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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 REPLY BRIEF

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Argument in Reply

I. Alternate Juror Selection Error

Introduction

Nowhere disputing the procedure the court below used to select the alternate was contrary to the governing statute, §972.10(7), *Wis. Stats.*, requiring selection of the alternate by lot, respondent State makes four arguments to which counsel replies seriatim below.

A. The error was not "invited."

Respondent State claims trial counsel's failure to object to the procedure used waives the error by the doctrine of invited error. Respondent's

Brief at 4-5, hereinafter RB. Whether a party has invited error "is a question of law subject to *de novo* review." *State v. Gary M.B.*, 2004 WI 33, ¶11, 270 Wis.2d 62, 71, 676 N.W.2d 475.

Invited error "refers to the principle that a party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to commit." *Harvis v. Roadway, Exp. Inc.*, 923 F.2d 59, 60 (6th Cir.1991). In Wisconsin, the doctrine is known as "strategic waiver." *Gary M.B.*, *supra*, *id.* It is clear from the cases the doctrine does not apply unless the party claiming error has taken some affirmative step to invite or induce the error. See, *e.g.*, *Gary M.B.,* ¶12 (following *State v. Ruud*, 41 Wis.2d 720, 723-724 [where counsel stipulated to admission of statements taken with defective *Miranda* warning, *Miranda* violation could not be argued on appeal]); *Zindell v. Central Mutual Ins. Co.*, 222 Wis. 575, 582, 269 N.W. 327, 330 (1936)(where defendant's objections prevented admission of plaintiff's diminished value evidence, they could not complain on appeal of insufficient evidence of such value); *Shawn B.N. v. State*, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct.App.1992) (where counsel requested psychological evaluation, any error in use of report was waived as invited).

Here, it was the court below suggesting, "it may be . . . he can be declared an alternate" (66:6 [lines 1-3]), Appellant's Appendix at 6, hereinafter AA, when the decision was put off at the beginning of the trial, not trial counsel. She simply acquiesced in the court's suggestion, as did the State. The error here was not "invited."

Furthermore, trial counsel did object to designating juror 24 as the alternate. See (70:54-55) (70:58 [lines 15-16 (court "overrule[s] the defense's objection to designate [juror 24] as the alternate)]); AA 15. Thus the error is preserved for review.

B. Juror 24 was designated as the alternate not stricken for cause.

Respondent State claims the court below wasn't really selecting an alternate, rather it was deciding on motions to strike for cause. RB 5-8.

First, this claim is belied by the record. Counsel has provided the relevant transcript excerpts in the appendix, see AA 5-6, 7-15, and nowhere in the record, either before the evidence began, AA 5-6, or after it was closed, AA 7-15, is there any mention by the court below or the parties that juror 24 is vulnerable to a challenge for cause. Indeed, when asked for his reason for wanting the juror designated as the alternate, the prosecutor said "if this information had come . . . had been presented to the state, that we would have . . . that we would have struck him." AA 10, lines 19-22. That is to say, the prosecutor was essentially asking for another peremptory strike and that is exactly what he got. AA 14, lines 16-25 (court rules: "And had [juror 24] raised [his convictions] at [voir dire], 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 and * * * I am designating [juror 24] as the alternate.").

Secondly, there is basic unfairness in an after-the-fact characterization of this alternate designating procedure as motions to strike for cause. The court below informed no one the alternate would be designated only if the juror's behavior justified a finding of cause to strike so trial counsel was not on notice she needed to develop facts and present argument about the bias necessary for such a strike. See *State v. Mendoza*, 227 Wis.2d 838, 848-850, ¶19-¶22, 596 N.W.2d 736 (1999)(discussing 3 types of bias justifying strike for cause).

Counsel is, of course, aware a discretionary

decision can be affirmed if there is a correct result based on the wrong reason, *State v. Alles*, 106 Wis.2d 368, 391-392, 316 N.W.2d 378 (1982), but that rule assumes a decision applying proper legal principles to a properly developed set of facts to make a "rational, legally sound conclusion." *Burkes v. Hales*, 165 Wis.2d 585, 590-591, 478 N.W.2d 37 (Ct.App.1991). Here, the court below was acting contrary to the statute requiring the alternate to be chosen at the end of the trial by lot. If it was inquiring as to cause to strike jurors as the State contends, the record shows no consideration of the types of bias outlined in *Mendoza*, *supra*, *id.*, nor any findings on these types. Furthermore, it conducted no additional *voir dire* of any juror. If juror 24 was so obviously vulnerable to a challenge for cause at the beginning of the trial, why did the court below wait until the end of the trial to protect the impartiality of the jury? *Cf. State v. Nantelle,* 2000 WI App 110, ¶10, 235 Wis.2d 91, 612 N.W.2d 356 (supreme court cases dictate no peremptory challenges may be exercised after the jury has been accepted by the parties).

