In the Court of Appeals of Wisconsin

District I

State of Wisconsin,

Plaintiff-Respondent,

v.

Jesus Gonzalez,

Defendant-Appellant

Appeal No. 2021AP001496

Appeal from the Judgment of the Milwaukee County Circuit Court, The Hon. Michelle Havas

Reply Brief of Appellant

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Argument

Summary: The State incorrectly concludes that Gonzalez's first appellate counsel was not ineffective because Gonzalez's suggested issue, trial counsel advice not to testify, was not clearly stronger than first appellate counsel's issue.

Gonzalez's entire theory of defense at trial was self-defense. But his trial counsel, Nelida Cortez strongly advised him not to testify. The only evidence of self-defense presented at trial was Gonzalez's call to 911 in which he said two people tried to assault him. Trial counsel therefore pursued a self-defense theory with only the slimmest of evidence to support the theory. When the theory is self-defense, it should be obvious that evidence of the defense must be shown. Gonzalez's first appellate counsel, Timothy Provis, agrees. He testified that in 40 years of doing criminal appellate work he has never seen a self-defense case where the defendant did not testify. Yet somehow he did not even spot the issue. He testified that it never occurred to him. Doc 275, p. 9.

Instead, Provis's issues for appeal were 1) the process used by the trial court for designating the alternate juror and 2) the trial court's allowing the jury to take notes during closing arguments. This Court ruled that Gonzalez waived the first issue by failing to object to the alternate juror selection process at the time, but even if he hadn't, the trial court struck a potential alternative for cause and not for reasons Gonzalez had urged. Doc. 100. This Court also stated that any error in striking a juror for cause

was harmless. *Id.*[1] Finally, this Court concluded that the trial court's allowing the jury to take notes during closing was harmless error. Doc. 100, pp. 17-18.

Provis should have anticipated the rulings from this Court. He should have been aware that Gonzalez did not object to the Court's striking of a juror for cause, effectively making that juror the alternate. He also should have known that erroneously striking a juror for cause is harmless error. Provis also should have expected that allowing a jury to take notes during a closing, though contrary to statute, is not inherently prejudicial. Provis should have known that this statutory violation is harmless error.

On the other hand, ineffective assistance of counsel is not harmless error. If it can be demonstrated, and potential prejudice shown, it is reversible error. The shocking fact that Provis did not even spot the issue should give this Court pause. Gonzalez will show in the next section that trial counsel was ineffective for giving the advice not to testify. Thus, Gonzalez's claim of ineffective assistance of trial counsel is clearly stronger than the claims that Provis actually raised. If Provis had brought the ineffective assistance of trial counsel issue on appeal, there is a reasonable chance this Court would have reversed. Gonzalez was therefore prejudiced.

Summary: The State incorrectly concludes that Gonzalez's testimony would not have helped.

The State argues in its response, "Gonzalez's testimony [at trial] would have helped his defense little, if any." Response, p. 20. The State boldly states, "The jury likely understood that Gonzalez's defense was that

[1] This Court also concluded that there was no evidence at trial to support Gonzalez's contention that he was attacked. Doc. 100, p. 15. This is exactly Gonzalez's point in the present appeal. His trial counsel failed to put any such evidence in the record.

one of the victims had tried to run him over with a car." *Id.* How? There was no evidence to that effect. No one testified to that, and as noted in Footnote 1 above, this Court's conclusion was that there was no evidence of self-defense at trial. The State's position defies logic.

Gonzalez testified at the *Machner* hearing what his testimony would have been. His family had hosted a birthday party for his nephew. *Id.* Gonzalez got tired and went to retire for the evening, but noticed his car keys in his pocket and remembered he had to move his car off the street. *Id.* When he went outside to move the car, he noticed a car sitting in the middle of the parking lot of Mamie's tavern, two doors down from his house. *Id.*, p. 8. As Gonzalez walked towards his car, he saw someone later identified as J.C. get out of the passenger side of the car at Mamie's. *Id.* J.C. ran towards Gonzalez. *Id.*, p. 9. Every time Gonzalez looked at J.C., J.C. walked, but when Gonzalez looked away, J.C. would run towards Gonzalez and close the distance between them quickly. *Id.*

When J.C. got to three or four feet from Gonzalez, Gonzalez jumped away to about 10 feet and drew a pistol. *Id.* J.C. threatened Gonzalez, laughed, danced and was "gang-banging." *Id.* He taunted Gonzalez for wearing a sport shirt (that Gonzalez had worn to the party) and called Gonzalez "A-S-S mother f-er." *Id.*, p. 10. He said, "Don't worry, mother f-er, I'll be back." *Id.* Gonzalez told J.C. to "back the F up," but J.C. did not back up. He just got more excited. *Id.*, p. 11. Gonzalez became apprehensive and ran J.C. off. *Id.*, p. 10. The two ran to Mamie's parking lot, and the car that had been in the lot (later determined to be driven by the deceased, Danny John) revved its engine and started towards Gonzalez. *Id.*, p. 12. Gonzalez ran to the left to get out of the car's way. *Id.* If he had not moved, the John would have run Gonzalez over. *Id.*

