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STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2015AP784-CR

JESUS C. GONZALEZ,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE MILWAUKEE COUNTY CIRCUIT COURT
HONORABLE RICHARD J.SANKOVITZ, PRESIDING

APPELLANT'S BRIEF

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ISSUES PRESENTED

1. Whether basic Due Process was violated when the court below used a procedure contrary to §972.10(7), *Wis. Stats.*, to select the alternate juror which had the effect of giving the State one more peremptory challenge than Mr. Gonzalez.

Over objection, the court below selected a specific juror as the alternate after evidence was closed and noted this was the same as allowing the State an additional peremptory challenge.

2. Whether allowing juror note taking of closing arguments contrary to §972.10(1)(a)1., *Wis. Stats.*, was prejudicial error.

In its closing instructions, the court below told jurors they could take notes during closing argument. Trial counsel objected.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

STATEMENT ON PUBLICATION

Counsel requests publication because the opinion here is likely to apply established rules of law to a factual situation significantly different from those in previous opinions and therefore will clarify those rules.

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of Mr. Gonzalez' conviction of 1st Degree Reckless Homicide and 2nd Degree Recklessly Endangering Safety and of the denial of his postconviction motion.

2. Proceedings Below

On May 13, 2010, complaint no. 10-CF-2323 was filed in Milwaukee County Circuit Court charging Mr. Gonzalez with violations of §§940.01(1)(a) (1st Degree Intentional Homicide and 940.01(1)(a) & 939.32, *Wis. Stats*. (Attempted 1st Degree Intentional Homicide). (2).

On May 20, 2010, Mr. Gonzalez waived preliminary hearing and an information was filed making the same charges as in the complaint. (4)(5).

On January 25, 2011, trial counsel filed a motion to admit other acts evidence. (14).

On February 18, 2011, the State filed its motions *in limine* (15), witness list (16) and requested jury instructions. (20). On that date, defense counsel filed her motions *in limine* (18), witness list (19) and proposed jury instructions. (20).

On October 24, 2011 jury trial began with *voir dire*. (64). A jury was selected and sworn. (65:88).

On October 25, 2011, the court reported juror 24 "had

convictions on his record which did not come to the attention of the parties." (66:5). The court said, "We've decided to put this decision [on what to do about it] off." (66:6).

On October 26, 2011, the State continued presenting its evidence. (68). The State rested its case that day. (69:42). The defense motion to dismiss was denied. (69:43-45). Mr. Gonzalez waived his right to testify. (69:45-49). The defense presented its witness (69:50) and rested. (69:61).

On October 27, 2011, the court chose the alternate by hearing argument as to which of 2 jurors should be so designated and then, over objection, granting the State's motion to designated juror 24 as the alternate. (70:50-58). That afternoon, the jury came in with its verdicts, finding Mr. Gonzalez guilty of 1st Degree Reckless Homicide on Count 1 and 1st Degree Reckless Injury on Count 2. (71:13-15). The court entered judgment on the verdicts. (71:17-18).

By the time of sentencing on November 18, 2011, the parties and the court realized 1st degree reckless injury is not a lesser included offense of the attempted 1st degree intentional homicide charged in Count 2.. (72:2-8). The parties agreed the conviction on Count 2 would be vacated and Mr. Gonzalez would enter a no contest plea to 2nd Degree Recklessly Endangering Safety pursuant to a plea bargain providing the State would recommend concurrent time on that conviction. *Id*. The court accepted Mr. Gonzalez no contest plea and found him guilty of the new charge. (72:9-15).

The court sentenced Mr. Gonzalez to 20 years confinement and 5 years extended supervision on Count 1 and a concurrent sentence of 5 years confinement and 5 years extended supervision on Count 2. (72:79-82).

Notice of Intent was filed May 13, 2014 (43) and this Court retroactively extended the deadline to permit its filing. (45).

Present counsel's postconviction motion filed November 13, 2014 (46) was denied by written order filed March 31, 2015. (52).

Notice of Appeal was filed April 20, 2015. (53).

3. Facts of the Offenses

On May 9, 2011, Mr. Gonzalez made a 911 call, saying he had been assaulted and shot out the windows of a vehicle. (66:53-54). He also said he had shot someone and would wait in front of his house. (66:29 [lines 17-20]). When police arrived at his house, Mr. Gonzalez was unarmed and surrendered to them without resistance. ((66:55).

In a nearby parking lot, officers found J.C. lying down with a bullet hole in his neck. (66:18). On a sidewalk, officers found Danny John, bleeding from 2 wounds. Mr. John was later pronounced dead at Froedtert Hospital. (66:24-25).

