STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2021AP126-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NESTOR LUIS VEGA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF EACH ENTERED IN THE PORTAGE COUNTY CIRCUIT COURT, THE HONORABLE ROBERT J. SHANNON, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## INTRODUCTION

During his trial for delivery of heroin and related counts, Defendant-Appellant Nestor Luis Vega testified that when he was arrested, police read him his rights and told him his arrest was related to five controlled buys of heroin by a confidential informant. In response to the prosecutor's questioning, Vega agreed that he wanted to tell police that he never sold heroin but did not because he was asserting his right to remain silent. A jury convicted Vega of the charges.

Vega argues that the State's brief questions about his desire to clear his name and his reasons for not doing so violated his constitutional rights and entitle him to a new trial. They do not. Even if the State's questions were improper, any error was harmless because it is clear beyond a reasonable doubt that the jury still would have convicted Vega. This Court should affirm.

## ISSUE PRESENTED

Did the State's questioning of Vega on cross-examination about his decision not to tell police he was innocent after his arrest violate Vega's Fifth Amendment rights?

The circuit court concluded that the questioning did not comment on Vega's right to remain silent and that any such commentary was harmless.

This Court should affirm.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This Court can resolve this case by applying settled legal principles to the facts.

## STATEMENT OF THE CASE

This case arises out of a three-day trial in which a jury found Vega guilty of multiple offenses, including five counts of delivery of heroin and one count of maintaining a drug trafficking place.[1] (R. 55:1.) The State charged Vega with the offenses after a confidential informant—referred to in the criminal complaint as CI 16-1 and later identified as Michael Gershon—purchased heroin from Vega multiple times in June of 2016. (R. 5:6–8.)

The case proceeded to trial in October of 2016. (R. 109; 110; 111.) On the first day of trial, the State presented testimony from a controlled substance analyst at the Wisconsin State Crime Lab in Wausau who testified that the substances recovered during the investigation of Vega contained heroin. (R. 109:123–26.)

Following the analyst's testimony, the State called Anthony Gischia, an investigator with the Portage County Sheriff's Department. (R. 109:141.) Gischia testified about the investigation into Vega, including working undercover to take Gershon to Vega's home for the controlled buys. (R. 109:142.) He explained that before taking Gershon to Vega's home, he and a detective would meet with Gershon and conduct a pat-down search to ensure Gershon did not have any illegal substances or cash in his possession before performing the controlled buys. (R. 109:142–43.)

Gershon then took the stand. (R. 109:181.) Gershon testified that he first became involved in the investigation of Vega after police questioned him about an unrelated theft. (R. 109:182.) Gershon had stolen his roommate's television and gaming system and traded them to Vega. (R. 109:183–84.) He volunteered to assist police by conducting controlled buys

[1] Vega also pleaded no contest to one count of possession of THC and two counts of felony bail jumping. (R. 55:1.)

from Vega in exchange for police providing extra funds for him to recover the stolen property from Vega. (R. 109:184–85; 110:62–63.) He confirmed that officers searched him before he went to Vega's home for the controlled buys, and he stated that he did not have any drugs or other paraphernalia in his possession when they did so. (R. 109:188.) Gershon testified that his controlled buys were secretly recorded by a device hidden in a pack of cigarettes. (R. 109:189.) The audio recordings were played for the jury, and Gershon explained what was happening in them. (R. 109:190–208.) Gershon testified that in each of the incidents, he had purchased heroin from Vega. (R. 109:196, 202, 208, 218.)

On the second day of trial, Gershon's testimony continued. (R. 110:9.) Gershon described the other incidents in which he purchased heroin from Vega. (R. 110:13, 17.) He testified that, in all, there were five controlled buys in which Vega sold him heroin. (R. 110:31.)

The State's final witness was Detective Michael Schultz from the Stevens Point Police Department. (R. 110:61.) Schultz described his interactions with Gershon during the investigation of Vega, including describing how Gershon was searched before meeting Vega for a controlled buy each time and how he handled the heroin that Gershon obtained from Vega. At the conclusion of Schultz's testimony, the State rested. (R. 110:169.)

