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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP002299
Manitowoc County Circuit Court Case No. 2011CM000199

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANK D. ROSETI,

Defendant-Appellant.

ON APPEAL TO REVIEW AN ORDER DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL ENTERED IN THE CIRCUIT COURT FOR MANITOWOC COUNTY, THE HONORABLE JEROME L. FOX PRESIDING

THE BRIEF OF THE PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication.

ARGUMENT

I. Whether the trial court erred when it denied the defendant's motion for a new trial based on an ineffective assistance claim without holding a *Machner* hearing.

A. Standard of Review

Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law the Court reviews *de novo*. *State v. Allen*, 2004 WI 106, 274 Wis.2d 568, 682 N.W.2d 433.

B. Argument

The defendant's motion for a new trial is based on an alleged violation of Wis. Stat. Sec. 971.23(1)(b). This statute provides that the district attorney shall disclose to the defendant before trial a "written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of the witnesses to the defendant's oral statements." See Wis. Stat. Sec. 971.23(1)(b). Our State Supreme Court has interpreted "the phrase 'plans to use' to necessarily embody an objective standard: what a reasonable prosecutor should

have known and would have done under the circumstances." See *State v. DeLao*, 2002 WI 49, 252 Wis.2d 289 at 305, 643 N.W.2d 480.

In this case, the statement at issue is a statement the defendant made to Officer Hodek in which the defendant stated he didn't remember what happened at the time of the incident. (47, p.120, 10-14). Clearly this was not a statement that can be viewed under an objective standard as one that the prosecutor would have "planned to use" as it offers nothing. The defendant told the officer that he did not remember what happened. No reasonable prosecutor would have looked at that statement and planned to use it at trial because it offers nothing. The fact that the district attorney in this case did not plan to use the statement is evidenced by the fact that the statement was not used in his case-in-chief. It is further unreasonable to assume the district attorney should have known that the defendant would take the stand in his own defense and offer a detailed account of what occurred when the information available to the district attorney up to that point had been that the defendant did not recall what took place. Because this meets the objective standard of review as to whether or not a reasonable prosecutor in this case would have planned to use the statement at trial, there was no violation under Wis. Sta. Sec. 971.23(1)(b).

II. Whether the defendant is entitled to a new trial in the interest of justice.

A. Standard of Review

This is a question of law the Court reviews *de novo*.

B. Argument

The appellant correctly points out that the Court has the discretionary power to reverse a judgment when the real controversy was not fully tried or justice has for any reason miscarried. *Vollmer v. Luety*, 156 Wis.2d 1, 17, 456 N.W.2d 797 (1990). There is nothing in this record that shows the defendant ever claimed he did not recall having the conversation with Officer Hodek wherein the Officer stated the defendant could not recall what took place. In fact, the defendant's response upon cross examination was that such a report "would absolutely not be accurate." (47, p.116, line 13). This was not a case where the defendant alleged that he did not recall a conversation. The defendant was affirmatively stating that it did not occur and if the officer had noted it did, that would not have been accurate. It may have been a credible argument that it would have affected the trial strategy had counsel been aware of the report but it is clear from the record that the defendant was clear in his conviction that the report of Officer Hodek was not accurate. This

was not trial by ambush. The defendant clearly erred in his belief that the jury would find him to be more credible than the officer. This mistaken belief does not constitute a necessity for a new trial in the interest of justice.

CONCLUSION

Because the defendant was not denied effective assistance of counsel and because justice has not been miscarried, the convictions should stand and the defendant should not be granted a new trial.

Dated this 3rd day of March, 2015.

Respectfully submitted,

_____

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certifies that this brief and appendix conform to the rules contained in Sections 809.19(6) and 809.19(8)(b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 694 words.

Dated this 3rd day of March, 2015.

Respectfully submitted,

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CERTIFICATION 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 s.809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 3rd day of March, 2015.

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