FILED
09-10-2021
CLERK OF WISCONSIN
COURT OF APPEALS

The Wisconsin Court of Appeals
District

2020AP1981-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Sergio Moises Ochoa
Defendant-Appellant

Appeal from The Circuit Court of Sheboygan County
The Honorable Rebecca L. Persick, presiding

Reply Brief of Appellant Sergio Moises Ochoa

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Table of Contents

Table of Authorities

Argument

I. The State Has Failed To Rebut Mr. Ochoa's Constitutional Argument, and Attempts To Reframe the Argument, Urging This Court To Disregard Binding Precedent.

In his initial brief, Mr. Ochoa demonstrated his constitutional right to present a defense was violated by the circuit court's refusal to admit *McMorris* and expert testimony. Rather than confront this constitutional challenge, the State urges this court to ignore binding caselaw and reframes Mr. Ochoa's constitutional challenge as a simple challenge to the judge's exercise of discretion. This argument fails

Few rights are more fundamental than that of an accused to present witnesses in his own defense. *See*, *e.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The goals of the criminal justice system would be defeated if cases were decided on partial or speculative presentations of facts. *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S.Ct. 646 (1988). The right to present evidence in a defendants favor is not unlimited; there is no unfettered right to present testimony which is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence. *Taylor*, 484 U.S. at 410; *but see*, *State v. Pulizzano*, 155 Wis. 2d 633, 654, 456 N.W.2d 325 (Wis. 1990)(The traditional test of strict scrutiny must apply when a state's interest in evidentiary rules conflict with the fundamental constitutional right to present evidence.).

A. *McMorris* evidence

Wisconsin's leading case on the constitutional right to present other acts evidence such as *McMorris* evidence is *State v. Pulizzano*. In *Pulizzano*, our Supreme Court surveyed the scope of the case law and scholarship regarding the right to present evidence. *Pulizzano*, at 645-646. A multi-step test was then enunciated which establishes when the constitutional right to present other-acts evidence is violated. The court then went on to

say, "Those five tests comport with the showing required by *Chambers*[1] and *Davis*[2] to establish a constitutional right to present evidence otherwise excluded by a state evidentiary rule." Once this initial showing is made, the burden shifts to the State to demonstrate its interest in the evidentiary rule is compelling and the least restrictive means of accomplishing this compelling goal. *Pulizzano* at 645, citing *Chambers* 410 U.S. at 295; *Davis* 415 U.S. at 320. The State's interest in upholding the court's discretionary decision is not so compelling as to outweigh a defendant's constitutionally protected interest in presenting a defense. *State v.St. George*, 2002 WI 50 ¶71, 252 Wis. 2d 499, 643 N.W.2d 777 (Wis. 2002).

The State argues since it is "aware of no case where an appellate court has used the *Pulizzano* framework to review the admission or exclusion of *McMorris* evidence" this court should abandon this binding case law, and instead apply a more deferential standard. (State's Br. 23). The State makes the claim when a circuit court properly exercises its discretion in excluding *McMorris* evidence, there is no constitution violation. (State's Br. 21). The State claims paragraph 129 of *State v. Head*, 2002 WI 99, supports this proposition. The cited paragraph doesn't address this proposition, and the *entire case* is devoid of any constitutional argument. The word "constitution" does not appear in the opinion. The State's argument is inaccurate, and unsupported.

It is alarming the state would urge this court to recklessly abandon binding caselaw, and extend the decision in *Head* war beyond the plain language.

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[1] *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)

[2] *Davis v. Alaska*, 415 U.S. 308 (1974)

The lack of caselaw on whether a defendant's constitution right to present *McMorris* evidence is easily explained: Wisconsin has a dedicated judiciary who respect defendants' constitutional rights; it is rare a judge so abuses their discretion in the introduction of evidence that a defendant's constitutional right to present a defense is implicated.[3] That *Pulizzano* has so rarely been needed does not indicate it is "bad law", or not applicable, it simply reflects a wise judiciary respectful of a defendant's constitutional rights.

