STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2016AP002494-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MORRIS RASH,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction and an Order Denying Postconviction Motion, Both Entered in Milwaukee County Circuit Court, the Honorable J.D. Watts, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The Record from Mr. Rash's Jury Trial Has Not Been Reconstructed Beyond a Reasonable Doubt.

The State agrees that Mr. Rash has demonstrated a colorable need for the photographs of S.A. and M.R. from his trial so that he can meaningfully appeal the circuit court's decision to provide the jurors the photographs during deliberations. (Respondent's Brief at 16). Thus, the primary question on appeal is whether the circuit court properly reconstructed the record to include missing Exhibits 3, 4, 13, and 14.

The reconstruction of the record cannot be based on speculation. ***State v. Perry***, 136 Wis. 2d 92, 103, 401 N.W.2d 748 (1987). It is the duty of the trial court to determine what the record from a trial actually was beyond a reasonable doubt. ***Id***.; ***State v. DeLeon***, 127 Wis. 2d 74, 81, 377 N.W.2d 635 (Ct. App. 1985). And to do so, a court should generally hold a reconstruction hearing to determine if the record can be reconstructed. *See* ***DeLeon***, 127 Wis. 2d at 82; *see also* ***State v. DeFilippo***, 2005 WI App 213, ¶12, 287 Wis. 2d 193, 704 N.W.2d 410; *see also* ***State v. Raflik***, 2001 WI 129, ¶36, 248 Wis. 2d 593, 636 N.W.2d 690.

For multiple reasons, the circuit court in this case failed to reconstruct the record beyond a reasonable doubt and without impermissible speculation. Therefore, this Court should conclude that the record from Mr. Rash's trial has not been reconstructed.

First, the court never established beyond a reasonable doubt that the State had provided the court with the actual photographs from Mr. Rash's trial. In regards to the 10 photographs the State collected from the Milwaukee Police Department (MPD), the court stated:

> The prosecutor who prepared the State's response indicates that the CD contains all the images taken by police during the investigation of this case. The court accepts the prosecutor's statement as an officer of the court, and there being no indication that any other photos exist, the court is satisfied that the 10 color photos of [S.A.] and [M.R.] include the four photos that were admitted into evidence at the defendant's trial.

(69:3-4; Appellant's App. 105-106). In the court's own words, it accepted the one-sided assertion from the State that it had provided the photographs from Mr. Rash's trial. The court made this threshold finding—which formed the basis of the rest of its ruling in this case—based solely on the State's assertion it had provided the exhibits from trial, and not on its recollection of the trial, notes from the trial, recalled witnesses, or affidavits or testimony from the State and defense counsel. *See* ***Perry***, 136 Wis. 2d at 103.

Moreover, contrary to the State's argument, Mr. Rash was under no obligation to submit an affidavit from either himself or trial counsel indicating he disputed the State's assertion that the 4 photographs from his trial were included in the 10 photographs from the MPD. (Respondent's Brief at 21). Postconviction counsel attempted to get the trial exhibits from the court, State, defense counsel, and MPD without success. (54:2; 60:5). After the State submitted the 10 photographs, Mr. Rash filed a response with the court indicating that the State had not demonstrated beyond a reasonable doubt that those were the actual photographs from

his trial. (64:3-4). When there is a disagreement between the parties about the state of the record, the court must resolve it and ensure that the record is reconstructed accurately beyond a reasonable doubt. ***Id***. The court failed to do that here, regardless of whether Mr. Rash submitted an affidavit from himself or defense counsel.

Undersigned counsel, the assistant attorney general, and the judges on this Court have no idea who S.A. and M.R. are, what they look like, or whether the 10 photographs from the MPD are photographs of them. Thus, it is particularly important that the circuit court establish beyond a reasonable doubt that the record has been reconstructed for appellate review. By accepting the State's one-sided assertion that it had provided the photographs from the trial without a hearing and without consulting with defense counsel, asking other parties to the trial to submit affidavits or testify, recalling witnesses, or checking to see if any notes from the trial existed, the court failed to reconstruct the record beyond a reasonable doubt. *See* ***id***.

Second, *assuming arguendo* the State provided the actual photographs from Mr. Rash's trial, the court's written decision, incorporating the prosecutor's affidavit, is filled with impermissible speculation regarding which of the 10 photographs were the 4 trial exhibits.