As Gonzalez was taking evasive action, he fired seven rounds at the John, who was driving the car. *Id.*, p. 13. He fired because he believed

John was trying to kill him. *Id.* As he fired, he was falling backwards. *Id.*, p. 14. Defense exhibits D1- D9, all introduced at the *Machner* hearing, show the relative positions of Gonzalez, J.C., John, and the cars. The State did not refute any of Gonzalez's testimony or Exhibits D1-D9.

Gonzalez fired all seven rounds at John, and all seven rounds either hit John or John's car. Doc. 280, p. 19. Gonzalez never intentionally fired any rounds at J.C., but believes J.C. was hit by a ricochet off John's car. *Id.* Gonzalez told everything he testified to at the *Machner* hearing to Cortes before the trial. *Id.*, p. 20. He tried to tell it to Provis as well, but Provis said it did not matter because Gonzalez chose not to testify at trial.

It simply cannot be said that Gonzalez's testimony would not have included valid evidence of self-defense – something that was lacking in Gonzalez's trial. The theory of defense was self-defense but no self-defense evidence was introduced. This was a major tactical blunder, something that Provis acknowledges now but did not spot at the time he did the first appeal. The testimony that Gonzalez gave at the *Machner* hearing is very good support for a self-defense theory.

The State counters that Gonzalez would not have been a good witness on cross examination. The State does not substantiate this argument, but only says he was not a good witness at the *Machner* hearing. Even then, the State is unable to point to anything specific in the transcript from the *Machner* hearing that supports the claim.

Moreover, "not a good witness" is not a legal standard. The State does not and cannot say that Gonzalez would break down and confess to murder, or contradict himself to the point of having no credibility. There is a range of quality of witnesses, from horrible to stellar. There is nothing in the record to indicate that Gonzalez would fall somewhere in the middle of that range, along with the majority of people in the world.

Even if Gonzalez would be on the lower end of the range, the fact remains that trial counsel introduced essential no evidence of self-defense. It is self evident that very good evidence of self-even if attenuated by poor performance on cross examination, is far superior to no evidence of self-defense (when the theory of defense is self-defense).

It makes no sense to try a case on a theory of self-defense and not introduce evidence of self-defense.

The State emphasizes Cortez's conclusion, after consultation with others, that there was not a valid claim of self-defense. There are multiple problems with this line of thinking. First and most obvious, is that Cortez testified at the *Machner* hearing that the theory of defense was self-defense. Doc. 275, pp. 44-45. Cortez's subjective lack of faith in her own theory did not relieve her of her ethical obligation to represent her client zealously. If she did not believe she had a viable self-defense case, she should have pursued a different theory. But because she testified that her theory was self-defense, she should have pursued it vigorously.

Gonzalez's testimony at the *Machner* hearing established a viable self-defense claim – and a claim for "perfect" self-defense at that. While it is impossible to say that the jury would obviously acquit Gonzalez based on that testimony, it certainly is true that the jury might have acquitted him. The jury stood no chance of acquitting Gonzalez on the evidence presented. Again, this Court found that there was no evidence of self-defense presented at trial.

Conclusion

Provis did not raise ineffective assistance of trial counsel because he assumes that advice of trial counsel is sound advice. He does not consider anything to the contrary and he did not in the present case. Even though in

40 years of practice he never has seen a self-defense case without defendant testimony, he did not even spot the issue in this case.

Cortes's testimony was inconsistent with itself and with what she represented to the trial court at sentencing. She did not believe Gonzalez had a valid self-defense claim and she sabotaged his ability to bring one by advising him not to testify. She knew that a perfect self-defense claim requires evidence of the reasonableness of a defendant's believe and use of force, but she did not introduce any. Once she selected self-defense as the theory of defense. She was obligated to pursue that theory as far as it would go. Not only should she have advised Gonzalez to testify, she should have told him it was all but mandatory in a self-defense case.

For the foregoing reasons, the judgment of the circuit court should be reversed and Gonzalez should be afforded a new trial.

Electronically signed by: **John R. Monroe**

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Certificate of Service

I certify that on April 24, 2022, I filed this brief electronically and such filing shall generate an electronic notice that will operate as service upon:

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Certifications:

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 1,884 words.

Electronically signed by: John R. Monroe

John R. Monroe