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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Case No. 2020AP000108-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RICHARD BRIAN LOPEZ,

Defendant-Appellant.

On Notice of Appeal from Milwaukee Circuit Court Branch
46, Honorable David Feiss, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the trial court err in failing to exclude photographs turned over on the day of trial?

The trial court determined there was no prejudice and declined to exclude the photographs.

This Court should answer: any error in failing to exclude the photographs was harmless.

2. Did the trial court err in admitting the photographs into evidence?

The trial court admitted the photographs without any objection from Lopez's trial counsel.

This Court should not reach this question because it was not properly preserved for review.

If this Court does reach this question, it should answer: the photographs were properly admitted.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. § (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE¹

On April 6, 2018, the State filed a criminal complaint charging Lopez with three counts: misdemeanor battery,

¹ Lopez's "Statement of the Case" lacks citations to the record, contrary to Wis. Stat. § (Rule) 809.19(1)(d). Lopez's brief also fails to comply with various requirements of Wis. Stat. § (Rule) 809.81(3)–(5). Wisconsin Stat. § (Rule) 809.83(2) provides this Court with the authority to strike a paper as a sanction for noncompliance with any appellate rule.

intimidation of a victim, and disorderly conduct, each with domestic abuse assessments. (R. 1:1-2.) These crimes were alleged to have been committed against MLR, Lopez's live-in girlfriend and father of her children. (R. 1:2.)² The complaint alleged that, on April 5, 2018, Lopez punched MLR twice in the face in front of their nine week old infant. (R. 1:2.) When MLR attempted to call 911, Lopez attempted to take the phone from her so she could not call 911. (R. 1:2.) Lopez stated that he "did not do anything and this was all self-defense". (R. 1:2.) Lopez then went to the top of the stairs, told MLR that he was going to kill her, and drew his finger across his throat, which MLR understood as a threat to slit her throat. (R. 1:2.) MLR went outside and called 911. (R. 1:2). Officers responded and observed bruising on MLR's face. (R. 1:2.) MLR told officers she did not consent to being struck and was afraid for her safety. (R. 1:2.)

Lopez made his initial appearance on April 7, 2018 and entered pleas of not guilty. (R. 64:1, 3.) The commissioner entered a no contact order with MLR. (R. 64: 3-5.) Lopez was released on a \$1000 signature bond. (R. 64:5.) Lopez next appeared at a pretrial conference, represented by trial counsel. (R. 65:2.) Trial counsel would remain through trial. (R. 72, 73, 74.)

The case proceeded to jury trial on January 23, 2019. (R. 72.) That morning, trial counsel alerted the trial court that he just received additional discovery—reports and photographs—from the State. (R. 72:3-4.) He noted its lateness and asked for exclusion. (R. 72:4.)

The State noted that it had just received that discovery that morning. (R. 72:4.) The discovery consisted of photographs taken of MLR several days after the incident, showing the development of the bruising, and a report memorializing having taken those photographs. (R. 72:5.) The State noted that the officers were available for cross-examination and argued that there was no prejudice to Lopez because there were no additional facts alleged. (R. 72:5.) Additionally, the State noted that the victim was present and

² The State uses a pseudonym in place of the victim's name in compliance with Wis. Stat. § (Rule) 809.86(4)(2019–20).

would have been able to testify to the same facts demonstrated in the photographs, that “[m]y bruises got worse.” (R. 72:6-7.)

The trial court reviewed the photographs. (R. 72:7.) The trial court held:

All right. At this point, given the information that I have that the victim is present and the victim can offer testimony with regard to her injuries and how long those injuries lasted, the Court wanted to see the photos. They do depict bruises, but they're not particularly graphic or they're not something that would -- that are pictures of horrific injuries, so I am going to deny the request to exclude them from the evidence. I don't find that the pictures would be unfairly prejudicial, given as long as they're introduced through the victim.

(R. 72:7.)

Lopez's trial counsel elected to give an opening statement before the State's case; trial counsel indicated that Lopez acted in self-defense. (R. 72:88-89.) Trial counsel claimed that MLR came at Lopez, so, in self-defense, he struck her twice in the eye. (R. 72:88-89.)

