STATE OF WISCONSIN

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

DISTRICT I

Case No. 2015AP784-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESUS C. GONZALEZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD J. SANKOVITZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

Page

CASES

Page

STATUTES

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable

precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will present additional facts in the "Argument" portion of its brief.

ARGUMENT

GONZALEZ RECEIVED FAIR AND FULL CONSIDERATION OF HIS GUILT OR INNOCENCE BY AN IMPARTIAL JURY OF TWELVE. THEREFORE, HIS CLAIMS REGARDING THE DESIGNATION OF AN ALTERNATE JUROR AND THE ALLOWANCE OF NOTE TAKING DURING CLOSING ARGUMENTS DOES NOT WARRANT ANY RELIEF.

I. Summary of Argument

Following jury selection, a juror (#24) disclosed that he had been convicted of three crimes. The parties, including Gonzalez, agreed to wait until later in the trial to address the issue. At the close of evidence, Gonzalez's trial counsel sought to have another juror (#9) designated as an alternate instead. The circuit court exercised its discretion in designating juror #24 rather than #9 as an alternate before deliberations, and Gonzalez received full and fair consideration of his guilt or innocence by twelve impartial

jurors. Thus, any error in designating an alternate juror rather than selecting him by lot was harmless.

Before closing argument, the circuit court stated that it would allow jurors to take notes. But the circuit court cautioned them against doing so instead of paying attention, and also instructed them multiple times as to what constitutes evidence and what could or could not be relied upon in determining Gonzales's guilt or innocence. Given these actions and the strength of the State's case, any statutory error in the court's allowing note-taking was harmless.

II. The Circuit Court's Designation of Juror #24 was not Error, and Gonzalez Agreed with its Decision to Designate a Particular Juror as an Alternate.

Gonzalez contends that he is entitled to a new trial following the circuit court's designation of one of thirteen jurors as a designated alternate. Gonzalez's Brief at 4-8. He primarily bases this contention off of Wis. Stat. § 972.10(7), which indicates that excess jurors should be chosen and discharged by lot. *Id*.

Gonzalez is not entitled to relief for four reasons.

First, though Gonzalez preferred that Juror #9 rather than Juror #24 be selected as the alternate, he took no issue with the process of selecting one or the other as contemplated by the circuit court (*see* 66:5-6, 70:50-58). That

is, his trial attorney did not object to setting the matter off initially, and did not object to the circuit court's selection of either Juror #9 or Juror #24 as the alternate (*id*). Rather, trial counsel simply preferred that Juror #9 (whom the circuit court had noted was "nodding [off] here and there . . . [e]very time I'm about ready to take action to make sure that she's paying attention again, she lifts her head and she is back with us") (70:51) be selected as the alternate instead of Juror #24 (70:54) ("Your honor, I would prefer Juror #9 be struck."). Consequently, whatever effect the circuit court's decision had, Gonzalez did not oppose the possibility that the circuit court would choose Juror #24 as the alternate. He simply disagreed with the choice of #24 over #9.

Generally, an appellate court will not review an error that a defendant "invited" or induced in the circuit court. *Shawn B.N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992). The concept of invited error is closely related to the doctrine of judicial estoppel, which recognizes that "[i]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). Having accepted the idea that either Juror #9 or Juror #24 should be designated as the alternate, Gonzalez cannot now be heard

to complain that it was erroneous for the court to have actually designated Juror #24 as the alternate.

Indeed, though Gonzalez contends he was wrongly deprived of an additional preemptory strike, there was no scenario in which one of the jurors (either #9 or #24) would not be designated as the alternate. Gonzalez does not agree with the choice made by the circuit court, but he certainly assented to the procedure that led to the court choosing Juror #24 as an alternate. Consequently, Gonzalez cannot now complain that the court did not choose the alternate by lot.

Second, the circuit court's designation of Juror #24 as the alternate juror did not effectively give the State an additional preemptory challenge as Gonzalez contends. *See* Gonzalez's Brief at 5-8. In *State v. Mendoza*, 227 Wis. 2d 838, 596 N.W.2d 736 (1999), the Wisconsin Supreme Court clarified the difference between a preemptory strike and a strike for cause:

> A peremptory challenge entails the right to challenge a juror without assigning, or being required to assign, a reason for the challenge. *Black's Law Dictionary* 1136 (6th ed.1990). This is a self-interested act designed to rid the jury panel of those who a party believes may be unreceptive to the party's position. Challenges for cause, on the other hand, seek a legal determination by the circuit court that the prospective juror in question is, under the law, unqualified or biased and should not serve on the jury. These are two very distinct occurrences.
>
> The erroneous dismissal of a prospective juror constitutes an error by the court; it does not compute as a

> peremptory challenge by a party. We decline to recognize the erroneous dismissal of a juror for cause as an additional peremptory challenge. Consequently, the defendant was not denied an equal number of peremptory strikes.

