STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

Case No. 2021AP126 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NESTOR LUIS VEGA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN PORTAGE COUNTY CASE 2016CF296, THE HONORABLE JUDGE ROBERT SHANNON PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The trial court abused its discretion by permitting the State to question Vega regarding his post-arrest, post-Miranda silence, over Vega's objection.

Vega has met his burden of demonstrating that he was questioned repeatedly about exercising his right to remain silent and the trial court's erroneous evidentiary ruling, to permit such questioning violated his Fifth and Fourteenth Amendment rights. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

a. Vega's constitutional right to due process was violated when the trial court permitted the State to impeach him with his post-arrest, post-Miranda silence.

The State offers absolutely no argument that Vega has not met his burden and shown error. The State begins its analysis with a comment that "even if" Vega has met his burden, that any error is harmless. However, the State offers no facts, legal citations, or developed argument of any kind to support any claim that the error does not exist. *State v. Petit,* 171 Wis. 2d 627, 646, 492 .W.2d 633 (Wis. App. 1992).

b. The trial court's erroneous ruling constitutes reversible error and Vega should be granted a new trial.

Having conceded that Vega met his burden of proving that error occurred and the State spends the entirety of its responsive brief addressing harmless error analysis. Both parties agree that once error has been shown, the State bears the burden of proving that the error was harmless. *State v. Sorenson,* 143 Wis. 2d 226, 263, 421 N.W.2d 77 (Wis. 1988); *State v. Sherman,* 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500.

i. The frequency of the error was high, and it was significant, both of which support Vega's request for a new trial.

The State argues that any error is harmless because the State claims that the prosecutor "asked a few questions about Vega's exercise of his right to remain silent, then moved on." (*St. Br.* at p. 12). Vega adamantly disagrees.

The prosecutor asked more than "a few" questions. The State asked 6-7 questions about Vega's silence. (App. 29-31; R. 111:75).

First, the prosecutor asked whether law enforcement had talked to Vega about the charged offenses when he was arrested:

> 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.

(App. 29). Vega never gave a statement to law enforcement. Therefore, Vega's arrest, the reading of his *Miranda* warnings and whether law enforcement approached him to talk were not relevant. Because Vega never made an incriminating statement, that question never should have been asked.

Then, the State followed up with a second question:

> 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.

(App. 30). That question directly confronted Vega about his decision to remain silent. The very question itself implies that Vega should have talked to law enforcement. It is irrelevant for any purpose other than discouraging the jury to not believe Vega.

The State immediately asked a third and fourth question:

> 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?

(App. 30). Once again, there was no purpose to ask the questions, other than to imply and infer that Vega should have come forward with an explanation of his innocence sooner.

Then, after hearing an objection from Vega's attorney, that the questioning was improper, the State continued further and asked a fifth time:

> Q. So, again, Mr. Vega, you have recounted for the jury here today your explanation of the five times when Mr. Gershon was at your residence and what those were for. I'm assuming you knew this same

> information back on June 28th when all of this happened and you were arrested.
>
> A. On the 27th, you mean?

(R. 111:75). With that question, the prosecutor insinuated that Vega had the information available to him (the testimony he gave at trial) to give to law enforcement at the time of his arrest. Thus, the State inferred that Vega should have talked to law enforcement rather than invoking his right to remain silent.

Even then, the State was not finished badgering Vega about his decision to remain silent. The State attacked Vega for the reason he didn't explain himself:

> A. Well, I don't know what he all meant when he said I had five control buys. I didn't know what that was for.
>
> Q. That's not my question. My question is what you told us today I'm assuming you knew back on June 27th, correct?
>
> A. Correct.
>
> 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?

(R. 111:75). And then again, the State asked two additional questions insinuating that Vega should have come forward and explained himself after his arrest:

> 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).

The State argues that the prosecutor "never implied or argued that the jury should take Vega's silence as evidence of his guilt" and therefore, the error is harmless. (St. Br. at p. 10). However, that argument is contrary to the record in this case.

The State had no purpose for badgering Vega with 6-7 questions about exercising his right to remain silent. The evidence was not admissible, and the State now concedes that error. The sole purpose of asking the question was to imply and to encourage the jury to infer that Vega's trial testimony was not truthful and he lacked credibility because he had not given a statement to law enforcement after his arrest.

The State concedes in its brief that the questions implied that Vega was not credible. However, the State argues that "it was merely one in a series of points calling Vega's credibility into question." (St. Br. at p. 12). However, it was not one question, it was 6-7 questions. And it was a significant challenge to Vega's credibility.

The error cannot be harmless when it calls into question, the credibility and truthfulness of Vega's entire defense. The State cites to no legal authority that the challenges to Vega's credibility were harmless. Though the State cites to two cases wherein the Supreme Court and Court

of Appeals have found harmless error relating to credibility, both relate to *excluded evidence* that was offered to *bolster* credibility.