The State called MLR first. (R. 73:4.) She testified that Lopez was her ex-boyfriend; they dated for five years; and that they had two children together. (R. 73:6-7.) She identified Lopez in court. (R. 73:7.) She testified that on April 5, 2018 she was at home with Lopez and their children. (R. 73:8.) At about 9pm at night, Lopez started asking MLR where a prescription bottle was; she told him she did not know where it was. (R. 73:9.) The altercation escalated and Lopez punched her with a closed fist to her left eye and to her left upper lip (R. 73:10-11.) She testified that Lopez's actions caused her pain and were done without her consent. (R. 73:13.)

MLR testified that she then attempted to get her phone and call 911, but Lopez walked behind her and tried to take her phone. (R. 73:13-14). She shoved Lopez back, he hit the wall, and a picture frame fell and shattered. (R. 73:14). A picture of this broken picture frame was admitted as exhibit 3. (R. 32; 73:14.)

MLR testified that she went to the front door and Lopez went to the top of the stairs. (R. 73:15.) She said that Lopez

stated, “he didn’t do anything, and that this was self-defense.” (R. 73:15.) While standing at the top of the stairs, Lopez said he would kill MLR and made a gesture like cutting her throat. (R. 73:15.) The State described the gesture MLR made: “you’re taking your thumb and you’re drawing a line across your neck from left to right”. (R. 73:15.) MLR interpreted this as a threat to kill her. (R. 73:16.)

MLR went on to deny that she was the aggressor, or that Lopez acted in self-defense. (R. 73:16.)

MLR testified that police came back four days later and took more photos of her injuries. (R. 73:17.) She identified two photographs taken during this visit. (R. 73:17.) They were admitted, without objection, as exhibits 4 and 5 (R. 73:17-18.)

The State also called two police officers who responded to the incident, Officer Anthony Fitzgerald and Officer Ryan Borkowski. (R. 73:39; 73:60.)

The State rested. (R. 73:74.) Trial counsel requested a self-defense instruction, which was granted, and then decided to waive his right to testify. (R. 73:77; 73:79; 73:81-84.) In their closing argument, Lopez’s trial counsel again argued self-defense on the battery count. (R. 74:36.)

The jury convicted Lopez of all three counts. (R. 36-38.) The Trial Court entered judgments of conviction on the verdicts. (R. 44.) This appeal follows.

STANDARD OF REVIEW

Whether a discovery violation has occurred poses a question of law reviewed de novo. *State v. Prieto*, 2016 WI App 15, ¶ 10, 366 Wis. 2d 794, 799, 876 N.W.2d 154, 157; *State v. Lock*, 2012 WI App 99, ¶ 122, 344 Wis.2d 166, 823 N.W.2d 378.

Alleged discovery violations are evaluated in three steps. *State v. Rice*, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517. First, this Court examines whether the State violated the discovery statute, WIS.STAT. § 971.23. *Id.*

Second, if a violation occurred, this Court determines whether the State has shown good cause for the failure to make a required disclosure. *Id.* Third, if the circuit court admitted evidence that should have been suppressed, this Court decides whether the admission of evidence was harmless. *Id.* Each step poses a question of law that this Court reviews without deference to the circuit court. *Id.*

Whether the defendant objected to the admissibility of evidence in a manner sufficient to preserve the issue for appellate review is a question of law the Court reviews *de novo*. *State v. Peters*, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991).

This Court reviews evidentiary issues on appeal for an erroneous exercise of discretion. *State v. Mainiero*, 189 Wis. 2d 80, 94–95, 525 N.W.2d 304 (Ct. App. 1994); *State v. Ringer*, 2010 WI 69, ¶ 24, 326 Wis.2d 351, 785 N.W.2d 448. “A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record.” *Weborg v. Jenny*, 2012 WI 67, ¶ 41, 341 Wis.2d 668, 816 N.W.2d 191 (citing *Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶ 22, 339 Wis.2d 493, 811 N.W.2d 756).