Mendoza, 227 Wis. 2d at 859-60.

Here, the State asserted that Juror #24 was untruthful in his *voir dire* responses. It argued that, had he known the same information earlier, it likely *would have* sought use of a preemptory strike or sought removal for cause (70:53-54). That entire discussion is found on the record, and occurred outside the presence of the jury (70:47-59). Indeed, as the circuit court described it in its postconviction decision, the State was seeking to remove Juror #24 for cause, not seeking to exercise an additional[1] preemptive strike:

> In reality, neither party was asking me to merely determine how to discharge an unneeded juror. Both parties were asking me in essence to discharge[2] a juror

---

[1] This fully distinguishes Gonzalez's case from *U.S. v. Harbin*, 250 F.3d 532 (7th 2001), Gonzalez's Brief at 6-7. In that case, the prosecution did in fact use two preemptory strikes, and did actually get both jurors off of the jury. *See* Harbin, 250 F.3d at 537. Further, the fact pattern is different in that a juror, either #24 or #9 was going to be designated as an alternate, so both sides had the same problem and equal opportunity to address it. Thus, one party was not receiving a benefit that another was not, as in *Harbin*. *See* i*d.* at 540, "Due process does not require absolute symmetry between rights granted to the prosecution and those afforded to the defense. Our system is not one of symmetry at every stage, but of an overall balance designed to achieve the goal of a fair trial."

[2] A circuit court has discretion to discharge a juror for cause during trial without a specific showing of bias. *State v. Williams*, 220 Wis. 2d 458, 466, 583 N.W.2d 845 (1998).

> for cause. The State essentially argued that Juror [#24] should be discharged for lack of candor, and Mr. Gonzalez essentially argued that Juror [#9] should be dismissed for failing to pay attention.

(52:4, *see also* 70:57.) "So I'm going to allow the state to exercise that [strike] now and move [Juror #24]--I'm going to designate--I can't say the state is exercising the preemptory [strike] now because that means the other preemptory strikes the state exercised would have to be vacated, and we can't do that. I'm not doing that. I am designating [Juror #24] as the alternate" (70.57).

The circuit court is correct: both parties were looking to remove a prospective juror from the twelve who would be deliberating based upon information that came to light after preemptory strikes had been made. But, as the circuit court explained (52:4), exercising a preemptive strike was not what either party was looking to do. Indeed, as the *Mendoza* court further explained, there is an appreciable difference between strikes for cause and those that are preemptory, and also why preemptory strikes exist but are not constitutionally anchored:

> Challenging a juror for cause is different from removing a juror through a peremptory strike. There are no limits on challenges for cause. . . .
>
> Peremptory challenges are qualitatively different. Peremptory strikes challenges without cause, without explanation, and without judicial scrutiny afford a suitable and necessary method of securing juries which in fact and in the opinion of parties are fair and impartial. *Swain,* 380 U.S. at 212, 85 S.Ct. 824.

. . . .

> In *Ross v. Oklahoma,* 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), the Supreme Court described peremptory challenges as "a means to achieve the end of an impartial jury." *Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. Id.* at 89, 108 S.Ct. 2273.

Mendoza, 227 Wis. 2d at 857-59 (emphasis added), *see also Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (". . . we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.") *Id*.

Third, this court's decision in *State v. Gonzalez*, 2008 WI App 142, 314 Wis. 2d 129, 758 N.W.2d, along with the Wisconsin Supreme Court's decision in *Mendoza*, also lend credence to the circuit court's approach in dealing with an issue that only arose after a jury panel had been picked.

In *Gonzalez*, on the third day of trial, a juror informed the circuit court that she recognized one of the State's witnesses who had not been on the witness list. *Gonzalez*, 314 Wis. 2d 129, ¶ 4. Concerned that the juror might not be impartial after a colloquy, the circuit court designated the

juror as an alternate before ultimately dismissing her. *Id.*, ¶ 6.

This court affirmed the judgment of conviction and found that the circuit court properly exercised its discretion in designating the juror as an alternate and ultimately removing her:

> The trial court properly exercised its discretion when it designated Juror Molenda as an alternate based on its concern regarding her potential impartiality. The trial court has a duty to ensure that the impaneled jury is an impartial one; one that is free of bias or prejudice. *See State v. Williams,* 2000 WI App 123, ¶ 19, 237 Wis. 2d 591, 614 N.W.2d 11 ("[T]he trial court ultimately bears the responsibility for ensuring that a fair and impartial jury is impaneled.").
>
> Wisconsin Stat. § 805.08(1) pertains to the juror selection process and provides: The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused.
>
> Both the United States Constitution and the Wisconsin Constitution contain provisions guaranteeing an impartial jury trial for criminal defendants. The discretionary steps that the trial court took to ensure that the court's duty to impanel an impartial jury were appropriate and within the limits of the trial court's discretion. The procedure followed, in designating Juror Molenda as an alternate, was appropriate as well.

Gonzalez, 314 Wis. 2d 129, ¶¶ 21-22 (footnotes omitted).

Though the circuit court in *Gonzalez* ultimately discharged Juror Molenda for cause, this court specifically saw no issue with designating her as the alternate before

doing so, as long as an impartial jury was convened. Here, Gonzalez got exactly that: a jury of twelve impartial jurors to consider his guilt or innocence. The designation of a thirteenth juror as an alternate does not alter this truth. *Cf. Gonzalez*, 314 Wis. 2d 129, ¶ 15 ("When the trial court finally dismissed Juror Molenda, there was still a full panel of twelve jurors who had heard all of the evidence and whose impartiality was not in question."). Indeed, before the selection of the twelve jurors who would be deliberating, the circuit court repeatedly instructed the jury not to discuss the case until after closing was completed (69:69, 70:47). Outside the presence of the jury, the circuit court also specifically instructed Juror #24, now the alternate, to not discuss the case with the jury as he was gathering his things before departing (70:88). Jurors are presumed to follow the instructions they are given. *State v. Gary M.B.*, 2004 WI 33, ¶ 33, 270 Wis. 2d 62, 676 N.W.2d 475.

Even if that designation was error, the Wisconsin Supreme Court has concluded that the erroneous discharge or removal of a juror from the panel is not error requiring reversal so long as a jury of twelve impartial jurors decided the defendant's guilt or innocence:

> In this case, the court's error affected two competing interests: Mendoza's right to an equal number of strikes and the circuit court's important discretionary power to strike jurors to avoid the appearance of bias. *In the long run, a court's discretionary power to remove questionable jurors and avoid the appearance of bias outweighs the*

right of parties to an equal number of strikes. Over time the court's discretionary power is likely to accomplish more to attain impartial juries than the exercise of peremptories.

The United States Supreme Court has concluded that not every error, even constitutional error, requires automatic reversal of a conviction. *See Chapman v. California,* 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The Supreme Court also has recognized that an erroneous dismissal of a prospective juror does not automatically require reversal if an impartial jury was impaneled. In *Northern Pacific R. Co. v. Herbert,* 116 U.S. 642, 646, 6 S.Ct. 590, 29 L.Ed. 755 (1886), the Supreme Court stated: [The prospective juror] was . . . challenged, and the allowance of the challenge constitutes the first error assigned. . . . [I]f we regard the challenge as for cause, its allowance did not prejudice the company. A competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could demand.

Several federal courts and numerous state courts have recognized the principle enunciated in *Northern Pacific,* and applied it in the criminal arena.

A defendant is entitled to fair and impartial jurors, not jurors whom he hopes will be favorable towards his position. *See Pollack v. State,* 215 Wis. 200, 207–08, 253 N.W. 560 (1934), overruled in part by *State ex rel. Goodchild v. Burke,* 27 Wis.2d 244, 133 N.W.2d 753 (1965). *A defendant's rights go to those who serve, not to those who are excused.*

We therefore hold that automatic reversal is not required when a circuit court erroneously grants a party's motion to strike a prospective juror for cause. To hold otherwise would undermine our long-standing assertion that circuit court judges should liberally grant requests to strike prospective jurors for cause.

We stated in *Ferron* that "[t]he circuit courts are . . . advised to err on the side of striking prospective jurors who appear to be biased, even if the appellate court would not reverse their determinations of impartiality. Such action will avoid the appearance of bias, and may save judicial time and resources in the long run." *Ferron,*

> 219 Wis. 2d at 503, 579 N.W.2d 654. This continues to be sound policy.