The questions asked here did not exclude evidence offered to bolster Vega's credibility, they called his base credibility into question. The State's impermissible questions were asked to infer that he had no credibility. Therefore, those cases do not support the State's position.

ii. The nature of Vega's defense, the nature of the State's case, and the strength of the State's case all support Vega's request for a new trial.

Vega's defense at trial was that the confidential informant was a person with a motive to falsely incriminate Vega because he was cooperating with law enforcement to escape culpability for his own theft charges, and that the informant accomplished that by hiding drugs on his person to setup Vega.

The State argues that Vega's defense is "beyond belief" and "far-fetched." However, law enforcement testified that a *thorough* search of the informant never occurred. According to Detective Schultz, the informant was not searched under his clothing, nor was the informant asked to remove his shoes during the search. (R. 110:108). The informant was merely patted down.

Additionally, Officer Gischia testified that the quantity of heroin involved in the controlled buys was approximately the size of a marble. (R. 109:174). Furthermore, Officer Gischia acknowledged that it is possible for an informant to have a small item concealed or hidden on their person. (R. 109:161).

The State's argument focuses entirely upon the likelihood of whether the informant would have tried to get

Vega into trouble which relies entirely upon speculation. That argument encourages speculation or a balance of credibility, which Vega maintains was central to the jury's verdict here.

Furthermore, it ignores the fact that at the time of Vega's arrest, no heroin was located on his person, in his vehicle, or in his home. (R. 109:171-109:172). In addition, none of the pre-recorded buy money used in the alleged controlled buys was recovered from Vega. (R. 110:134).

The jury's verdict rested almost entirely upon whether Vega would be found guilty by the jury rested entirely on whether they believed Vega or the informant more.

The State's argument that Vega's defense was "far-fetched" and "beyond belief" goes against the State's own witness. Officer Gischia admitted that the drugs were the size of a marble and that it was entirely possible for an informant to conceal such an item on their person.

As such, the State has not met its burden of showing that the error was harmless. The repetitive nature of the questioning, the damaging implications of insinuating that Vega was not credible or truthful because he exercised his right to remain silent violated Vega's Fifth and Fourteenth Amendment rights.

The State has not and cannot meet its burden of showing that the error was harmless. *Sorenson,* 143 Wis. 2d at 263. Therefore, Vega should be granted a new trial.

II. Vega's counsel performed deficiently, by failing to immediately object to questioning about Vega's post-arrest, post-Miranda silence and failed properly renew a continuing objection, which caused Vega prejudice at trial.

Trial counsel performed deficiently by not objecting immediately to any and all questions asked about statements made by Vega after his arrest and the errors caused Vega prejudice. *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

The State does not develop any legal argument against the relief requested by Vega. Therefore, Vega urges this Court to grant the requested relief. *State v. Petit*, 171 Wis. 2d 627, 646, 492 .W.2d 633 (Wis. App. 1992).

a. Vega's trial attorney performed deficiently by failing to immediately object and raise a proper, continuing objection to the State's questioning of Vega on cross-examination, regarding Vega's post-arrest, post-Miranda silence.

The State does not address the first prong regarding deficient performance. Rather, the State argues that any and all objections were properly made and preserved.

If this Court reaches a determination of error and harmless error analysis on any and all questions asked about Vega's post-arrest silence, then this issue is moot.

However, counsel failed to object immediately to all questions. In total, the prosecutor asked 6-7 questions about Vega's post-arrest silence. Vega's counsel only objected after the third or fourth question. (App. 29-31). Therefore, Vega maintains his claim that if this Court would not review

all questions asked about his silence, that this claim needs to be addressed.

b. Vega was prejudiced by his counsel's deficient performance because the prosecutor was permitted to improperly cross-examine Vega contrary to Vega's right to remain silent.

The State does not develop an argument against prejudice. Rather, the State relies upon its harmless error analysis related to the first issue in this appeal.

The rules of appellate procedure require that every issue must be fully briefed individually. Therefore, Vega urges this Court to find that the State has conceded error and grant Vega a new trial. *Petit*, 171 Wis. 2d 627, 646.

If this Court reviews Vega's ineffective assistance of counsel claim on its merits, Vega relies upon its initial briefing and urges this Court to find prejudice for the same reasons that the error is not harmless.

CONCLUSION

Vega's trial counsel was ineffective for not objecting to earlier questions and the trial court improperly permitted the State to question Vega about his decision to remain silent after he was arrested and read his *Miranda* warnings. The error is not harmless, and Vega was prejudiced by the State's questions. Therefore, Vega urges this Court to grant him a new trial.

Dated this 24th day of September, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 the brief is 2,174 words.

Dated this 24th day of September, 2021.

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