ARGUMENT

I. There was no prejudice to Lopez in the admission of the photographs.

The State concedes that the photographs were turned over late, and since they were in the possession of law enforcement, without good cause. However, the error in failing to exclude the photographs was harmless.

A. Standing Discovery Demand

As an initial matter, the State concedes that Wis. Stat. § 971.23(1) properly applies because of a standing discovery demand between the Milwaukee County District Attorney’s Office and the Office of the State Public Defender. It is attached in the Appendix. Under the Memorandum of Understanding, a formal discovery demand need not be served upon the State to implicate Wis. Stat. § 971.23.

Trial counsel was an attorney with the State Public Defender's Office. (*See* R. 6.) As such, this Standing Discovery Demand applies.

Therefore, the Court need not accept Lopez's invitation to read a standing discovery demand into Milwaukee County's local court rules, and the State will not address that argument further.

B. Trial counsel's motions *in limine* requested exclusion of physical evidence not disclosed

As an additional basis that Wis. Stat. § 971.23(1) was implicated, trial counsel filed motions *in limine* that requested exclusion. (R. 26.) Paragraph 18 requests "[t]hat the Court order that the State be precluded from introducing any physical evidence or medical records which have not been provided to the defense for inspection or for which notice has not been provided. Wis. Stats. §§ 908.03(6m) and 971.23(1)(e) & (g)." (R. 26:5 (emphasis omitted).)

This document, filed and on record, invokes the discovery statute and asks for exclusion. This document provides an additional basis from which the Court can find that Wis. Stat. § 971.23(1) properly applies, and this Court should therefore decline to "read" a standing discovery demand into the local court rules.

C. Admitting the photographs was harmless error

In the context of a discovery violation, our Supreme Court has stated that an error is not harmless if "the State's nondisclosure of the evidence sufficiently undermines the court's confidence in the outcome of the judicial proceeding," but is harmless if "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Harris*, 2008 WI 15, ¶¶42-43, 307 Wis. 2d 555, 745 N.W.2d 397(citation omitted). "The penalty for the breach of disclosure should fit the nature of the proffered evidence and remove any harmful effect on the defendant." *Kutchera v. State*, 69 Wis.2d 534, 542-43, 230 N.W.2d 750 (1975).

As an initial note, the trial court essentially considered whether there was any prejudice to Lopez in allowing the photographs in, subject to proper foundation. (R. 72:7.) The trial court correctly noted that the photographs were not overly graphic and MLR was present and available for cross-examination. (R. 72:7.) These are compelling reasons for why Lopez did not suffer any prejudice from their admission.

It is clear that these two photos are hardly the lynchpin of the State's case. They add minimal corroboration to MLR's testimony. (R. 73:17.)

Lopez cannot show *any* probability that the jury's verdicts would have been different absent the offending photographs. Importantly, the additional evidence shown by the photographs comports with Lopez's theory of defense, self-defense. (*See, e.g.*, R. 74:34.)

In *DeLao*, the Defense had committed to a strategy and told the jury in their opening statement that DeLao would be testifying; when a new statement by DeLao was turned over mid-trial, it put him in an impossible situation: fail to testify as promised or possibly be impeached by evidence unknown and unexpected when he said he would testify. *State v. DeLao*, 2002 WI 49, ¶ 62, 252 Wis. 2d 289, 317–18, 643 N.W.2d 480, 494–95. The Supreme Court held that this sort of dilemma, one that caused prejudice, merited a new trial. *Id.* at ¶ 65.

This case is entirely unlike *DeLao*. The new evidence 1) was turned over before trial started and 2) actually comported with Lopez's theory of self-defense. Trial counsel argued no reason to exclude the photos other than their untimely disclosure; put another way, trial counsel did not indicate that the photographs affected trial preparation of the theory of defense. (*See* R. 72:3-4.) This hardly undermines confidence in the verdicts.

Moreover, if the two photographs had been excluded, Lopez would still have been convicted based on MLR's testimony and the other photographs admitted. Therefore, any error in admitting the photographs was harmless.