Mr. Ochoa has raised the issue of whether his constitutional right to present *McMorris* evidence has been violated. This issue is well founded in caselaw, and is one of the most fundamental rights. *See e.g. Chambers,* 410 U.S. at 302. The State's entire argument addressing the merits of Mr. Ochoa's constitutional claim is contained in a single sentence, hidden in a footnote. "If this court does approach this issue using the *Pulizzano* framework, however, the State would argue that Ochoa cannot show that the alleged acts 'clearly occurred.'" (States Br. 24 n. 6). This argument is forfeited. A failure to object constitutes a forfeiture of the right on appellate review; the purpose of the forfeiture rule is to enable the circuit court to avoid or correct any error, and and gives parties a fair opportunity to address the objection. *State. v. Ndina*, 2009 WI 21 ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (Wis. 2009). In the circuit court, the State did not challenge whether the events occurred. (R.155:3)(Ochoa's Br. 17). The State does not offer any evidence

[3] The State faults Mr. Ochoa's use of the term "abuse of discretion". (State's Br. 30, n.7). While the Wisconsin courts prefer the term "erroneous exercise of discretion", the standard is undoubtably the same. Further, many courts, including the United States Supreme Court, still use "abuse of discretion". *See e.g. Lomax v. Ortiz-Marquez*, 140 S.Ct. 1721, 1726, (2020)("[A] trial court might *abuse its discretion* by dismissing an IFP suit…")(Emphasis added).

in the record of an objection to whether the events actually occurred, and does not develop any argument why this court should abandon the rule of waiver. As such, this court must reject this argument. *See State v. Petit*, 171 Wis.2d 627, 492 N.W.2d 633 (Wis. Ct. App. 1992).

B. Expert witnesses

Mr. Ochoa demonstrated the circuit court violated his constitutional right to present expert witnesses in his defense. The State addresses Mr. Ochoa's argument in the same disingenuous fashion as it did with *McMorris* evidence.

In *State v. St. George*, our state Supreme Court addressed the issue of whether the exclusion of expert testimony violated the right to present a defense. *St. George*, 2002 WI 50. The Court established a four part test to show a constitutional deprivation. *St. George* at ¶54. This is a question of constitutional fact, to be reviewed independently. *Id.* at ¶16. The State's interest in upholding the court's discretionary decision is not so compelling as to outweigh a defendant's constitutionally protected interest in presenting a defense. *Id.* at ¶71.

The State fails to acknowledge *St. George* anywhere in its brief. Instead, the State argues the exclusion was proper.[4] (State's Br. 25). This is not the issue raised. By failing to address Mr. Ochoa's claim, the State has forfeited any argument. *A.O. Smith Corp. V. Allstate Ins. Cos.,* 222 Wis. 2d 475, 490-494,

[4] The State chides Mr. Ochoa for failing to "engag[e] with the circuit courts reasoning regarding any of these experts". (State's Br. 26). A constitution challenge under *St. George* is not required to address the circuit court's reasoning; the review is conducted independently. The question is whether the evidence is admissible, not whether the circuit court properly excluded the evidence. This is a threshold question, as defendants do not have an unfettered right to offer testimony which is incompetent. *Taylor*, 484 U.S. at 410.

588 N.W.2d 285 (Wis. Ct. App. 1998)(When a party fails to argue an issue in its main brief, this issue as abandoned).

II. The Circuit Court's Legal Analysis of Non-Hearsay Statements Was Faulty, the Limited Record Indicates There Were Further Non-Hearsay Statements Excluded by This Faulty Error. The State Capitalized on This Error in its Closing Argument, and As Such the Error Cannot Be Harmless

The legal standards governing the admissibility of out of court statements are not contested. The State does not challenge the accuracy of Mr. Ochoa's recitation of caselaw holding imperative statements are not hearsay. The State's only contention is Mr. Ochoa was able to testify LG. insisted Mr. Ochoa return, and that he thought L.G. had something really important to tell him, thus negating any error. (State's Br. 31). This court can consider errors of law revealed in a trial court memorandum, but may assume, in the absence of a transcript, that every fact essential to sustain the trial judge's exercise of discretion is supported by the record. *Austin v. Ford Motor Co.,* 86 Wis. 2d 628, 641, 273 N.W.2d 233. Here, the circuit court erred in its legal analysis, and there are sufficient evidence in the record which supports the argument there is evidence which Mr. Ochoa was not able to testify to based on this incorrect legal analysis.

The State's argument Mr. Ochoa was able to testify to L.G.'s imperative statements is unpersuasive. Mr. Ochoa was not permitted to testify *why* L.G. wanted him to return. (R.497:32). More alarmingly, the circuit court refused to allow testimony into L.G.'s plans for the next day, *which is the reason* Mr. Ochoa needed to return in the middle of the night. (R.496:26). The judge stated she believed the discussion of plans would be a violation of the hearsay rule "for the reasons I already went into

yesterday" (R.496:26). Unfortunately, the circuit court did not understand the applicable hearsay laws, refused to apply binding appellate precedent, and cited to a non-precedental, unpublished opinion which had been overturned to support her legally unfounded decision.

The circuit court refused to allow Mr. Ochoa to testify to what his cousin said which made him go back in the middle of the night. This decision was based a view of the law which is without support. While the record is not explicit as to why L.G. was so insistent to have Mr. Ochoa return, Mr. Ochoa's motion for reconsideration does state L.G. was returning to Milwaukee and did not know when he would be returning to the area. (R.368:2).

The failure to apply the correct legal standards constitutes an abuse of discretion. This error was not harmless; the State relied on it to convince the jury Mr. Ochoa behaved in an unreasonable manner, and engaged in conduct which created a substantial risk of death.

III. The Circuit Court's Refusal To Instruct the Jury a Belief May Be Reasonable Even if It Is Mistaken Is an Error of Law. The State's Argument This Error Is Harmless Is Purely Speculative and Insufficient To Convince This Court the Error Is Harmless Beyond a Reasonable Doubt.

The State and Mr. Ochoa are in agreement for much of the legal analysis regarding the Court's failure to give a full, and complete instruction of the law. (*See* State's Br. 34-35; Ochoa's Br. 30).

In its brief, the State concedes the requested instruction, Wis. JI-Criminal 805, is a correct statement of the law of self-defense, and is not included in Wis. JI-Criminal 1016. (State's Br. 38). Instead, the State argues "the record demonstrates that there is no 'mistaken belief' Ochoa may have had that still would

have been reasonable…"(State's Br. 40). Let us dispense with this argument; the record is replete with examples of beliefs Mr. Ochoa could have been mistaken about, but a mistaken belief could still be reasonable. The following examples come from the State's closing argument.

- The defendant claims the when he went to the [L.G.'s] residence July 19, [L.G.] was saying, I need you to return because there's something so important. And the defendant said he'd never seen [L.G.] talking in this manner of having something so important, so it caused the defendant a feeling he needed to return. It was important to return. In fact, it was an issue that was so significant that it woke him from his sleep. (R.499:142)

Was Mr. Ochoa mistaken about the importance of returning that evening? Given the circuit courts refusal to allow Mr. Ochoa to fully explain why he believed it was necessary to return to his cousin's home in the middle of the night, the jury could have believed this was a mistaken belief, and the mistake made his return unreasonable.

- The defendant's beliefs, what he had to do, needed to do, the opportunity that he had was an opportunity that he could have avoided the entire situation. If truly he's chased, if truly he's in danger he could have gotten out the back door. He could have gone out the front door. There were feasible options…What he did was not reasonable. (R.499:152).
- The defendant testifies that he's in fear. He thinks his life is in jeopardy. He's seen a knife on two occasion…he had every opportunity to go out the back door, to go out the front door. (R.499:146)

Mr. Ochoa testified he tried to leave, but L.G. was behind him with a knife, not allowing him to leave. (R.498:50-51). The jury could well have believed the State, finding Mr. Ochoa was mistaken in his belief he could not leave. If the jury believed Mr. Ochoa's belief to be mistaken, they could have concluded his

staying in a hostile, volatile situation was unreasonable, just as the State argued.

- We have [F.L], who's on the couch, and he takes out his knife, and he's opening and closing it four times; and he's saying something that's understood to be basically you're in trouble, or you're going to get it. Well, the knife gets put away, but it come back out later…and the statements from[F.L.] get even more serious of basically the time is now, and you are going to die. (R.499:146)
- But even if you were to buy that he's in this residence and he's afraid, and you have a man with a knife; and you have another person with a knife, but you put the knife down apparently; and he has to act, ladies and gentlemen, his beliefs, they were not reasonable. (R.499:151)
- The Defendant was looking at [F.L.]. [F.L.] was looking at him. And although [F.L.] did not have any knife out - - claimed he had it out twice before - - and he starts making a reaching motion according to the defendant, so the defendant has to fire. (R.499:139).

Was Mr. Ochoa mistaken about where the knives were, and if F.L. was reaching for a knife? It is estimated 20-33% of police shootings are mistaken regarding the presence or severity of the perceived threat. (R.491:40-41). These shooting used in the study were determined to be reasonable, despite the mistake of fact. (R.491:41).

The State's closing argument disposes of the argument there were no mistaken beliefs Mr. Ochoa may have had. The law allows for reasonable mistakes of fact when someone engages in self-defense. Mr. Ochoa was not afforded this protection when the circuit court refused to fully instruct the jury on the applicable laws of self defense.

The State has a curious argument in its harmless error analysis: if the jury did not believe Mr. Ochoa acted in reasonable self-defense, it would have convicted Mr. Ochoa of second degree intentional homicide. This ignores the simplest explanation: the

jury did not believe Mr. Ochoa acted with the intent to kill either man, which is an independent requirement for finding Mr. Ochoa guilty of intentional homicide. Regardless, this type of argument is purely speculative; the State is guessing at the jury's assessment of the evidence and how they would or wouldn't have decided the case absent the omission of proper jury instructions. Such speculation does not constitute proving the error harmless beyond a reasonable doubt. *Cf. Coy v. Iowa*, 487 U.S. 1012, 1021-22, 108 S.Ct. 2798 (1988)(An assessment of harmlessness cannot include consideration of whether the jury's assessment would have been unaltered; such an inquiry would obviously involve pure speculations".)

Examining the elements of the crime Mr. Ochoa was convicted of reveals the question of reasonableness to be pervasive. The term reasonable and its counter parts are used no less than five times. Further, the jury is twice told to consider the evidence related to self-defense twice. The fact of the matter is that the jury was not properly informed on the law of self-defense and reasonable beliefs because the judge refused to give a legally accurate and complete jury instruction.

Conclusion

"The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Taylor* at 409.

Mr. Ochoa was not allowed to testify to his knowledge of F.L. and L.G.'s violent history, and he was not allowed to inform the jury on the principles which guid trained shooters like himself, in the decision to use deadly force. Further Mr. Ochoa was not permitted to truly explain why he needed to return to his cousin's home in the middle of the night as the circuit court refused to apply the correct legal standards in analyzing an imperative statement. The circuit court continued to err, refusing to fully instruct the jury on the full law of self-defense, leading to a completely speculative harmless error analysis on appeal.

The public cannot maintain its confidence in our administration of justice when convictions like this are allowed to stand. Mr. Ochoa respectfully requests this court vacate his convictions and remand for a new trial. A new trial is necessary to vindicate Mr. Ochoa's constitutional rights and restore confidence in our justice system.

Dated: Thursday, September 2, 2021
Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

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 2,969 words.

Electronically Signed By: Steven Roy