STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

CASE NO. 2014AP2888-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LONEL L. JOHNSON, JR.,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

On Appeal From the Decision of The Honorable
William M. Atkinson, Circuit Court Judge
Circuit Court for Brown County, Branch VIII

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ARGUMENT

I. Mr. Johnson did not waive any challenge to the jury instructions.

Mr. Johnson preemptively argued against any waiver in his Postconviction Motion for Resentencing (R. 44, App. 15-16). The State did not respond to this argument in its Brief Opposing Defendant's Motion for Resentencing (R. 48, App. 19-24), so there was no need to raise the issue once again in the Defendant's Reply Brief. The State likewise did not argue waiver at the Postconviction Motion Hearing. Unrefuted arguments are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Ironically then, after the State conceded any waiver argument before the trial court, now for the first time on appeal the State claims in its Response Brief (p. 7-8)--conflating waiver with forfeiture--that Mr. Johnson forfeited his claim because at the jury instructions conference at trial, defense counsel did not object but rather stipulated to the standard jury instructions and verdict. Likewise, for the first time on appeal, the State

claims that Mr. Johnson has not raised an Ineffective Assistance of Counsel claim. "This court will not address issues for the first time on appeal." ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997).

Furthermore, the State's 17-line argument in the Response Brief does not address the argument against waiver that Mr. Johnson set forth in his Brief-in-Chief (p. 31-32). Mr. Johnson did not and could not personally waive a constitutional right of which he was unaware. ***State v. Smith***, 2012 WI 91, ¶ 54. Again, unrefuted arguments are deemed refuted.

Undersigned counsel did not raise an IAC claim because trial counsel was not ineffective: there was no deficient performance per the first prong of ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). As is well known, to establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of "reasonably effective assistance." ***State v. Domke***, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 805 N.W.2d 364 (citing ***Strickland***, internal citations omitted). Reviewing

courts should be "highly deferential" to counsel's strategic decisions and make "every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** There is a " 'strong presumption' that [counsel's] conduct 'falls within the wide range of reasonable professional assistance.'" ***Id.***

In ***Domke***, trial counsel gave deficient performance when failing to object to hearsay inadmissible under the well-established rule of ***State v. Huntington***, 216 Wis.2d 671, 695, 575 N.W.2d 268 (1998) (declining "to apply the hearsay exception for statements made for medical diagnosis or treatment, Wis. Stat. § 908.03(4), to statements made to counselors or social workers"). ***Id.*** at ¶¶ 38-46. The annotations to Wis. Stat. § 908.03 in both the 2005–06 and 2007–08 Wisconsin Statutes explicitly cited ***Huntington*** and its holding. ***Id.*** Likewise, the standard treatises on evidence set out this rule. *See* Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence § 803.4, at 611–12 (2d ed.2001); the late Judge Ralph

Adam Fine's Wisconsin Evidence, § 908.03(4), at 908–45 (2007). ***Id.*** Thus, "[c]ontrary to the State's argument, this rule from *Huntington* is not obscure or unsettled law." ***Id.*** at ¶ 44. In contrast, counsel is not required to argue an unsettled or unclear point of law. ***Id.*** (citing ***State v. Maloney***, 2005 WI 74, ¶ 28, 281 Wis.2d 595, 698 N.W.2d 583).

Here, in stark contrast, there is no settled law set out in a Supreme Court case issued a decade before trial. There is no statutory annotation. Upon information and belief, there is no discussion in any standard treatise. Indeed, there does not appear to be any precedent, even unpublished appellate cases--not surprising, given that the Domestic Abuse Repeater law is still relatively new. This point is anything but settled or clear. To his credit, trial counsel raised this novel ***Apprendi*** issue at sentencing, just after the US Supreme Court issued ***Alleyne***.

So trial counsel was not ineffective for not requesting a jury instruction that was not even published until almost a year after the jury trial. The Sixth Amendment does not mandate a Sixth Sense; the

Constitution does not command clairvoyance. The intimation that trial counsel must know the future is meritless, like the prosecutrix's claim at the postconviction motion hearing to insider knowledge of workings of the Jury Instructions Committee.[1]

Finally, this Court still has the discretionary power to review a waived instructional error if the error goes to the "integrity of the fact-finding process." ***State v. Hatch***, 144 Wis. 2d 810, 824, 425 N.W.2d 27 (Ct. App. 1988). It appears that the standard for review is harmless error. ***Id.*** at 826 ("We conclude that the instructions, considered in their entirety, render any error harmless because the overall meaning communicated by the instructions was a correct statement of the law.") The State concedes that the trial court erred in not giving the domestic abuse instruction (Resp. Brief p. 8 "It was error not to do so in this case."). As argued in the Brief-in-Chief and below, this error was not harmless, so this Court still can exercise

[1] "I know that it's my understanding that one of the judges has also been changing positions...she believes that both issues are to be decided by the Court." (R. 62:7, App. 42).

discretionary power to review the unrequested instruction.