C. *State v. Gonzalez*, 2006 WI App 142, 314 Wis.2d 129, 258 N.W.2d 153 does not control here.

In its third argument, the State claims *Gonzalez*, *supra*, controls here. RB 8-13. It does not because the circuit court there specifically found "I did strike [the juror] for cause," ¶13, whereas here, as noted above, the court below was allowing the State to exercise a peremptory challenge by designating juror 24 as the alternate. AA 14, lines 16-25.

Assuming *arguendo* juror 24 was stricken for cause, conspicuously absent from the State's brief is any argument it was a proper strike for cause and *Gonzalez* shows why it was not. There, the circuit court scrupulously followed the procedure mandated by *State v. Lehman*, 108 Wis.2d 291, 300, 321 N.W.2d 212 (1982), by making a "careful inquiry." See

Gonzalez at ¶13 ("The trial court followed the correct procedure in questioning [the juror] . . ."). Here, the court below never did any individual *voir dire* of juror 24 before striking him.

Furthermore, counsel questions whether the court below came to a "rational, legally sound conclusion." It designated the juror as the alternate based on his lack of candor because he did not answer a question never asked of him (No one asked the jurors if they had been convicted of a crime. The only question on the subject was about crime involving "taking somebody's life, attempting to take somebody's life or shooting at anybody with a gun. . ." (65:23)) and because he voluntarily brought his convictions to the bailiff's attention! AA 14. This despite finding juror 24 "deserved credit" for disclosing his convictions, AA 7, lines 23-24 and that his conduct as a juror was proper. AA 8, lines 10-13.

The gravamen of the court's reasoning was juror 24 "didn't tell us in time for the state to be able to make preemptive strikes. He didn't tell us at the same time *is what makes the difference.*" AA 12, lines 14-17, emphasis added. This is not a proper reason for striking a juror for cause as it is unfair to expect jurors to know jury selection procedures. Had the court bothered to *voir dire* him it might have found he was simply embarrassed to bring his convictions, (none of which fit the court's question about crime (AA 10, lines 3-9), see AA 14, lines 7-8 [court admits it is not sure a layperson would have understood its crime question to include juror 24's record]), out in public.

Therefore, the State's after-the-fact characterization of the alternate designation procedure used here as motions to strike for cause has no support in fact or law.

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D. The error justifies reversal.

The test for harmlessness set out in *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985) has stood the test of time. See generally, Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* (6th ed.2014), Appendix C at 78-79. An error, constitutional or not, is prejudicial if "there is a reasonable possibility that the error contributed to the conviction." 124 Wis.2d at 543. To show harmlessness the State must "establish" there is no such possibility. *Id.*

Here "it is simply impossible as a practical matter to assess the impact on the jury of [the] error" *U.S. v. Harbin*, 250 F.3d 532, 548 (7th Cir.2001), because the juror was erroneously excluded from deliberations. Justice Traynor's classic treatise found such errors "ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment." Roger J. Traynor, *The Riddle of Harmless Error* (1970) at 68. That is to say, the State cannot meet its burden.

Looking specifically at the constitutional rule, the *Harbin* court, after concluding violating the basic principle of equality was Due Process error, see Appellant's Brief at 6, hereinafter AB, found it was structural error justifying automatic reversal because "the framework in which the trial proceeded was fundamentally altered, with the jury selection mechanism transported to the trial stage for one party." 250 F.3d at 548. This is, of course what happened here when the State was allowed to exercise an extra peremptory at the end of the case in violation of statute and case law. *Nantelle*, *supra*, *id.*

So, the error is reversible either because the State cannot show it did not contribute to the verdict or because it was structural and so reversible without consideration of prejudice as in *Harbin* or both.

II. Note Taking Error

Conceding the error, respondent State argues it was harmless because jurors are presumed to follow their instructions. RB 16-27. (This is an interesting switch of position since the prosecutor at trial all but joined in the defense objection. (70:49-50), AB 8.) Questionable or not, see generally David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 Stanford L. Rev. 4078 (2013), this Court is bound by that presumption.

But adopting the State's argument sends the message a circuit court may deliberately ignore the specific command of the legislature. This is contrary to another rule binding this Court, one which is not questionable: courts must follow the law. AB 8. When they deliberately do not, there is harm to the legal system as a whole because judicial integrity has been compromised. "Judicial integrity is, . . ., a state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002)(conc.opn.per Kennedy, J.). This harm should be considered in the harmlessness inquiry and justifies reversal.

Conclusion

Counsel respectfully submits the foregoing demonstrates the State's arguments are without merit and prays the Court for reversal and remand of the judgment below.

Dated: September 27, 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 1,899 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: September 28, 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 September 28, 2015. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: September 28, 2015 So Certified,

Signature: _____

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