Mendoza, 227 Wis. 2d at 862-64, (footnote omitted) (emphasis added), s*ee also Gonzalez*, 314 Wis. 2d 129, ¶ 9 ("A criminal defendant is entitled to a jury which will insure him a fair and impartial trial, but not to an unlimited choice in an attempt to secure a jury which will acquit him.") (citation omitted).

The circuit court recognized this reality in its decision denying postconviction relief:

> But the State's invocation of *Mendoza* is prescient nevertheless, because *Mendoza* also teaches that even if the circuit court errs in discharging a juror for cause, a new trial is not required if the jurors who convicted the defendant were impartial. *Id*. At 864, ¶ 65. As the *Mendoza* court put it, "A defendant's rights go to those who serve not to those who are excused." *Id*. at 863, ¶ 62.
>
> In other words, for Mr. Gonzalez to win a new trial on the ground that there was insufficient cause to discharge [Juror #24], Mr. Gonzalez must [have] demonstrated that one of more of the other twelve jurors were less than impartial. He does not. Therefore, the verdict convicting him must be upheld and his motion for a new trial must be denied.

(52:5-6.)

Notably, either on appeal or before the circuit court, Gonzalez makes no claim regarding the fairness or impartiality of the jury of twelve that served at his trial. Ultimately, that is the central inquiry into whether or not Gonzalez requires a new trial because the right to a fair and

impartial jury is guaranteed in both the United States Constitution and our state constitution:

> Under the United States constitution a criminal defendant in a state court is guaranteed an impartial jury by the Sixth Amendment as applied to the states through the Fourteenth Amendment. Principles of due process also guarantee a defendant a fair trial by a panel of impartial jurors. In Wisconsin a defendant is entitled to a trial by an impartial jury as a matter of state constitutional law under sec. 7, art. I, of the Wisconsin Constitution.

State v. Lehman, 108 Wis. 2d 291, 297 n.3, 321 N.W.2d 212 (1982) (citation omitted). The circuit court has a duty and responsibility to guarantee that the right to a fair and impartial jury is secured in its courtroom. *State v. Williams*, 2000 WI App 123, ¶ 19, 237 Wis. 2d 591, 614 N.W.2d 11

Fourth, any error in the circuit court's selection of an alternate did not prejudice Gonzalez in any way because an impartial jury of twelve, having considered significant evidence of Gonzalez's guilt, rendered his guilty verdict. Any error was therefore harmless. *See Mendoza*, 227 Wis. 2d at 864 ("Wisconsin Stat. § 805.18 provides that an error is harmless if it does not effect the substantial rights of the party seeking reversal of the judgment. Section 805.18 is applicable to criminal cases pursuant to Wis. Stat. § 972.11(1). *State v. Dyess,* 124 Wis. 2d 525, 547, 370 N.W.2d 222 (1985)."); *Cf. Delgado*, 223 Wis. 2d 270, 280, 588 N.W.2d 1 ("We have repeatedly stated that this court is reluctant to grant new trials.") (citations omitted).

The State's theory of the case was that Gonzalez shot J.C. after encountering him in the street and shot D.J. through the passenger side of his car as D.J. attempted to drive away (2:2-4; 66:110, 118; 67:13-17, 27). J.C. survived a bullet to the neck but is paralyzed and D.J. was pronounced dead upon arrival at Froedtert Hospital (2:2, 6; 67:86). Gonzalez's only defense was that J.C. and D.J. attacked him *(see e.g.* 66:14) and that he was defending himself. Gonzalez elected not to testify (69:48-49), but the jury heard the 911 call that Gonzalez made on the night of the shootings (67:61).

However, that defense went against a weight of evidence that provided a strong basis upon which to find Gonzalez guilty of both crimes.

There was live testimony at trial by the surviving[3] victim, J.C., who testified unequivocally that he and D.J. did not attack or even seek out Gonzalez and that neither he nor D.J. were armed (67:82-90). There was further testimony by officers who discovered J.C. and D.J. and confirmed that neither had any weapon on them (67:47, 81). Further, Officer Efrain Cornejo, who arrived on scene following the shooting and tended to J.C., corroborated that testimony, testifying without contradiction that J.C. told him that a Hispanic male had shot him that night (66:22, 67:10).

[3] Officers testified that J.C. was largely unresponsive when they contacted him and that he did not say who shot him (66:25-27).

Officer Willie Williams, who responded to Gonzalez's 911 call, testified that he noticed a firearm on some boxes in Gonzalez's porch (66:34-35). That firearm was later determined to be the weapon that dispensed all seven shell casings found near the shootings (68:117).