The State argues that the court's inability to determine whether photograph 24 or 26 was Exhibit 3 does not matter because both photographs depicted a similar view of S.A., allowing appellate counsel to make necessary arguments about prejudice on appeal. (Respondent's Brief at 17-18). However, the State fails to recognize that in addition to not being able to say if Exhibit 3 was photograph 24 or 26, the court impermissibly speculated that photograph 23 was not

Exhibit 3. As to photograph 23, the court stated the following:

> The photo marked number 23 depicts [S.A.'s] entire body on a hospital gurney, from an angle that does not clearly depict her upper torso, neck and head, and *is not consistent with* the court's description of Exhibit 3 on the record. The court does not recall this photo from the defendant's trial and does not believe it was admitted as an exhibit.

(69:4; Appellant's App. 106) (emphasis added). In its affidavit, the State said it believed "to the best of affiant's knowledge and recollection, that Photograph 23 was not presented to the jury." (65:1; Appellant's App. 109).

The court was required to determine beyond a reasonable doubt that photograph 23 was not Exhibit 3, not that it was "not consistent" with the trial transcript. The court's words demonstrate that it was merely speculating about which photograph was Exhibit 3 and not making a determination beyond a reasonable doubt which photograph—23, 24, or 26—of S.A. was admitted at trial.

In addition, the court impermissibly speculated in regards to which photographs were Exhibits 13 and 14 of M.R. Regarding Exhibits 13 and 14, the court wrote:

> The court's on-the-record description of Exhibits 13 and 14 is most consistent with the photos marked numbers 17 and 18 in the State's submission. These are the only photographs which depict a dark background and [M.R.'s] face with a neutral expression. Photo numbers 19-22 do not depict [M.R.'s] facial expression and are not consistent with the court's description of Exhibits 13 and 14 at trial.

(69:4; Appellant's App. 106)

Again, the court was required to determine beyond a reasonable doubt which of the photographs of M.R. were from the trial, not the photographs that were "most consistent" with the trial transcript. Because the court failed to do this, the record regarding the photographs of M.R. also has not been reconstructed.

For a meaningful appeal, Mr. Rash needs to know the exact photographs of S.A. and M.R. that were given to the jury because each photograph would potentially involve a different argument as to why they were unfairly prejudicial and should not have been admitted into evidence or given to the jury during deliberations. Accordingly, any error by the court in establishing beyond a reasonable doubt and without speculation which, if any, of the 10 photographs were admitted into evidence at Mr. Rash's trial is not harmless.

Notably, approximately three and a half years had passed since the end of Mr. Rash's trial and the filing of his postconviction motion. (46:1; 60:1). In light of this large time span, it is understandable that the circuit court and the State would have some uncertainty about which photographs were admitted into evidence at trial. In fact, this Court has found that "[f]ifteen months…is certainly long enough for recollections to become inaccurate." ***DeFilippo***, 287 Wis. 2d 193 at ¶14. Due to the problems with the large passage of time, the court should have held a reconstruction hearing and admitted evidence which included the trial court's own recollection, trial notes, consultation with the trial attorneys (both the assistant district attorney and defense counsel), and recall of witnesses. *See* ***Perry***, 136 Wis. 2d at 101, 103.

In sum, a great deal of ambiguity still exists concerning which photographs were presented to the jury. Considering that Mr. Rash's potential claim of error is

entirely contingent on an analysis of the exact photographs that the jury received, the record cannot be said to be adequately reconstructed beyond a reasonable doubt.

The remedy for a missing record that cannot be reconstructed is a new trial. ***Id***. at 99; ***DeLeon***, 127 Wis. 2d at 82. Because the record has not been reconstructed—and there is insufficient evidence to show that reconstruction is possible—this Court should grant Mr. Rash a new trial. If this Court does not grant Mr. Rash a new trial, it should remand Mr. Rash's case to the circuit court and require the court to conduct a hearing and admit evidence to determine if the record can be reconstructed beyond a reasonable doubt.

CONCLUSION

For the reasons stated in this brief and Mr. Rash's brief-in-chief, Mr. Rash respectfully requests that this Court remand to the circuit court with directions that the court vacate Mr. Rash's convictions and grant him a new trial.

If this Court does not grant Mr. Rash a new trial, he requests that this Court remand to the circuit court with directions that the court hold a reconstruction hearing to determine if the trial record including the photographs of S.A. and M.R. can be reconstructed beyond a reasonable doubt.

Dated this 15th day of September, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,606 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 15th day of September, 2017.

Signed:

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