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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 15AP297 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Mychael R. Hatcher,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERD IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLES SUE BISCHEL AND TAMMY JO HOCK, PRESIDING

REPLY BRIEF OF THE DEFENDANT - APPELLANT

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EXECUTIVE SUMMARY

The scope of the argument in the Defendant's Reply Brief is limited to responding to the arguments in the Brief of Plaintiff-Respondent. Brief of Plaintiff–Respondent at 2-36. No further legal arguments will be addressed because Mychael Hatcher (Hatcher) believes the arguments from the Brief of the Defendant-Appellant have sufficiently addressed all other matters to the extent that the Court can find the defendant is entitled to a new trial.

ARGUMENT

I. The court violated Hatcher's constitutional right to a fair trial when the court denied Hatcher the opportunity to enter guilty pleas to two of the three remaining counts in response to the State's Amended Information.

In the State's Brief, it makes a number of arguments. First, the State cites *United States v. Shepherd* for the law that "Where a court errs by denying a change-of-plea request, the remedy is not a new trial, but reversal for entry of a guilty plea and a resentencing." Brief of Plaintiff-Respondent at 4. In response, *Shepherd* was a situation where a defendant wished to reach a plea agreement mid-way through trial in exchange for the government's agreement to recommend a downward departure from the sentencing guidelines, but the trial court denied such. *United States v. Shepherd,* 102 F.3d 558, 562-565 (D.C. Cir. 1996). Considering the above, and considering the defendant's request to get the benefits of the plea bargain, it makes sense why the court indicated the remedy was a new sentencing hearing. However, here, this was not merely a situation where the defendant had reached an agreement with the State but was shorted out of light sentence recommendation; instead, this was a case where the defendant was intending on pleading guilty to two charges to keep out prejudicial information at trial – in addition to getting credit for taking responsibility on those two counts at sentencing. Brief of Defendant-Appellant at 6, 12; (142:26-29). Therefore, in this case, as discussed in Hatcher's brief, the defendant was denied the opportunity to plead to the two counts, to ultimately prevent the State from using prejudicial information relating to the two counts at trial, and this ultimately impacted his constitutional right to a fair trial on the remaining count. Brief of Defendant-Appellant at 6, 12.

Second, the State argues, the court did not deny the defendant the opportunity to plead to two counts, but it was actually the defense whom withdrew the request to enter the pleas. Brief of Plaintiff-Respondent at 4. In response, it appears the State is mischaracterizing what occurred. Here, the court was asked to accept the defendant's pleas, and its response was: 1) it griped of the fact it had previously clearly told the defendant he would only be able to enter pleas if he did so earlier; 2) it told the State the State did not have to accept the pleas, 3) it stated the plea form was not completely filled out and it had no confidence the defendant understood the entire contents of the form, and 4) then, after the defendant implied he wanted to at least get

credit for admitting guilt since the court was not accepting the pleas, the court responded "I thought I made myself loud and clear last Thursday that if he wanted to take responsibility for anything, that was the day to do it." (142:26-29). Considering the above, it appears the court denied the defendant the opportunity to enter pleas.

Third, the State argued the defendant did not preserve the constitutional right argument at the circuit court; therefore, the issue is waived. Brief of Plaintiff-Respondent at 4-5. In response, case law states the purpose of the waiver rule is so that the parties can make arguments, and the court can then make a ruling on the issue. *State v. Huebner,* 2000 WI 59, P12, 235 Wis.2d 486, 611 N.W.2d 727. Ultimately, to minimize the need for appeals. *Id.* Here, the defendant requested to plead to the two counts, and the State responded, and ultimately the court denied the defendant the opportunity to do so. (142:26-29). Nonetheless, even if there was a waiver, this Court has the discretion to reverse a circuit court judgment when it is probable that justice has been miscarried. *State v. Huebner,* 2000 WI 59 at P28.

Fourth, the State argues Hatcher had the opportunity to plead, and the trial court's decision to deny the defendant's request to plead at a late stage was not an erroneous exercise of discretion. Brief of Respondent- Plaintiff at 5-6. The State's argument, however, overlooks and does not address the fact, as the defendant discussed in its brief, that the State changed the circumstances so that the defendant now wished to enter pleas, and the court ultimately declined the defendant's request based upon the circuit court's blanket policy to deny any pleas after a certain time frame regardless of considering the changed circumstances. Brief of Defendant-Appellant at 10-14.

Fifth, the State argues that any error was harmless. Brief of Plaintiff- Respondent at 6. In doing so, the State concedes it must show beyond a reasonable doubt that the error did not contribute to the verdict. Brief of Plaintiff – Respondent at 6-7. In response, however, as for the bail jumping charge, clearly evidence one was out on bail does not look favorable upon a defendant. Therefore, there is reasonable prejudice, the State cannot show beyond a reasonable doubt the error did not contribute to the verdict, and the State's argument does not undermine the defendant's show of prejudice in its brief. Brief of Defendant – Appellant at 42-45.

II. The court violated Hatcher's constitutional right to a fair trial when the court admitted the State's rebuttal evidence.