Detective El Sarenac, who contacted Gonzalez on the night of the shooting, testified that Gonzalez had no injuries, no rips in his clothing, and no other indications that he had been attacked (67:22-25). Detective Sarenac also took nine pictures of Gonzalez that night, all of which were introduced into evidence and viewed by the jury (*id*). Further, Milwaukee County medical examiner Dr. Brian Peterson testified that he examined D.J.'s body and found no injuries, bruises, or lacerations of any kind; indeed "there was nothing" like that anywhere on the body (68:76-77). Sergeant Patrick Brousseau, who also contacted Gonzalez immediately after the shooting, similarly testified that Gonzalez's person showed no signs of being attacked (66:50).

The State later elicited testimony that the shooting actually took place in the opposite direction from Gonzalez's house from his car, such that "if you're coming out of the house, going to the car, you're walking *away* from the shooting scene[]" (67:43) (emphasis added). This is significant because Gonzalez claimed he went outside to move his car and encountered D.J. and J.C. (*see e.g.* 70:70).

Finally, firearm and toolmark examiner Mark Simonson testified that he examined the handgun taken

from Gonzalez's porch, and that he concluded that it fired the seven recovered bullet casings came from Gonzalez's handgun (68:117, *see also* 69:38-39). There was also a stipulation between the parties that a box of 9 millimeter ammunition of the same caliber as found in the spent casings near the scene of the shootings was also found in Gonzalez's residence (69:42).

Given all of this evidence that showed that Gonzalez attacked D.J. and J.C. unprovoked, including uncontroverted testimony from J.C. as to that sequence of events, there is no reasonable doubt that Gonzalez was guilty of killing D.J. and permanently injuring J.C. Therefore, because an impartial jury of twelve heard substantial evidence showing Gonzalez's guilt, any error in designating Juror #24 as the alternate did not affect the substantial rights of the party seeking reversal of the judgment. *Mendoza*, 227 Wis. 2d at 864.

III. The Circuit Court's Allowance of Note-Taking During Closing did not Prejudice or Harm Gonzalez.

Separately, Gonzalez argues that the circuit court's decision to allow note-taking during closing arguments was error and that such error was not harmless. Gonzalez's Brief at 8-9.

The State acknowledges that Wis. Stat. § 972.10(1) would appear to prohibit note-taking during closing arguments. *Id*. However, because the closing arguments

were merely recitation of the trial evidence and nothing substantive occurred, and because the circuit court repeatedly instructed the jury that arguments of the attorneys are not evidence, any error was harmless beyond a reasonable doubt.

The circuit court plainly instructed the jury several times regarding what did and did not constitute evidence during the course of trial. Jurors are presumed to follow the instructions they are given. *Gary M.B.*, 270 Wis. 2d 62, ¶ 33.

Regarding evidence, at the preliminary instructions, the circuit court instructed the jury:

> The evidence in this case will consist of one or more of the following three things: First, the sworn testimony of the witnesses from the witness stand when they're on direct or cross-examination, regardless of who calls the witness. Plus any physical evidence that I may receive in the trial record, photographs, physical objects, reports, things like that. Plus any facts to which the parties agree.
>
> . . . .
>
> Consider carefully the arguments and the remarks of the attorneys that you'll hear first thing tomorrow morning and that you'll hear at the end of the trial, but remember this: *What the attorneys say is not evidence. If the attorneys say something to you that isn't backed up by evidence, then disregard what they say and draw no inference or conclusion from it.*

(65:103-104,106, *see also* 70:42, 46) (emphasis added.)

Further, the circuit court specifically instructed the jury how to use and not use its notes:

> You were told during jury orientation that judges sometimes allow jurors to take notes during the trial to

> help them remember what was said during the trial. Because our trial is a little bit longer and there's a few more witnesses than normal, I'm going to allow you to take notes. I want to give you a couple of instructions about how to make those notes helpful to you.
>
> First of all, don't let the notes get in the way of you remembering what was said during the trial. So that means a couple of things. First of all, don't try to write everything down. We have a professional here. The professional is writing everything down for us. While we can't give you a transcript at the end of trial . . . if there's any dispute about a few things that a witness says, we can get some notes to try to get that precise for you. Try to remember what they say and use your notes as a way to remember the things that you wouldn't remember if you didn't write it down.
>
> Secondly, if you find yourself using your notepads in a way that distracts you, you should probably put the notes aside. So sometimes we give jurors notepads and pencils and they find themselves doodling or making to-do lists or making grocery lists or the like. If you find yourself doing that, the notes are probably distracting you and you should put them to one side.
>
> The other thing to remember about the notes is that they're yours and yours alone. They're confidential. You shouldn't show them to your fellow jurors during the trial just like you shouldn't discuss the case with them. And even in deliberations, there's really no need to share them unless the jurors can't remember what happened. When it's time to show the jurors your notes, feel free to do that. If there's a disagreement among jurors about what happened, you should go with what you all remember. And if the notes help you, great. If they get in the way, put them aside. Your memory comes first and then the notes.

