STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP279-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CAROLINE D. PRIETO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER EXCLUDING WITNESSES, ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE CHAD G. KERKMAN PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN EXCLUDING ALL BUT ONE OF THE STATE'S WITNESSES AS A SANCTION FOR VIOLATING THE COURT'S SCHEDULING ORDER.

A. Prieto has conceded many of the State's arguments by failing to contest them; based on these tacit concessions alone, this court should reverse the trial court's order.

A comparison of the State's brief-in-chief with Prieto's responsive brief reveals that Prieto is not attempting to refute many of the arguments the State has advanced.

Significantly, Prieto does not address the State's argument that *Irby v. State*, 60 Wis. 2d 311, 210 N.W.2d 755 (1973), and *Kutchera v. State*, 69 Wis. 2d 534, 230 N.W.2d 750 (1975), as well as cases from foreign jurisdictions, support the proposition that exclusion of evidence is an inappropriate sanction for a discovery violation where the defendant is not prejudiced. Nor does Prieto contest the State's assertion that she did not and cannot show she suffered any prejudice when the State filed its witness list thirteen days before the scheduled trial date, in violation of the trial court's scheduling order. Nor does Prieto challenge the State's contention that the record shows the prosecutor's noncompliance with the scheduling order was merely negligent, rather than deliberate or willful.

Based on Prieto's failure to contest the above points, this court should take them as confessed. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) ("'Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.'" (citation omitted)). The supreme court recently invoked this principle against the State in a criminal appeal. *See State v. Hurley*, 2015 WI 35, ¶ 61 n.20, 361 Wis. 2d 529, 861 N.W.2d 174.

These tacit concessions alone provide a sufficient reason to reverse the trial court's order excluding all of the State's witnesses except Dr. Swenson as a sanction for the

prosecutor's failure to file the State's witness list by the date established in the scheduling order. Under the case law discussed in the State's brief-in-chief, exclusion of witnesses is an improper sanction for a discovery violation where the defendant is not prejudiced, and the violation is not willful or deliberate. This court could reverse on that basis without reaching the State's alternative argument that excluding all witnesses except the State's expert amounted to a dismissal with prejudice and that imposing such a severe sanction is an erroneous exercise of discretion where the client is blameless. The State addresses that argument below.

B. Prieto's arguments for refusing to extend *Marquardt* to criminal cases are unpersuasive.

In its brief-in-chief at 33-35, the State argued that the ruling in *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 61, 299 Wis. 2d 81, 726 N.W.2d 898, that a trial court should not dismiss a case with prejudice based on attorney misconduct where the client is blameless, should be extended to criminal cases.

Regarding that alternative argument, Prieto agrees with the State's assertion that despite the State's failure to raise it below, this court should decide the issue because it "is of sufficient public interest and deserves analysis." Prieto's brief at 11. Curiously though, Prieto simultaneously argues that the State forfeited the argument that the exclusion of all State witnesses except Dr. Swenson

effectively amounted to a dismissal with prejudice. Prieto's brief at 13. According to Prieto, the trial court was the proper forum for the State to demonstrate what its case would look like before and after the trial court excluded most of its witnesses. *See id.*

There are two problems with Prieto's position. First, there is no need for this court to address *Marquardt*'s application in criminal cases unless this court first determines that the trial court's order was tantamount to a dismissal with prejudice. Absent such a foundational determination, *Marquardt* would not have any effect here, so that a determination that it should extend to criminal cases would be dictum.

Second, contrary to Prieto's belief, it was unnecessary for the prosecutor to make an offer of proof to establish what the State's case would be before and after the trial court excluded all but one of the prosecution's witnesses. The witness list filed thirteen days before trial shows whom the State planned to call (107), and the trial court's order left the State with only Dr. Swenson to testify. Given that Dr. Swenson had no personal knowledge of who had physical custody of C.B. when he sustained his injuries, the State could not prove Prieto responsible based solely on the doctor's testimony. In contrast, the State's witness list is sufficient to show what the substance of the State's case would have been were it not for the trial court's order excluding witnesses.

This court should therefore reject Prieto's argument that the State forfeited the claim that the order excluding witnesses was tantamount to dismissal with prejudice by failing to make an unnecessary offer of proof.

Assuming this court agrees to decide whether *Marquardt* should extend to criminal cases, Prieto's two arguments against extending it are unpersuasive.

The first reason is essentially a contention that the court's statement, "it is an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct to the client, where the client is blameless" (*Marquardt*, 299 Wis. 2d 81, ¶ 61), is dictum because the *Marquardt* court concluded that Industrial Roofing was not blameless. Prieto's brief at 12. The State disagrees. The *Marquardt* court followed up this statement by declaring that it was overruling *Johnson v. Allis-Chalmers Corp.*, 162 Wis. 2d 261, 470 N.W.2d 859 (1991), to the extent *Johnson* could be read as holding that a dismissal with prejudice is warranted even when the client is blameless. *Marquardt*, 299 Wis. 2d 81, ¶ 61. That express overruling refutes the notion that the immediately preceding statement was merely dictum.

Prieto's second argument against extending *Marquardt* fares no better. She notes that, unlike the private litigants in civil cases, "[t]he public will always be blameless" for the prosecutor's violation of a discovery order in a criminal case. Prieto's brief at 12. While the State

admits that the public generally will be blameless in such a situation, so that dismissal with prejudice is unwarranted, that will not always be so. Rather, in those situations where a victim is uncooperative and this lack of cooperation contributes to the State's violation of a scheduling order, blame can be imputed to the public because the victim is a member of that collective entity.