Vega's first witness was Naila Santiago, his long-term girlfriend. (R. 110:172.) Santiago testified that she did not allow heroin in her home and that she had never seen Vega possess or sell heroin. (R. 110:177.) However, during cross-examination, Santiago admitted that she could not recollect every time Gershon had come to the house and did not always know what Gershon and Vega did when Gershon came over. (R. 111:16–17.)

Finally, on the third day of trial, Vega testified in his own defense. (R. 111:21.) Vega admitted that he possessed marijuana when police arrested him, but he claimed that he was not a drug dealer and that Gershon had simply been repaying him money Gershon owed him during the controlled buys. (R. 111:24, 56–57.)

During cross-examination, the State asked Vega about his arrest. (R. 111:73.) The following exchange then took place:

> Q. Now, I'm assuming that on June 27th or into the early morning hours of June 28th when you were taken into custody Detective Schultz must have approached you to talk about what was going on, right?
>
> A. On the 27th?
>
> Q. After the traffic stop when you were arrested.
>
> A. No. He came by—He—He read me my rights and told me that I was being arrested for five controlled buys.
>
> Q. All right. So I'm assuming at some point--Okay. So did he tell you the reason for you being placed under arrest was for selling heroin?
>
> A. Correct.
>
> Q. All right. And I'm assuming, based on your testimony here today, that that was a shock to you?
>
> A. Yes, it was.
>
> Q. And I'm assuming because of what your testimony is here today that you didn't sell heroin; you would have wanted to tell the detective that you didn't sell heroin?
>
> A. Correct. But I also have the right to remain silent.

> Q. But you didn't—So you didn't make any effort to talk to the detective about the fact that you were innocent of these charges?
>
> A. No.
>
> Q. And you didn't take any opportunity after that point to contact Detective Schultz to explain Mr. Gershon's presence at your residence on those five occasions?

(R. 111:73–74.) At that point, Vega's attorney objected, and a side bar conference took place. (R. 111:74.) Afterwards, the State asked a few follow-up questions:

> Q. All right. So if you knew it on June 27th—I understand that day you chose not to talk with the officers, but even after that point you never made any effort to contact the police to talk about what happened from your point of view?
>
> A. If I wouldn't have known what it's about, what am I going to talk about?
>
> Q. You never made any attempt after June 28th to talk with law enforcement to share this information with them that you shared with the jury here today?
>
> A. No.
>
> Q. And I'm assuming you had the opportunity to do so. You just chose not to.
>
> A. That's one of my rights.

(R. 111:75.)

Shortly thereafter, the defense rested. (R. 111:81.) Then, outside the presence of the jury, the parties made a record of the sidebar that occurred in response to Vega's objection to the questioning about his decision not to talk to police. (R. 111:82–83.) Vega's attorney noted that he had objected to "continued questions about exercising the right to remain silent and his rights in general." (R. 111:82.) The State countered that it did not believe there was any commentary

on Vega's right to remain silent. (R. 111:83.) The court concluded that the line of questioning had been proper because Vega "referred to his right, and the State was entitled to ask whether at any time thereafter following the, the arrest that Mr. Vega had spoken with the police, and that's, that's where it ended." (R. 111:83.)

The State did not refer to Vega's exercise of his right to remain silent during its closing argument. (R. 111:114–27, 149–67; 118:31.)

After deliberation, the jury found Vega guilty of five counts of delivery of heroin and one count of maintaining a drug trafficking place. (R. 111:172.) At a later hearing, the court sentenced Vega to eight years of imprisonment, bifurcated as 56 months of initial confinement and 40 months of extended supervision. (R. 55:2.)

In March of 2020, Vega filed a postconviction motion seeking a new trial. (R. 90:1.) Vega alleged that the circuit court erred by allowing the State's questioning about his decision not to talk to police after his arrest. (R. 90:1.) Vega also alleged that any failure to timely object to the State's questioning constituted ineffective assistance of counsel.[2] (R. 90:5–6.)

At a hearing on January 13, 2021, the circuit court[3] denied Vega's motion for relief. (R. 118:51.) It concluded that the State's line of questioning regarding Vega's exercise of his right to remain silent was designed to impeach Vega's claim that he did not know anything about the sale of heroin. (R. 118:44.) The court further commented that its own

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[2] Vega's postconviction motion also raised alleged errors related to what he called other acts evidence and other ways in which he claimed trial counsel was ineffective. (R. 90:3–4, 6–9.) Vega has not renewed these arguments on appeal.