(65:106-108.)

Thus, the circuit court carefully and specifically described what individual jurors should do with their notes, and also cautioned them to avoid using the notes in any way that would interfere with their ability to follow the trial.

Given those instructions, and that jurors are presumed to follow instructions as given, it is difficult to see how any of the three scenarios (jurors confusing notes on argument with notes on evidence, jurors taking better notes during arguments than during evidence, jurors giving more or equal weight to notes on closing over notes on evidence) envisioned by Gonzalez could possibly come into play. *See* Gonzalez's Brief at 8-9.

When the circuit court permitted the jury to take notes during closing arguments, it reiterated:

> During this process I'm allowing you to take notes. There's a state statute which says that jurors are not allowed to take notes during the closing argument. Most judges believe that the state statute is one that gives us some discretion. We believe that it's a good exercise of our discretion for jurors to be able to take notes during the closing arguments so in their notes they can link ideas together based on what they hear from attorneys.
>
> But, I will remind you of what I had said to you previously. *The notes are there to help you remember what has been said here, but they are not a substitute for what happened here. So make sure as you take notes you listen carefully so you can remember what you've heard and only rely on the notes as a fallback.*

(70:9-10) (emphasis added.)

Indeed, later when Gonzalez's trial counsel objected to the allowance of note taking during closing arguments, the circuit court reasoned:

> Your arguments are important to [the jury] and you are helping them make sense of all of this, and you want them to remember what you said. In this day and age, people write down things to remember. That's what we do in classrooms. That's what we do at work. You, both,

> during the trial I saw you taking notes undoubtedly to help you remember things, and that's a professional thing to do. That's something we admire in people who are doing their work, not something to distract from their work.
>
> By all means I'm going to let them take notes to make sure they encapture (sic) what they need to from your arguments to make sense of the evidence.

(70:49.)

Harmless Error

In any event, in addition to the circuit court's instructions, the evidence adduced at trial (before closing arguments) was considerable and largely undisputed. Thus, any statutory error was harmless. *See Mendoza*, 227 Wis. 2d at 864, *Cf. Delgado*, 223 Wis. 2d at 280 ("We have repeatedly stated that this court is reluctant to grant new trials.") (citations omitted).

As set forth above in Section II, the State's theory of the case was that Gonzalez shot J.C. after encountering him in the street, and shot D.J. through the passenger side of his car as he attempted to escape (2:2-4; 66:110, 118; 67:13-17, 27). However, that defense went against a weight of evidence that cut against Gonzalez's self-defense claim and provides a strong basis upon which to find Gonzalez guilty of both crimes. Because there was substantial evidence adduced at trial prior to closing arguments, none of which Gonzalez disputes on appeal, the allowance of note-taking during closing arguments "does not effect (sic) the substantial rights

of the party seeking reversal of the judgment." *Mendoza*, 227 Wis. 2d at 864.

The closing arguments here were nothing more than restatements and arguments based on evidence elicited at trial (*see* 70:60-68, 78-85). The State discussed the evidence elicited, commented on it, and argued for a conclusion that Gonzalez's self-defense theory did not fit with any of the physical evidence or testimony given (70:63, 66-68). The defense argued that the evidence was inconclusive and that the 911 tape shows that Gonzalez really acted in self-defense, noting that he did not run from officers and was cooperative in their interaction (70:74-77).

A full review of the parties' closing arguments shows nothing new or significant other than what had been said in opening arguments. The parties introduced no new theories, concepts, or evidence other than what was already adduced at trial. Because of that, the substantial evidence of Gonzalez's guilt, and the circuit court's cautionary instructions to the jurors to not misuse their notes, any statutory error that Gonzalez suffered was harmless.

CONCLUSION

For the foregoing reasons, this court should affirm Gonzalez's judgment of conviction and the order denying his motion for postconviction relief.

Dated this 17th day of September, 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 5,320 words.

_____
Robert G. Probst
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 17th day of September, 2015.

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