As a final matter, the State did not mean to suggest that prosecutors purposely flout scheduling orders because of their crushing workloads. Rather, the State agrees with Prieto's statement that prosecutors "find a way to honor court directives in spite of the work load they must carry." Prieto's brief at 12. While that statement is true in the vast majority of cases, the reality is that despite their best efforts, prosecutors will on occasion find themselves unable to comply with courts' scheduling orders or discover that they inadvertently violated such orders, the situation here. When that happens, trial courts should know whether an order like the one the trial court issued is a permissible sanction.

C. Time limits established in a court's scheduling order do not control the definition of what amounts to "a reasonable time before trial" in Wis. Stat. § 971.23(1)(d).

Although she does not say so directly, Prieto intimates that the language "within a reasonable time before trial" in Wis. Stat. § 971.23(1)(d) should be defined by reference to a trial judge's scheduling order in a given case. This would

mean that every time an attorney violates a trial court's scheduling order in a criminal case, she also violates the discovery statute. If that is Prieto's position, the State disagrees with it.

In *State v. (Kevin) Harris*, 2004 WI 64, ¶ 37, 272 Wis. 2d 80, 690 N.W.2d 737, the supreme court held that "for evidence to be disclosed 'within a reasonable time before trial' for purposes of § 971.23, it must be disclosed within a sufficient time for its effective use." The facts of this case demonstrate that the date for filing witness lists as established in a trial court's scheduling order should not be viewed as defining the outside limit of "a reasonable time before trial" in the criminal discovery statute.

Here, the original trial judge had scheduled Prieto's trial for June 23, 2014, and directed the parties to file their witness lists within 60 days, i.e., by February 5, 2014 (*see* 175:4-5). That would have required the State to file its list four and one-half months before the trial. Under Prieto's theory, filing the list after this date would not be "within a reasonable time before trial" because the scheduling order would determine what a reasonable time before trial means.

Prieto offers no authority for this novel proposition, which runs afoul of *Kevin Harris* in that a witness list can be disclosed much closer to the date of trial than four and one-half months and still permit its effective use by opposing counsel. Under Prieto's theory, what is reasonable under the discovery statute will be subject to the vicissitudes of the

individual trial judge and will differ from case to case. The State maintains that this is no way to interpret a statute.

For these reasons, and the reasons advanced at 15-20 of the State's brief-in-chief, this court should find that the prosecutor did not violate the discovery statute when she filed her witness list thirteen days before trial even though this timing violated the trial court's scheduling order.[1]

D. Prieto wrongly believes that harmless-error analysis is inapplicable when a discovery violation surfaces before the start of trial.

Prieto argues that cases applying a harmless-error analysis to discovery violations, such as *State v. (Ronell) Harris*, 2008 WI 15, 307 Wis. 2d 555, 745 N.W.2d 397, are inapposite because they involve discovery violations that were not detected until after the start of trial rather than before. Prieto's brief at 10. She suggests, but does not explicitly argue, that discovery violations that surface before trial should be treated more harshly. *Id.* at 10-11.

Admittedly, the procedural posture of *Ronell Harris* and other cases cited in the State's brief-in-chief differs from the pretrial posture of this appeal in that here the prosecutor's violation of the scheduling order came to the

[1] The State acknowledges that this court would not have to decide this issue in order to reverse the trial court's order. This is because, as the State pointed out in its brief-in-chief, Wis. Stat. § 971.23(7m)(b) and case law make it clear that exclusion of witnesses as a sanction for a statutory discovery violation is not mandatory. Prieto concedes this point at 9-10 of her brief.

trial court's attention before trial. But it does not logically follow from that distinction that where a discovery violation surfaces before trial, a court can properly impose a sanction as draconian as the exclusion of virtually all of the State's witnesses where the defendant suffers no prejudice. Indirect support for the view that exclusion of witnesses is not permissible when the violation surfaces before trial and the defendant suffers no prejudice comes from *State v. Miller*, 2004 WI App 117, 274 Wis. 2d 471, 683 N.W.2d 485.

In *Miller*, the trial court before the start of trial had excluded expert testimony based on the prosecutor's violation of the discovery statute, after which the prosecutor sought and obtained dismissal of the case without prejudice. *Miller*, 274 Wis. 2d 471, ¶ 1.[2] When the prosecutor refiled the charges against Miller, a different trial judge ruled that the previously excluded expert testimony was admissible, and Miller was convicted. *Id.* ¶¶ 6-7. On appeal, this court found that the original order excluding the expert testimony did not preclude the State from using the previously excluded evidence against Miller in a subsequent case involving the same charges. *Id.* ¶ 15.

This court's decision to allow the State to introduce the previously excluded expert testimony in a later trial against

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[2] Here, the trial court denied the State's motion to dismiss without prejudice (180:35; A-Ap. 137). Instead, the trial court tried to force the State to proceed to trial with only one witness, which would have resulted in a dismissal with prejudice.

Miller refutes the notion that exclusion of witnesses is a proper sanction where the defendant suffers no prejudice. Although the belatedly disclosed expert testimony was excluded in Miller's original trial, this court found it could come in at his later trial because at that point it was timely disclosed. In other words, following the dismissal of the original charges, Miller was no longer prejudiced by what was initially untimely disclosure.

CONCLUSION

For the reasons advanced above and in the State's brief-in-chief, this court should reverse the trial court's order and remand for further proceedings.

Dated this 27th day of July, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,153 words.

_____
Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 27th day of July, 2015.

_____
Marguerite M. Moeller
Assistant Attorney General