In the State's Brief, it makes a number of arguments. First, it argues the court reasonably concluded McKenzie was a bona fide rebuttal witness since the defendant elicited information on cross examination; therefore, the state was not obliged to name her as a witness. Brief of Plaintiff- Respondent at 13-14. In the State's brief, it cites *State v. Gershon* for the conclusion that the State can use a rebuttal witness in a situation where a defendant elicits information on cross examination. Brief of Plaintiff- Respondent at 14-15. In response, the issue in *Gershon* was whether three statements were admissible on rebuttal when considering the hearsay statute. *State v. Gershon,* 114 Wis.2d 8, P9, 337 .W.2d 460 (Ct. App. 1983). Notably, the issue contested was not whether the State is permitted to use a rebuttal witness for purposes of rebutting on cross examination by the defense. When the rebuttal issue was contested, however, in a more recent case, the court stated the proper test is whether the rebuttal witness became necessary after the defense's case-in-reply. *State v. Konkol,* 2002 WI App 174, P18, 256 Wis.2d 725, 649 N.W.2d 300. Considering the above, it appears McKenzie was not a bona fide witness.

Second, the State argues, even if the above paragraph fails, the court still properly admitted the testimony due to the fact the witness was a bona fide rebuttal witness since Hatcher's testimony implied T.T. wanted to conceal the voluntary cheating between her and Hatcher, and thus she called her friend before the police. Brief of Plaintiff- Respondent at 15-16. In response, this position is not logical. Clearly, if T.T. wanted the voluntary cheating to be secret, she would not have called a friend of Lisa Ewald's to tell her of the cheating. Therefore, there would be no need to rebut an illogical argument, and McKenzie would not have been a bona fide rebuttal witness.

Third, the State argues that any error was harmless. Brief of Plaintiff- Respondent at 18. In doing so, the State conceded it must show beyond a reasonable doubt that the error did not contribute to the verdict. Brief of Plaintiff – Respondent at 6-7. In response, however, the error was not harmless. It was used to shore up T.T.'s testimony. The State's argument does not undermine the defendant's

show of prejudice in its brief. Brief of Defendant – Appellant at 42-45.

III. The court's decision to limit Hatcher's testimony violated his constitutional right to present a defense.

In the State's Brief, it states "According to Hatcher, the court excluded testimony: 1) that T.T. talked at the bar about wanting to have sex; and, 2) that T.T. flirted with Hatcher and other men at the bar." Brief of Plaintiff – Respondent at 18, 26-27. However, the State argues, the trial court never excluded testimony regarding "T.T. flirted with Hatcher and other men at the bar". Brief of Plaintiff-Respondent at 18-19. In response, the State's position is partially true. Although the trial court did not strike Hatcher's statement that he observed T.T. fail to flirt and pick up men at the bar, the court did prevent him from going into any further detail. (143:346-348, 352). As noted, Hatcher had intended on providing more detail of T.T.'s failed attempt to flirt and have sex with the other patrons, and then how the flirtation with Hatcher grew to caressing. (125:Attach. 21); Brief of Defendant – Appellant at 28.

Second, the State argues the court properly used its discretion in denying Hatcher from testifying that T.T. talked at the bar about wanting sex that night; nonetheless, even if it failed to do so, it was permitted to do so since such evidence would have been inadmissible since it was cumulative. Brief of Plaintiff – State at 20-21. In response, the trial erroneously exercises its discretion when it examines relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. *State v. Marinez,* 2011 WI 12, P17, 331 Wis.2d 568, 797 N.W.2d 399. Here, as Hatcher explained in his brief, the court improperly excluded such evidence under the rape shield statute. Brief of Defendant – Appellant at 17-31. Therefore, the court erroneously exercised its discretion. Further, such evidence was not cumulative. Hatcher intended on testifying T.T. failed in attempting to have sex with other men that night, and that she told him she would even have sex with a black man that night – which was abnormal for her. (25:20-21); Brief of Defendant – Appellant at 27-28. This was not cumulative and would have corroborated Hatcher's version.

Third, the State argues the defense forfeited his right to argue he was denied a constitutional right to present a defense since he did not raise the issue in the trial court. Brief of Plaintiff – Respondent at

22-23. In response, first it is important to take the situation in context. On the first day of trial, when the objection was raised by the prosecutor regarding T.T.'s flirtations and her words indicating she wished to have sex, defense counsel indicated it should come in as a prior inconsistent statement, and the trial court determined it was permissible as a prior inconsistent statement. (142:303, 309). The next day, the court determined the rape shield statute prevented the evidence from coming in. (143:351). Therefore, it was implicitly apparent the court was aware of why said evidence would be admissible as a prior inconsistent statement, but it felt the rape shield statute trumped such. Then, on postconviction, due to Hatcher's argument, the trial court addressed whether the trial court properly denied the evidence under the rape shield statute, and under the defendant's constitutional right to present a defense. (122:12-15). Again, on appeal, both arguments were made by defense, and the attorney general has fully briefed the issues. Essentially then, Hatcher is using constitutional language on appeal but making the same claims – that the evidence should have been admitted. As a result, similar to *State v. Burton,* even if there is any waiver, this Court should address Hatcher's claims. *State v. Burton,* 2007 WI App. 237, P11-12, 306 Wis.2d 403, 743 N.W.2d 152.