II. The omission of the jury instruction was not harmless error.

The State fails to prove that it is clear beyond a reasonable doubt that the jury found that Mr. Johnson committed domestic abuse against Mrs. Johnson. Unlike the historical fact of the park in ***Harvey***, this issue is neither undisputed nor indisputable.

Ignoring the clear testimony at trial, the State minimizes as a "short scuffle" (p. 11) the violent altercation between Mr. Johnson and police officers, fully set forth in the Brief-in-Chief. It is undisputed that Mr. Johnson was disorderly with the police, who kneed him, took him to the ground, and tased him.

In contrast, it is not clear beyond a reasonable doubt what happened in the room before the police made entry. As the State concedes, the prosecution had to rely on the word of the alleged victim and her child. "It is worth pointing out that although A.J. and her son were clear that Johnson had 'choked' her, A.J.'s

testimony and the remaining evidence was relatively weak in proving the other charges. There was no evidence of injury (apart from pain and difficulty breathing), A.J. refused medical treatment" and she was able to push past Mr. Johnson to get out of the bedroom. (Resp. Brief p. 11 n.11.) So the jury had to take the alleged victim and her son at their word.

But the State admits that the alleged victim at trial denied saying, "You're choking me" (p. 4 n.4)--even though police (who, unlike the alleged victim, had no reason to lie) testified at that they heard someone inside say she was being choked. Mr. Johnson himself testified that his wife said "Oh, you're choking me." So the State effectively concedes that she lied at trial.

Indeed, as set out in the Brief-in-Chief, this was not the only lie. She admitted that she had been drinking that night and angry at Mr. Johnson, so there was motive. She admitted on cross-examination that if she told officers that nobody else was there, that would have been a lie. Officer Walwort heard a male and a female both say that nobody else was in the apartment, but there were other people inside. She said that he

was on top of her on her bed choking her throat with both hands, and the bedroom door was closed "throughout the whole incident." But despite the closed door, at some point, her young son threw her a cell phone into the bedroom, and at some point, the child came into the room.

Likewise, the only other corroborating witness, her son, had inconsistent tales. At trial, he testified that he went into the hallway and as the bedroom door was open--not closed throughout the whole incident as his mother said--he saw Mr. Johnson choking his mother in her bedroom, standing over her, with his hands or his arm on her throat. She was on the bed, bent very far back. Other than saying that "I was just a witness," he did not tell the police anything else.

Officer Haar testified that once scene he spoke with the boy, who came up to the officer on his own and indeed said, "I'm a witness." The officer asked him what happened, and the boy (who did not tell the police anything else?) replied, "He was holding her down, and he had his hands over her mouth"--not throat as she and he claimed at trial. Officer Haar did

not dispute the preliminary hearing transcript, in which he stated that the child had said that he had seen his mother and Mr. Johnson "on the ground"--not on the bed as she and he claimed at trial. On scene the boy tells police only "I'm a witness" but he gives details about the alleged attack. He sees his mother on the bed but he sees her on the ground. He sees her throat being choked but he sees her mouth being covered. Like his mother, he cannot get his story straight.

This set of inconsistencies and lack of credible evidence most likely led to the acquittal of the charges in which the jury instructions specifically mentioned Mrs. Johnson as the target. There was, however, not just a plausible but an undisputed factual basis for the DC--his altercation with the police. It is thus far from clear beyond a reasonable doubt that even without the special instruction, a jury would have found Mr. Johnson guilty of DC-Domestic Abuse. The error was not harmless.

CONCLUSION

For these reasons, Mr. Johnson respectfully requests that the Court reverse the trial court's decision denying the motion to resentencing. He has already served the maximum possible sentence for DC-Repeater and should be released forthwith. It is right and just to do so in this anniversary month of *Magna Carta Libertatum*.

Dated this 19th day of June 2015

Respectfully submitted,

Peter R. Heyne
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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) for a brief produced with a proportional serif font. The length of the brief is 1,714 words.

Dated this 19th day of June 2015

Peter R. Heyne
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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.

Dated this 19th day of June 2015

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AFFIDAVIT OF MAILING

I certify that copies of this brief and appendix were deposited in the United States mail for first class delivery on June 19, 2015 to the following:

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