** case. It did not implicate a defendant's confrontation right.

Trinidad's Testimony Implicated Nieves. It Was Not Harmless Error.

The State argues that no ***Bruton*** violation occurred because the informant's testimony did not implicate Mr. Nieves, and if it did, it was harmless error. We disagree.

To properly analyze the impact of Trinidad's testimony, it must be considered in context.

In its opening statement the State laid out its theory of the case. The State explained to the jury how the defendants and the victims were members of a gang in Illinois. It explained that they were all involved in a retaliatory shooting, after which they fled to Kenosha, and later to Milwaukee, where the defendants planned to kill the victims (R. 85:99-102). It was after this explanation that the State discussed Maldonado's discussions with Trinidad. The prosecutor stated:

> Maldonado starts talking to Trinidad and tells him the story about how they had to leave Illinois, how they were hiding in Kenosha... .

(R. 85:107). At this point, the State did not limit its definition of "they" to Maldonado and the victims. Therefore, the jury would have understood "they" to include Mr. Nieves.

Later, during the trial when the State was questioning Mr. Trinidad, it asked him: "now at some point in time did you make law enforcement aware of the fact that both Mr. Nieves had made some statements to you, and Mr. Moldonado made multiple statements to you, about *their* involvement in this homicide" (R.89: 23).

The State's phrasing of the above question certainly indicated to the jury the State's view that Maldonado's statements implicated Mr. Nieves in the crime. There was no attempt to limit the statements of Maldonado to Maldonado, thereby protecting Nieves from any inference that Maldonado was implicating him.

The substantive questioning of Trinidad did not sufficiently limit Maldonado's statements either. During the questioning of Trinidad, the following exchange took place:

> Q. So what was the plan that Mr. Maldonado was involved in terms of these two shorties who he was afraid wouldn't hold water, wouldn't keep their mouth shut?
>
> A. Bring them to Wisconsin and kill them.

Q. And did he, in fact talk about how that happened and what Mr. Maldonado's involvement was with either of these two shorties?

A. **They** told them to come party or celebrate to Wisconsin. And they came to Kenosha, and then from Kenosha they came to Milwaukee.

Q. By "they", you mean Mr. Maldonado and the shorties?

A. Yes.

Q. And after leaving Kenosha, **they** were going to go to Milwaukee, and what happened once **they** got to Milwaukee according to Mr. Maldonado?

A. **They** brought them to a dark alley, if I'm not mistaken, and laid them on the ground. And then when he shot, he shot through the hoody.

(R. 89:17-18)

The State went on to question the informant regarding statements made by Maldonado about the time period that they were in Kenosha. The following exchange took place:

Q. Did he talk about, when he spoke of the period of time **they** were in Kenosha, where **they** were at where he was at with the shorties in Kenosha?

A. I believe **Mr. Nieves's mom's** house or his baby mama house.

Q. And did he talk about how long Mr. Maldonado was there with these shorties?

A. I believe for a day or two, a couple days. Not too long.

Q. And were they at that location before they came to Milwaukee according to Mr. Maldonado?

A. Yes.

(R. 89:21-22)

Although the State attempted to limit the informant's testimony to statements implicating Moldonado, it was unable to do so. Any fair reading of the above questioning leads to the conclusion that the State was unsuccessful in avoiding any "reference to the existence" of Mr. Nieves. The only reasonable conclusion a jury could make is that the "they" referred to in the questioning included Nieves. The testimony even mentioned his name, indicating that "they' went to his mother's or his baby mama's home.

The failure to sever was not harmless error. As shown above, this is not a case where one minor improper reference was made, as the State argues in its brief.

Also, the State is incorrect when it argues that Nieves' alleged admission rendered harmless any improper reference to him by Trinidad. On the one hand the State minimizes testimony given by Trinidad as "one improper reference", yet characterizes an ambiguous statement allegedly made by Mr. Nieves, (i.e. "he said that didn't spark. He got his guy" (R.89:23), related by a jailhouse

snitch), as a full blown admission. Nieves "admission" was not as powerful as the State would make it, and does not render the admission of Maldonado's statements harmless.

The State goes on to argue harmless error based on the notion that the jury was unlikely to believe that one of the co-defendants legitimately confessed to Trinidad, and yet Trinidad lied about the other confessing. The State's argument makes our case. It is because one confession bolsters the other that the rule requiring severance is in place. In ***Cruz v. New York*** 481, U.S. 186 (1987), the United States Supreme Court reaffirmed the ***Bruton*** holding that "where a non-testifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant...the confrontation clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." ***Cruz*** at 193-194. This is because a co-defendant's confession that corroborates a defendant's confession significantly harms the defendant's case. ***Cruz*** at 192.

The State's case relied on the testimony of a victim who had told multiple stories, and a jail house informant looking for consideration. It was not a mistaken

identification case. The admission of Maldonado's statements was not harmless.

III. THE ALLEGED THREAT TO KILL S.V. WAS PREJUDICIAL HEARSAY.

The alleged statement by "Boogie Man" that Nieves and Maldonado intended to kill S.V. was hearsay and was not admitted for a proper purpose. The court allowed the hearsay because, according to the court, the statement was offered to show how S.V. "felt". How S.V. "felt" was not an issue material to the case. As stated in ***Wilder v. Classified Risk Ins. Co.*** 47 Wis. 2d 286, 291, 177 N.W. 2d 109 (1970), to be admissible a statement must be material to an issue in the case. In ***Wilder*** the court stated: "(u)nless there is such an issue of whether a statement was in fact made, the hearsay statement should not be admissible because it is immaterial and there is great danger the jury, in spite of instructions, will use the hearsay evidence as proof of what the statement says."

In a homicide case, the great danger that the jury, hearing that a threat to kill was made, would consider the statement for the truth of what it asserts, is a practical certainty. To allow into evidence a hearsay threat to kill, on the basis that the State is exploring the victim's

feelings, stretches the hearsay rule beyond its breaking point. This prejudicial testimony should not have been admitted.

Dated: _____, 2015.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief in non-proportional type with a courier font and is 13 pages long including this page.

Dated: _____, 2015.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 § 809.19(12).

I further certify that this electronic brief is identical to the printed form of the brief filed as of this date.

A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: _____, 2015.

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