[3] The Honorable Robert J. Shannon presided.

"estimation" was that Vega "probably got the better of that exchange." (R. 118:44–45.) And the court noted that the State "essentially entirely abandoned that area and did not—did not address it, did not argue it on closing or rebuttal." (R. 118:45.) Thus, the court concluded, there was no constitutional error, and even if there was, there was no reasonable possibility that it contributed to the jury's guilty verdicts. (R. 118:46.)

Vega now appeals.

## STANDARD OF REVIEW

Whether an error is harmless is a question of law that an appellate court reviews de novo. *State v. Monahan*, 2018 WI 80, ¶ 31, 383 Wis. 2d 100, 913 N.W.2d 894.

## ARGUMENT

### I. Any error related to the State's cross-examination of Vega was harmless.

Vega's primary argument is that the State's questioning related to his invocation of the right to remain silent violated his constitutional rights, entitling him to a new trial. However, even if the questioning constituted improper commentary on his silence, any error was harmless. The State never implied or argued that the jury should take Vega's silence as evidence of his guilt, and there was ample other evidence of Vega's guilt. This Court should affirm.

### A. Improper commentary regarding a defendant's right to remain silent is subject to harmless error review.

"In *Miranda*,[4] the [Supreme] Court noted that the prosecution may not use at trial the fact that a defendant stood mute or claimed his privilege in the face of accusation." *State v. Brecht*, 143 Wis. 2d 297, 310, 421 N.W.2d 96 (1988). To do so might implicate the Due Process Clause of the Fourteenth Amendment. *See Doyle v. Ohio*, 426 U.S. 610, 619–20 (1976). However, violations of a defendant's Due Process right prohibiting commentary on his silence are subject to harmless-error analysis. *See State v. Sorenson*, 143 Wis. 2d 226, 263, 421 N.W.2d 77 (1988).

"The harmless error rule . . . is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do." *State v. Harvey*, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189 (citing Wis. Stat. § 805.18(2)). "Wisconsin's harmless error rule is codified in WIS. STAT. § 805.18 and is made applicable to criminal proceedings by WIS. STAT. § 972.11(1)." *State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500.

"[I]n order to conclude that an error 'did not contribute to the verdict' within the meaning of *Chapman*,[5] a court must be able to conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Harvey*, 254 Wis. 2d 442, ¶ 48 n.14; *see also State v. Martin*, 2012 WI 96, ¶¶ 42–46, 343 Wis. 2d 278, 816 N.W.2d 270 (reviewing harmless-error principles and factors).

Appellate courts consider several factors in a harmless error analysis: "(1) the frequency of the error; (2) the importance of the erroneously admitted evidence;" (3) the

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[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[5] *Chapman v. California*, 386 U.S. 18 (1967).

presence or absence of corroborating or contradicting evidence; (4) any duplication of properly admitted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the strength of the State's case. *State v. Jorgensen*, 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77. "The standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise." *Sherman*, 310 Wis. 2d 248, ¶ 8. "The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." *Id.*

### B. Even if the State's questioning implicated Vega's constitutional rights, any error was harmless.

Even if Vega has established that the State's line of questioning regarding his exercise of his right to remain silent was improper, this Court should affirm because any error was harmless beyond a reasonable doubt. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (stating that appellate courts should decide cases on the narrowest grounds). This is so because the line of questioning was on a tangential point that was not central to the case. Even without the jury hearing the State's questions and Vega's answers, it is clear Vega still would have been convicted.

The first, second, fifth, sixth, and seventh *Jorgensen* factors are most relevant to this analysis. For the first factor, the frequency of any error was minimal. The State asked a few questions about Vega's exercise of his right to remain silent, then moved on. It never returned to the topic. (R. 111:73–75, 114–27, 149–67; 118:31.) On the second factor, the line of questioning about Vega's silence was not central to the State's case. This goes hand-in-hand with the first factor: the State did not return to the topic of Vega's silence because it was not an important point. Rather, it was merely one in a series of points calling Vega's credibility into question.