Argument

I. BASIC DUE PROCESS WAS VIOLATED WHEN THE COURT BELOW SELECTED THE ALTERNATE JUROR CONTRARY TO §972.10(7), *Wis. Stats.*, EFFECTIVELY GIVING THE STATE ONE MORE PEREMPTORY CHALLENGE THAN MR. GONZALEZ RECEIVED.

A. Introduction

To narrow the issue, it may be helpful to note what this case is not about.

It is not about a circuit court's failure to allow the accused the statutorily required number of peremptory strikes before trial. *State v. Erickson*, 227 Wis.2d 758, 596 N.W.2d 749 (1999). Nor is it about an accused forced to expend a peremptory challenge to correct a circuit court's failure to excuse a juror for cause. *State v. Lindell*, 2001 WI 68, 245 Wis.2d 689, 629 N.W.2d 223. Neither is it about allowing prosecutors discriminatory peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79 (1986).

What this issue is about is effectively giving the State one more peremptory challenge than the accused by adopting a procedure for selecting the alternate contrary to statute.

B. Standard of Review

Issues of statutory interpretation are reviewed *de novo*, *State v. Hansen*, 2001 WI 53, ¶9, 243 Wis.2d 328, 627 N.W.2d 195, as are Due Process issues. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis.2d 179, 717 N.W.2d 1.

C. Additional Facts

During jury *voir dire*, neither the court nor the attorneys asked the jurors if any of them had been convicted of a crime. The court did ask if any juror had been charged with a crime involving "taking somebody's life, attempting to take somebody's life or shooting at anybody with a gun ?" (65:23). After the jury was selected and sworn, juror 24 went to the bailiff and revealed he had been convicted of a crime. (66:5-6)(70:50-51) Instead of reopening jury selection, the Court, with the acquiescence of the parties, decided to wait until after the evidence was closed to deal with this problem. *Id.*

After the evidence was closed, the Court suggested either juror no. 9, who had been nodding off, or the convicted juror 24 be designated the alternate and heard argument from the parties. (70:50-58). Defense counsel opposed the State's motion to designate juror 24 as the alternate and argued for juror 9. (70:54-55). Then the Court designated the convicted juror as the alternate. (70:56-58). As the court itself pointed out, this was the same as giving the State an additional peremptory challenge. (70:57 [line 17-57]).

The court denied the postconviction motion arguing Due Process error. (46)(52).

D. Discussion

The peremptory challenge "has its roots in [our] ancient common law heritage," *Swain v. Alabama*, 380 U.S. 202, 217, 85 S.Ct. 824 (1965), a fixture of jury trial in England since at least 1305. *Id*. at 213 (citing statute). Due to the "long and widely held belief that peremptory challenge is a necessary part of trial by jury," *id*. at 219, nearly every American state gives peremptories "by statute to both sides in both civil and

criminal cases . . .” *Id*. at 217.

So it is the highest Court has repeatedly declared the peremptory challenge “is ‘one of the most important of the rights secured to the accused.’ ” *Id*. at 219 (citation omitted). And see *State v. Gesch*, 167 Wis.2d 660, 671, 482 N.W.2d 99 (1992)(same).

While the highest Court has yet to declare the peremptory challenge a constitutional right, *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273 (1988), it has made clear basic Due Process is denied “if the defendant does not receive that which state law provides.” 487 U.S. at 89. *Cf. Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585 (1956)(though there is no constitutional right to appeal, where state grants right by statute, Due Process requires the right to be fairly administered).

The key legal principle of fair administration of peremptory challenges in Wisconsin is equality. The statutes provide “each side” the same number of challenges. §972.03, *Wis. Stats*. See *State v. Mendoza*, 227 Wis.2d 838, 860, ¶53, 596 N.W.2d 736 (1999)(“We agree with the court of appeals on the importance of maintaining an equal number of peremptory strikes in two-party cases.”).

Equality is required to satisfy Due Process as well. “[T]he relative rights of the prosecution and the accused [as to peremptories] must be at least equal.” *U.S. v. Harbin*, 250 F.3d 532, 541 (7th Cir.2001)(where prosecution allowed to use peremptory to eliminate juror on 6th day of eight day trial, Due Process violated and conviction reversed). Because “[p]eremptory challenges are a significant means of achieving an impartial jury, . . .the ‘balance’ struck to achieve an impartial jury and a fair trial is one of equivalent rights . . .” *Id*.