Fourth, the State argues the defendant cannot show there was a constitutional violation since the testimony was not vital to the defense since it would be cumulative; further, even if he could do so, it can show beyond a reasonable doubt that any error was harmless because the testimony would be cumulative. Brief of Plaintiff – Respondent at 24-26. In response, however, the testimony was not cumulative. Hatcher intended on testifying to more detail of T.T.'s failed attempt to flirt and have sex with the other patrons, and then how the flirtation grew to caressing. (125:17, 20-21); Brief of Plaintiff – Respondent at 27-28. As Hatcher noted in his brief, this evidence would have corroborated Hatcher's version, and contradicted T.T.. Brief of Defendant – Appellant at 28. The State's argument does not undermine the defendant's show of prejudice in its brief. Brief of Defendant – Appellant at 42-45.

IV. Hatcher was denied constitutional right to effective counsel when attorney Schenk was ineffective for failing to file a Miranda-based suppression motion.

In the State's Brief, it argues Hatcher cannot show ineffectiveness since Hatcher would not have been successful on the

motion to suppress statements. Brief of Plaintiff – Respondent at 28-32. As for the motion to suppress statements, Hatcher would lose since it was not necessary for the police to inform Hatcher of the *Miranda* rights at the time Hatcher spoke on the porch since Hatcher was not yet in custody. Brief of Plaintiff – Respondent at 28-32. Additionally, it notes case law that states a person is in custody if the person has suffered a restraint on freedom of movement of the degree associated with a formal arrest. Brief of Plaintiff – Respondent at 30. In response, however, the facts belie the State's argument. In Hatcher's case, Hatcher was awoken by an officer, and told he needed to come downstairs. (145:27). Upon doing so, and after going on the porch, the officer began questioning him about the assault. (145:29). While doing so, the officer denied Hatcher the opportunity to use the washroom or to get a cigarette out of the kitchen. (145:30-31). Further, when T.T. needed to exit the house, the officer ordered Hatcher to walk toward the fence and face the wall so that he could not see T.T.. (145:31). After T.T. left, Hatcher was instructed to return to the porch. (145:31-32). In reviewing the facts, it appears Hatcher suffered a restraint on freedom of movement of the degree associated with a formal arrest at the time he was on the porch, he was in custody, and handcuffs and the words "you are under arrest" would be merely a formality. Therefore, the *Miranda* rights were necessary and counsel was ineffective.

V. Hatcher was denied constitutional right to effective counsel when attorney Schenk was ineffective for admitting evidence of T.T.'s blood alcohol content.

In the State's brief, it argues counsel was not ineffective since counsel strategically decided to admit the report because the blood alcohol content, even at its highest level, "doesn't typically result in the sort of mental impairment that was alleged in this particular . . . matter". Brief of Plaintiff – Respondent at 33. Further, counsel's strategy was reasonable since counsel also included an officer's testimony that he had encountered people who were able to move and speak with the blood alcohol levels indicated in the report. Brief of Plaintiff – Respondent at 33. In response, as Hatcher indicated in his brief, counsel's decision was unreasonable, even if it was strategic. Brief of Defendant – Appellant at 40-41. Although counsel knew people usually do not suffer from the sort of mental impairment that was alleged by T.T., even at the highest blood alcohol levels, the fact of the matter is the jurors likely did not. Counsel needed an expert if he wished to introduce such evidence. Further, the officer's testimony

did not save his deficiency since the officer merely testified that he has seen people walk and talk at said levels, not that all, or most people, can walk and talk at said levels.

VI. Hatcher is entitled to a new trial based on cumulative harm.

In the State's brief, it argues there was no ineffectiveness, thus "zero plus zero equals zero". Brief of Plaintiff – Respondent at 34-35. In response, Hatcher, in his initial brief, has already explained counsel's deficiencies and how said performance prejudiced the defendant; therefore, he will not rehash his initial argument.

Last, the State argues the court should not consider the combined errors of the trial court and the defense counsel. Brief of Plaintiff – Respondent at 34-35. In support, the State notes Hatcher did not cite authority for the proposition, and the State was unaware of any. Brief of Plaintiff – Respondent at 34-35. In response, Hatcher made the argument because it makes logical sense to consider the combined errors rather than to penalize the defendant because the court made the mistake rather than defense counsel. In other words, ultimately, it is the defendant whom is being prejudiced as a result of the mistake, so why should it matter whom is causing the prejudice. Furthermore, notably, the State has not provided any authority, and Hatcher is unaware of any, that would prevent the court from considering the combined errors.

CONCLUSION

For the reasons given above, and for the reasons stated in Hatcher's initial brief, Hatcher requests this Court reverse the trial court's order denying his postconviction motion and to remand the case to the circuit court for a new trial.

February 25, 2016

Signed:

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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.

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.

February 25, 2016

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CERTIFICATE AS TO FORM AND 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 2819 words.

February 25, 2016

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