The fifth, sixth, and seventh *Jorgensen* factors are all related. Fundamentally, Vega's defense was that Gershon could not be trusted because he was a heroin addict. This was so because the State established significant facts that Vega could not challenge. For example, the State clearly proved that Gershon met with police, was searched, received money, went to Vega's home, returned to the police, and gave the police heroin that he said he bought from Vega. These interactions were recorded, and the substance was tested and confirmed to be heroin. Vega launched no real defense to any of these facts. Instead, he argued that Gershon must have—five times—smuggled heroin past an initial police frisk, taken money from the police to repay Vega amounts that he owed, then retrieved the heroin from wherever he stashed it to give to police while wearing a recording device.

The problem with Vega's story—and surely why the jury did not believe it—it is that the story is simply beyond belief. To believe Vega's description of events, the jury would have had to accept that Gershon was so desperate to evade a minor theft charge and to pay off Vega that he obtained heroin elsewhere and effectively sold it to police. This makes no sense. First of all, the relative risk of a minor theft charge versus *trafficking heroin to police* makes it extremely unlikely that anyone—even a heroin addict—would attempt such a bold strategy. Second, why would Gershon be so concerned about paying Vega back if he was willing to send himself to prison for years as a heroin trafficker? Moreover, Vega's story would require the jury to accept that Gershon, despite being a heroin addict, did not use the heroin he supposedly acquired elsewhere, nor did he simply sell that heroin to someone who was not a police officer to get the money he supposedly owed Vega.

None of these massive flaws in Vega's argument had anything to do with the State's questions about Vega's silence. The State never argued that Vega's choice to remain silent

upended Vega's defense. Ultimately, the verdicts were the result of the jury weighing the relative credibility of Gershon's story and Vega's story. The jury clearly concluded that Gershon's testimony was more reliable. Thus, it is evident that even if the State's line of questioning had not been allowed, the outcome of the trial would have been the same: the jury would have convicted Vega on all counts.

Vega argues that his credibility was at issue in this case and that because the alleged error related to his credibility, the State cannot establish that any error was harmless. (Vega's Br. 15–16.) However, the mere fact that an alleged error pertained to witness credibility does not mean that such an error cannot be harmless. For example, in *Hunt*, "a case that largely turn[ed] on credibility determinations," the Wisconsin Supreme Court concluded that the erroneous exclusion of evidence that would have bolstered the defendant's credibility was harmless error. *See State v. Hunt*, 2014 WI 102, ¶¶ 28–36, 360 Wis. 2d 576, 851 N.W.2d 434; *see also State v. Moore*, 2002 WI App 245, ¶¶ 18–20, 257 Wis. 2d 670, 653 N.W.2d 276 (finding improper credibility-bolstering testimony harmless where defendant's story was "farfetched"). Thus, simply because an alleged error bears on the relative credibility of witnesses does not mean that it cannot be harmless.

Here, any error was harmless. Vega's own farfetched explanation for his interactions with Gershon did more to damage his credibility than the State's few questions about his decision not to talk to police. Even in the absence of those questions, the jury would not have believed his story. This Court should affirm.

## II. Vega did not receive ineffective assistance of counsel.

Vega claims that if the State argues or this Court holds that his objection to the questioning about his silence was not preserved, then he received ineffective assistance of counsel due to counsel's failure to preserve the objection. (Vega's Br. 16.) The State did not argue below, nor does it now, that Vega's objection to the State's line of questioning was not preserved. And the circuit court did not base its decision on counsel's failure to object earlier. The State thus does not believe that resolution of Vega's ineffective assistance of counsel claim is necessary to resolve this appeal.

Nevertheless, the State notes that, to the extent Vega's ineffective assistance of counsel claim might be viewed as a standalone claim, it fails because Vega has not established prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). As discussed, any error in the State's line of questioning was harmless. Even if Vega's attorney objected to the questioning and even if that objection was sustained, the outcome of the trial would have been the same. Therefore, Vega cannot prevail on a claim of ineffective assistance of counsel. *See id.* This Court should affirm.

## CONCLUSION

For the reasons discussed, this Court should affirm Vega's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 9th day of September 2021.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,233 words.

Dated this 9th day of September 2021.

Electronically signed by:

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## CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 9th day of September 2021.

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