RECEIVED
01-29-2018
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP2187-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

KYLE LEE MONAHAN,

Defendant-Appellant-Cross-Respondent-Petitioner.

On Review of a Decision of the Court of Appeals
Affirming the Lafayette County Circuit Court,
The Honorable William D. Johnston, Presiding

REPLY BRIEF

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Cross-Respondent-Petitioner

TABLE OF CONTENTS

CASES CITED

ARGUMENT

The exclusion of evidence that R.C. was driving her car recklessly minutes before the crash was not harmless error.

The state takes issue with Mr. Monahan's assertion that an appellate court deciding whether an error was harmless must ask itself whether a jury, drawing reasonable inferences in the defendant's favor, could find reasonable doubt. Respondent's Brief at 32-36.

The state's objection has no merit. How could a court find an error harmless—that is, decide "no reasonable jury" would find for the defendant had the error not occurred, ***State v. Magett***, 2014 WI 67, ¶10, 355 Wis. 2d 617, 850 N.W.2d 42—without asking what a reasonable jury could do? If the correction of the error could lead a reasonable jury, drawing reasonable inferences, to find for the defendant, then by definition, the error is not harmless. You cannot say beyond a reasonable doubt that a jury would convict if you refuse to consider how it might acquit.

And though it is true that ***State v. Mendoza***, 80 Wis. 2d 122, 258 N.W.2d 260 (1977), is about the failure to give a requested jury instruction, what difference does this make? When a jury is erroneously instructed, it cannot decide whether the evidence satisfies the elements. When a jury is not allowed to hear compelling defense evidence, it is likewise prevented from deciding whether the all the evidence establishes guilt beyond a reasonable doubt. If, in deciding whether these errors mattered, an appellate court draws inferences favoring the state, it is not applying the harmless error test. It is stepping into the role of the jury, making a decision—who to believe—that is the jury's alone to make.

This simple notion does not, despite what the state seems to think, mean that the strength of the state's case can't lead to a conclusion of harmlessness, nor that there can never be a harmless error. Respondent's Brief at 33. The key word is "reasonable." Of course a jury can always acquit—it has that power under our Constitution. But the question of harmlessness is not whether a jury could nullify; the question is whether a reasonable jury could find reasonable doubt. Where the state's case is very strong, and the defense one very weak, there comes a point that inferences in the defendant's favor make no sense—they're unreasonable.

But this is just not that case, despite the state's best efforts. To be sure, the state had an expert, who gave a plausible account of how he concluded Mr. Monahan had been the driver. But Mr. Monahan also had an expert, who gave a plausible explanation for why it was impossible, given the physical evidence, to reach any firm conclusion about who was driving.[1] The state argues, in effect, that Trooper Parrott was more credible than Erdtmann, claiming, for example, that Parrott "refuted" Erdtmann's conclusion about when the airbag deployed. Respondent's Brief at 25. What Parrott did was *disagree* with Erdtmann (who had worked as a designer of airbags). The state just wants this court to take Parrott's side in the disagreement. But that's not for an appellate court; it's for a properly instructed jury that has heard all the evidence—including the defendant's.

Likewise, the state wants this court to believe some of Mr. Monahan's statements about the crash, but not others.

[1] As it did in the court of appeals, the state mischaracterizes Mr. Erdtmann's conclusion in its argument, saying he "could say only that he could not tell who the driver was" despite acknowledging in its facts section that he concluded "it cannot be determined who was driving." Respondent's Brief at 27, 9.

Respondent's Brief at 13-19. Again, this question—whether Mr. Monahan really recalled what happened, or whether he was simply, in his post-concussion state, telling people what they wanted to hear (and what had been told to him, by Deputy Gorham)—is a question of credibility. Decisions about credibility are for the jury; a credibility call is not a valid way for an appellate court to declare an error harmless.

As for the remaining evidence—basically, a photo showing a woman of R.C.'s size sitting, apparently comfortably, in the driver's seat as it was positioned, her mother's assertion that she preferred to sit close to the steering wheel, and the fact that Mr. Monahan's DNA was on the steering-wheel airbag, along with one other person's—it falls far short of establishing that no jury could find reasonable doubt.

And despite the state's argument, the evidence Mr. Monahan wanted to introduce mattered. The state understood this when it was fighting to exclude it. It understood this when it was arguing to the jury that R.C. would never have driven as it seems she did.[2] R.C.'s reckless driving moments before the crash was powerful evidence that it was her reckless driving, and not Mr. Monahan's, that caused the accident.

---

[2] It's unclear how the state can assert that the prosecutor did not "intentionally exploit" the absence of the GPS evidence. Respondent's Brief at 30. She was not the lawyer at the time the evidentiary ruling was made, but she was co-counsel for the entire trial and gave the entire closing argument. Is the state suggesting she played this role without learning the facts of the case, what the court had let in, and what it had kept out? In any case, Mr. Monahan agrees with the state on the main point—he doesn't need to show this improper argument was intentional.

The evidence against Mr. Monahan is real, but it is not overwhelming. The fact that he did not get to put on a crucial part of his case—that he was deprived of his constitutional right to a complete defense—could very easily have changed the outcome. Mr. Monahan was, and remains, entitled to a fair trial. This court should order that he receive one.

CONCLUSION

For the foregoing reasons, Mr. Monahan respectfully requests that this court reverse his conviction and sentence and remand the case to the circuit court for a new trial.

Dated this 29th day of January, 2018.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Cross-Respondent-Petitioner

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 1,006 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 29th day of January, 2018.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Cross-Respondent-Petitioner