Here, after the evidence was closed, the prosecutor was allowed to move the court to designate juror 24, who had told the bailiff after jury selection he had been convicted of crimes (66:5-6)(70:50-51), as the alternate. (70:53). The prosecutor stated his reason was, had he known of the convictions during jury selection, the State would have stricken him. (70:53

[lines 18-24]). The court granted the State's motion, saying, "And had [juror 24] raised [his convictions] at that point, I think the State would have the benefit of its peremptory strike. So I'm going to allow the State to exercise that strike now . . ." (70:57 [lines 16-20). The court then designated juror 24 as the alternate, understanding it was effectively giving the State another peremptory challenge.

Since this procedure violated both §972.10(7), *Wis. Stats.*, requiring selection of the alternate by lot, and §972.03, *Wis. Stats*., requiring an equal number of challenges for "each side," Mr. Gonzalez did "not receive that which state law provides," *Ross, supra,* 487 U.S. at 89, and basic Due Process was violated. As in *Harbin, supra,* granting the State an extra challenge at the end of the trial "destroy[ed] the balance [of advantages] needed for a fair trial," 250 F.3d at 540, because it "skewed the jury selection process in favor of the prosecution, and adversely impacted the ability of the peremptory challenge process as a means of ensuring an impartial jury and a fair trial." *Id.* at 541.

The *Harbin* court reversed without consideration of prejudice because "such an error affects the fundamental fairness of the trial . . .," *id.* at 547, by "calling into question the impartiality of the jury because it cripples the device designed to ensure an impartial jury by giving each party an opportunity to weed out the extremes of partiality." *Id*. at 548. Counsel submits there was the same fundamental unfairness here when the State had more challenges than Mr. Gonzalez, creating an impermissible "shift in the total balance of advantages in favor of the prosecution . . ." *Id.* at 547.

But even if reversal depends on harmless error rules, counsel submits the State cannot meet its burden under *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985) "to establish that there is no reasonable possibility that the error contributed to the conviction." This is because the error "here is precisely the type of error that defies harmless error analysis." 250 F.3d at 545. "[I]t is impossible to determine what impact [the illegal granting of an extra peremptory to the State] had on the jury's ultimate decision," and so the possibility the error contributed to the verdict cannot be ruled out.

Counsel respectfully submits reversal and remand is justified on this ground.

II. THE COURT BELOW ILLEGALLY PERMITTED THE JURY TO TAKE NOTES DURING CLOSING ARGUMENT TO MR. GONZALEZ PREJUDICE.

A. Additional Facts

In its closing instructions, the court below told the jurors they would be allowed to take notes during closing argument. (70:9-10). Defense counsel objected (70:48) and the State, noting the statute being violated, stated it would have objected had it known the court was going to allow such notes. (70:49-50).

B. Standard of Review

Issues of statutory interpretation are reviewed *de novo, State v. Hansen*, 2001 WI 53, ¶9, 243 Wis.2d 328, 627 N.W.2d 195.

C. Discussion

The governing statute grants the court the discretion to allow jurors to take notes during trial "except the opening statements and closing arguments." §972.10(1)(a)1., *Wis. Stats.* Despite this, the court below unabashedly told the jurors it had the discretion to ignore this statutory exception. (70:9-10). But no court has the power to rewrite a statute's plain language. *State v. Steffes*, 2013 WI 53, ¶21, 347 Wis.2d 683, 832 N.W.2d 101. Therefore, the court's decision to allow jurors to take notes during closing arguments was clearly erroneous.

The error was not harmless for the reasons trial counsel expressed (70:48) which counsel now explains further.

There could be no legal problem with allowing jurors to take notes on the evidence since it is their job to decide the facts. But if jurors take notes on the closings, which are not evidence, there are at least 3 potential dangers one or more jurors will 1) confuse their notes on argument with their notes

on evidence; 2) take better notes on arguments than on evidence and so be better able to remember arguments rather than evidence and 3) give equal or more weight to their notes on the arguments than the notes on the evidence. That is to say, one or more juror's notes on the State's arguments may influence that juror to decide the facts in a way it might otherwise have not. Counsel submits this may be the very reason the legislature chose to make this exception. (Counsel's research discloses no legislative history which could shed light on the intent behind the exception.). As there is no way to know how notes of arguments were used by the jurors, the possibility they were used improperly cannot be ruled out and the State cannot meet its burden on this issue "to establish that there is no reasonable possibility that the error contributed to the conviction." *Dyess*, *supra*, *id.*

Conclusion

Counsel respectfully submits the foregoing demonstrates prejudicial error and prays the Court for reversal and remand of the judgment below.

Dated: June 29, 2015

Respectfully submitted,

_____

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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 2,492 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated: July 1, 2015 So Certified,

Signature: _____

Timothy A. Provis

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CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on July 1, 2015. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: July 1, 2015 So Certified,

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