II. The photographs were properly admitted into evidence

A. This issue was not properly preserved for review

“The party raising [an] issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court.” *See State v. Caban*, 210 Wis.2d 597, 604, 563 N.W.2d 501, 505 (1997). Our Supreme Court has held: “An objection must be made to the introduction of evidence as soon as the adversary party is aware of the objectionable nature of the testimony. Failure to object results in a waiver of any contest to that evidence.” *Caccitolo v. State*, 69 Wis. 2d 102, 113, 230 N.W.2d 139 (1975).

“[R]equiring objections at trial allows the trial judge an opportunity to correct or to avoid errors, thereby resulting in efficient judicial administration and eliminating the need for an appeal.” *Vollmer v. Luety*, 156 Wis. 2d 1, 456 N.W.2d 797 (1990); *State v. Saunders*, 2011 WI App 156, 338 Wis. 2d 160, 807 N.W.2d 679.

Lopez did not object to the photographs’ admission. (R. 73:17-18.). Any claim against their admission on relevance or unfair prejudice is therefore forfeited.³ *Caccitolo*, 69 Wis. 2d at 113. This Court cannot properly review this issue because there was no ruling by the trial court on relevance, probative value, or prejudice.

It would be insufficient to claim that a request for their exclusion due to late disclosure preserved this issue. They are separate claims with different kinds of prejudice. Discovery violations are concerned with trial by ambush and giving the defense adequate notice to prepare a defense. *See DeLao*, 2002 WI 49, ¶¶ 60-69. On the other hand, an objection to the admissibility of evidence for unfair prejudice requires that “the evidence influence[s] the outcome by improper means or if it

³ Having failed to make an objection, any error related to the admission of the photographs is only reviewable under the rubric of ineffective assistance through a motion under Wis. Stat. § 974.06. *See State v. Counihan*, 2020 WI 12, ¶ 28, 390 Wis. 2d 172, 185, 938 N.W.2d 530, 536 (“Generally, if a claim is forfeited, we address that claim in the context of ineffective assistance of counsel.”). No such motion was filed.

appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.” *State v. Gutierrez*, 2020 WI 52, ¶ 35, 391 Wis. 2d 799, 824, 943 N.W.2d 870, 882 (internal quotation omitted); *see also* Wis. Stat. § 904.03.

Without having objected, any claim of error to the admission of the photographs was forfeited and this ground of appeal should be denied.

B. In any event, the photographs are relevant and probative, and therefore admissible

All relevant evidence is admissible. Wis. Stat. § 904.02. Relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Wis. Stat. § 904.01. Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Wis. Stat. § 904.03.

The photographs of MLR taken four days later are relevant. They go toward proving the injuries she received when Lopez struck her twice in the face. They show the progression of the injury, which adds credibility to her testimony.

For relevance, it is not necessary, that the evidence be of great import. Wis. Stat. § 904.01 specifically refers to **any** tendency, not a great tendency. Minimal relevance is sufficient.

Additionally, the photographs are relevant to Lopez’s theory of defense. In a self-defense case, Lopez had to admit that he struck MLR. These photographs make that theory more likely than not.

The photographs would not properly have been excluded for unfair prejudice. Photographs depicting the progression of

bruises do not play to the jury's sympathies or any other improper motive. They depict the same incident, so there is no chance of confusion of issues. And, like before, it comports with Lopez's theory of defense, so there is no prejudice in their admission.

Because the photos are relevant to MLR's injuries and probative thereof, and there is no unfair prejudice, the trial court did not erroneously exercise its discretion in admitting exhibits 4 and 5.

CONCLUSION

This Court should confirm Lopez's judgments of conviction and deny his appeal.

Dated this 3rd day of September, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 2869 words.

I further certify that filed with this brief is an appendix that complies with s. 809.19 (3) (b) and contains a table of contents.

Electronically signed by

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CERTIFICATE OF EFILING

Re: *State of Wisconsin v. Richard Brian Lopez*
Case Number 2020AP000108
District I

I hereby certify that on September 3, 2021 the **Brief and Appendix to Respondent's Brief** were electronically filed with the Clerk of Wisconsin Court of Appeals.

Respectfully submitted,

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