STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP000238-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. WASHINGTON,

Defendant-Appellant.

On Notice of Appeal from a Judgment and an Order
Entered in the Racine County Circuit Court,
the Honorable David W. Paulson, Presiding

REPLY BRIEF

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

Mr. Washington's absence from the entirety of his jury trial violated his statutory right to be present, requiring a new trial.

As Mr. Washington noted in his opening brief, ***State v. Dwyer***, 181 Wis. 2d 826, 512 N.W.2d 233 (Ct. App. 1994), establishes that a defendant who voluntarily absents himself before the jury is sworn does not waive his statutory right to presence. The state deploys several arguments, none successful, to avoid ***Dwyer***; that case requires a new trial here.

The state first posits that Mr. Washington's case should be analyzed as an ineffective assistance of counsel claim. Respondent's Brief at 11. Perhaps Mr. Washington could have raised ineffective assistance, but the fact is that he did not. The proposed rejiggering of Mr. Washington's claim may be the state's attempt to shed its burden to show harmlessness beyond a reasonable doubt. *See* Respondent's Brief at 22. But it is without merit, since it rests on the erroneous proposition that Mr. Washington's counsel forfeited the issue by her failure to object. But in ***State v. Harris***, 229 Wis. 2d 832, 837, 601 N.W.2d 682 (Ct. App. 1999), both the defendant and his counsel expressly *declined* to object to the court's brief questioning of jurors in the defendant's absence; this court nevertheless ordered a new trial. Indeed, it would make little sense to say that the statutory right to presence could be *forfeited* by a lawyer's failure to object when ***Dwyer*** holds that even the defendant him- or herself cannot by conduct *waive* the right at this time.

The state next seeks to distinguish ***Dwyer*** by arguing that it governs only waiver by conduct, while Mr. Washington's exclusion from his trial was the result of

"express waiver." Respondent's Brief at 18-19. But the defendants in both ***Dwyer***, 181 Wis. 2d at 836, and ***State v. Koopmans***, 210 Wis. 2d 670, 673, 563 N.W.2d 528 (1997) intentionally failed to appear in court; their acts made perfectly clear that they did not wish to be present. Why, then, should it make any difference that Mr. Washington, having been removed from the courtroom, verbalized this same position to his lawyer or to a bailiff (though not to the court). Though the state seeks to liken this case to ***State v. Soto***, 2012 WI 93, ¶33, 343 Wis. 2d 43, 817 N.W.2d 848, the court in that case "questioned [Soto] thoroughly about the use of videoconferencing and whether he agreed to the use of videoconferencing for his plea. Soto repeatedly assured the court that the videoconferencing equipment was working well and that he could see, speak to and hear the judge and that he agreed to proceed by videoconferencing." Soto, in other words, expressly waived his right to be physically present; Mr. Washington, in contrast, was denied his right to be present based on his refusal to appear in court—that is, because he "voluntarily absented" himself. This type of "waiver"—waiver by conduct—is governed by Wis. Stat. § 971.04(3), and that statute's conditions were not met here.

Nor does the state's argument that Mr. Washington "chose to waive his right to be present" successfully distinguish this case from ***Dwyer***. Respondent's Brief at 19-20. As Mr. Washington has previously noted, the defendants in ***Dwyer***, ***Koopmans*** and ***State v. Haynes***, 118 Wis. 2d 21, 25, 345 N.W.2d 892 (Ct. App. 1984), all chose to be absent from court, just as Mr. Washington did. Appellant's Brief at 9. And in each case, the appellate court remanded for a new trial or sentencing.

The state next asserts that ***Dwyer***, which binds this court, should be reversed, arguing that it is unworkable.

Respondent's Brief at 21. The state asserts that ***Dwyer*** permits a defendant to indefinitely "sandbag" his trial. But as Mr. Washington has previously pointed out, a court is permitted, in its discretion, to restrain a defendant in the trial court. Appellant's Brief at 10. And contrary to the state's suggestion, there is no authority for the notion that such a defendant could seek a new trial on the basis that the jury might have been exposed to his own "physically resistive and potentially aggressive" behavior. Respondent's Brief at 26.

The state finally argues that any error in trying Mr. Washington *in absentia* was harmless. Because, as is explained above, this is not an ineffective assistance claim, the state bears the burden of showing harmlessness beyond a reasonable doubt. While the state speaks in generalities about the test for harmless error, the more specific case law on trial *in absentia* establishes that Mr. Washington's absence from all of voir dire and trial cannot be harmless.

In ***Harris***, the court conducted a voir dire of potential jurors in the absence of the defendant and, for some of the time, his counsel. 229 Wis. 2d at 835-37. Though the defendant was present for the trial itself, this court rejected the argument that any error was harmless. Though there was no specific claim that any biased juror had been seated, this court stated that "[u]nless a defendant and his or her lawyer are present when potential jurors are questioned, the subtleties of responses are lost." ***Id.*** at 844. The court went on to note that the "the interplay between potential jurors and a defendant, while often subtle, is both immediate and continuous." ***Id.***

Thus, the few cases in which the courts have found a defendant's absence harmless have involved very brief absences. ***State v. Tulley***, 2001 WI App 236, ¶11,

248 Wis. 2d 505, 635 N.W.2d 807 (defendant and counsel excluded from in-chambers voir dire of three jurors, none of whom served on the jury); ***State v. Peterson***, 220 Wis. 2d 474, 486, 584 N.W.2d 144 (Ct. App. 1998) (defendant not present when court decided answer to single jury question and answer was a correct statement of law); ***State v. David J.K.***, 190 Wis. 2d 726, 737-38, 528 N.W.2d 434 (Ct. App. 1994) (defendant absent from in-chambers voir dire; attorney told defendant what had happened and attorney and defendant agreed on which jurors to strike). Those cases are a far cry from this one, in which Mr. Washington was absent from the entire trial, never laying eyes on the jury that convicted him. If a defendant's total absence from trial can be held harmless, then the right to presence is a nullity.

CONCLUSION

For the foregoing reasons, Mr. Washington respectfully requests that this court vacate his convictions and sentences and remand with directions that he receive a new trial.

Dated this 5th day of August, 2016.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/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 1,079 words.

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.

Dated this 5th day of August, 2016.

Signed:

_____

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant