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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1981-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SERGIO MOISES OCHOA,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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The Plaintiff-Respondent State of Wisconsin opposes the petition for review filed by Sergio Moises Ochoa on the following grounds:

1. The petition does not satisfy this Court's criteria for review as set forth in Wis. Stat. § (Rule) 809.62(1r). Ochoa claims that this Court's review is necessary to fix a conflict in the law created by the court of appeals' decision with respect to standards of review. In reality, he seeks little more than error correction—he believes the court of appeals applied the wrong standards of review to his claims and wants this Court to reverse.

2. Ochoa is incorrect in his assertions that the court of appeals applied the wrong standards of review. Ochoa raised three main issues in his appeal: (1) that the circuit court erred by excluding certain expert witnesses and certain other acts evidence; (2) that the circuit court erred by excluding certain hearsay evidence; and (3) that the circuit court erred in instructing the jury.

a. This Court has long and regularly held that the admission or exclusion of evidence is left to the circuit court's discretion. *See, e.g.*, *State v. Sarfraz*, 2014 WI 78, ¶ 35, 356 Wis. 2d 460, 851 N.W.2d 235; *McAllister v. State*, 74 Wis. 2d 246, 251, 246 N.W.2d 511 (1976). The question is not whether a reviewing court "would have admitted" the evidence, "but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *State v. Payano*, 2009 WI 86, ¶ 51, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted). "The circuit court's decision will be upheld 'unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.'" *Id.* (citation omitted).

This Court has also fairly recently confirmed that a circuit court's decision to admit expert testimony under Wis.

Stat. § 907.02(1) using the standards set forth by *Daubert* and its progeny is reviewed for an erroneous exercise of discretion. *See Seifert v. Balink*, 2017 WI 2, ¶¶ 89–96, 372 Wis. 2d 525, 888 N.W.2d 816. "[A] circuit court has discretion in determining the reliability of the expert's principles, methods, and the application of the principles and methods to the facts of the case." *Id.* ¶ 92. Appellate courts will therefore sustain the circuit court's evidentiary ruling admitting expert testimony unless it "rests upon a clearly erroneous finding of fact, an erroneous conclusion of law, or an improper application of law to fact." *Id.* ¶ 93; *see also State v. Dobbs*, 2020 WI 64, ¶ 51, 392 Wis. 2d 505, 945 N.W.2d 609 ("We conclude that the circuit court *properly exercised its discretion* in excluding Dr. White's testimony on the grounds that it did not sufficiently fit the facts of Dobbs's case" (emphasis added)).

b. With respect to jury instructions, a trial court "has broad discretion when instructing a jury." *Nommensen v. American Cont'l Ins. Co.*, 2001 WI 112, ¶ 50, 246 Wis. 2d 132, 629 N.W.2d 301. If a reviewing court determines that the trial court has committed an error in failing to give a jury instruction, it must then "assess whether the substantial rights of the defendant have been affected." *State v. Head*, 2002 WI 99, ¶ 44, 255 Wis. 2d 194, 648 N.W.2d 413 (citing Wis. Stat. § 805.18(2)). "An error does not affect the substantial rights of a defendant if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* "The harmless error inquiry raises a question of law" that appellate courts review de novo. *State v. Stietz*, 2017 WI 58, ¶ 62, 375 Wis. 2d 572, 895 N.W.2d 796.

3. Ochoa seems to argue that he can change the standard of review applicable to his claims simply by arguing that the circuit court's decision denied him his constitutional right to present a defense. He cannot. The standards of review

described above are the proper standards of review for the respective claims regardless of how Ochoa frames them. It is widely accepted that the constitutional right to present a defense is not absolute: it is subject to, among other things, states' rules of evidence. *See, e.g.*, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted"). That is to say, excluding evidence does not abridge a defendant's right to present a defense if the court properly deemed it inadmissible under the rules of evidence. *See State v. Muckerheide*, 2007 WI 5, ¶¶ 40–41, 298 Wis. 2d 553, 725 N.W.2d 930; *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony . . . inadmissible under standard rules of evidence.").

4. Finally, while it is true that the decision below is published, it bears mention that Ochoa requested publication—the State did not, as it disagreed that this case involved anything other than the application of settled precedent to the facts. This Court should not encourage litigants to request publication in cases where it is unwarranted simply to increase their odds of obtaining discretionary review when they do not prevail in the court of appeals.

Dated this 15th day of August 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 900 words.

Dated this 15th day of August 2022.

JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic response is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 15th day of August 2022.

JOHN A. BLIMLING
Assistant Attorney General