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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2024AP002368-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL R. OSORNIO,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
an Order Denying Postconviction Relief, Entered
in the Columbia County Circuit Court, the
Honorable Todd J. Hepler, Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

The ultimate question before this Court is whether Osornio received a fair trial. As argued in his opening brief, Osornio's conviction was the result of two errors: first, that witness Gail Ryzner was allowed to testify for improper purposes and that her testimony was unduly prejudicial; and second, that the multiplicitous charges violated Osornio's right to be protected against double jeopardy, the jury was instructed improperly, and once the jury reached a conclusion under the instructions it had been given, the court erred in continuing to require the jury to deliberate under additional, inconsistent instructions.

Because the state fails to prove that the errors were harmless beyond a reasonable doubt, this Court should reverse Osornio's conviction.

I. Ryzner's testimony was not proper context evidence, and her testimony unfairly prejudiced Mr. Osornio.

A. The testimony was not proper context evidence.

The state argues that Osornio preserved a challenge to Ryzner's testimony only on the third prong of *Sullivan*¹ and forfeited arguments under

¹ *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

prongs one and two. (State's br. at 18, 21). Osornio disagrees.

Osornio did not forfeit or concede any argument as to the first two prongs because the burden was on the state, not Osornio, to establish the first two prongs by a preponderance of the evidence: the state was required to show that the evidence was offered for a permissible purpose and that it was relevant. *State v. Payano*, 2009 WI 86, ¶¶63, 68 n. 14, 320 Wis. 2d 348, 768 N.W.2d 832; *State v. Hunt*, 2003 WI 83, ¶53, 263 Wis. 2d 568, 666 N.W.2d 771. Osornio objected to the state's proposed testimony as propensity evidence. The first prong of *Sullivan* requires the state to prove that the evidence is offered for a permissible purpose, *other than the prohibited propensity purpose*, pursuant to Wis. Stat. § 904.04(2)(a). *Sullivan*, 216 Wis. 2d at 772-73, 576 N.W.2d (emphasis added).

As to the second prong, the state argued that Ryzner's testimony provided context and that it was relevant because Ryzner would say that Osornio sold her heroin just before Osornio was alleged to have sold heroin to Jared. (131:21-22). The state argued that it was not unduly prejudicial because it would help the jury "get a fuller picture of what happened." (131:22). Osornio challenged its admission, arguing it was propensity evidence. (131:22). Osornio conceded in his opening brief that the evidence was arguably relevant to the extent it showed Osornio's intent to sell heroin. (State's br. at 28).

The court found that the state met its burden in regard to the first two prongs and that it was neither propensity evidence nor unduly prejudicial under the third prong because it concluded it would allow the testimony. (131:24). As Osornio argued in his opening brief, the court erroneously exercised its discretion in doing so because it failed to conduct any required analysis, because the testimony was not proper context evidence, and because the danger of unfair prejudice substantially outweighed its probative value. (Osornio opening br. at 21-30). Osornio recognizes that even under these circumstances, this Court independently “reviews[s] the record to determine whether it provides an appropriate basis for the circuit court's decision.” *State v. Marinez*, 2011 WI 12, ¶17, 131 Wis. 2d 568, 797 N.W.2d 399 (*quoting State v. Hunt*, 2003 WI 83, ¶34).

Osornio agrees with the state that the jury was instructed to consider Ryzner’s testimony for context. (*See state’s br. at 17*). The state argues that Osornio cannot challenge this issue because Osornio drafted the jury instruction, but Osornio drafted the jury instruction at the court’s direction. (131:24). The jury instruction he submitted adopted the pattern instruction provided by Wisconsin Criminal Jury Instruction 275. (*State’s br. at 11*).

Osornio also agrees with the state that the question is whether the circuit court erroneously exercised its discretion by admitting Ryzner’s testimony as other acts evidence for purpose of context and background. (*State’s br. at 17*). The state argues

that other acts evidence does not have to be tied to the alleged criminal conduct to be admissible as context evidence. (State's br. at 23). The state argues that the evidence need only be "near in time and place" as explained in *State v. Pharr*, 115 Wis. 2d 234, 348, 340 N.W.2d 498 (1983). (State's br. at 23).

But a close reading of *Pharr* and cases that allow other acts evidence for purposes of "context" shows that evidence submitted for this purpose has been approved when the evidence is part of the charged case itself. For example, Pharr was charged with attempted first-degree murder as party to a crime stemming from a robbery in Rock County. Pharr and two co-defendants drove from Madison to Rock County with the intent to rob someone they felt owed them money. *Pharr*, 115 Wis. 2d at 337. They had guns, which they fired during the robbery. *Id.* Pharr's co-defendant was driving, and on the way back to Madison, the car was pulled over by a highway trooper who had no knowledge of the robbery. *Id.* The trooper saw a gun in the car, and Pharr's co-defendant fired the gun at the trooper and sped away. *Id.* at 337-38. The trooper followed and Pharr fired at the trooper. *Id.* at 338. Pharr was ultimately stopped and arrested in Dane County. At his trial in Rock County, the state sought to introduce the evidence of Pharr's shooting at the trooper. *Id.* at 348. In concluding that the circuit court properly admitted that evidence, the supreme court found that the state needed, as part of its case, to introduce evidence showing Pharr's active participation in the events "incident to the escape phase of the robbery." *Id.* at 348. This was the

immediate context in which the evidence of Pharr's earlier actions was allowed.

Shortly after *Pharr*, this Court considered the issue in *State v. Shillcutt*, 116 Wis. 2d 227, 341 N.W.2d 716 (Ct. App. 1983). In *Shillcutt*, the state sought to admit evidence of Shillcutt's prior relationship with one of the prosecution's witnesses, including his solicitation of her to practice prostitution and his physical abuse of her. *Shillcutt* at 234-35. This Court approved the use of the evidence because it was probative on the issue of understanding the background relationship between the witness and the defendant and because it provided "context [for] a number of testimonial statements which were important to the State's case." *Id.* at 238.

More recently, our supreme court conducted a similar analysis in *State v. Gutierrez*, 2020 WI 52, 391 Wis. 2d 799, 943 N.W.2d 870. Gutierrez was charged with sexual assault of his stepdaughter, A.R. Prior to trial, the state sought to admit as other acts evidence allegations of prior sexual assaults by Gutierrez of A.R. from when A.R. was approximately six years old. *Id.* at ¶9. Because of the greater latitude rule applicable in child sexual assault cases, the circuit court granted the state's motion in part, admitting only the first incident of alleged assault for the limited purposes of proving motive and providing context and background. *Id.* at ¶9.

In these cases, the evidence was allowed only to provide context for something the defendant did or said in regard to a witness in the charged case, or in *Pharr*,

something the defendant did that bore on one of the events incident to a phase of the charged case.

B. The error was not harmless.

The state argues that any error in the admission of Ryzner's testimony was harmless because, even without it, the evidence established beyond a reasonable doubt that Osornio sold heroin to Jared. (State's br. at 23-25).

"The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction." *Sullivan*, 216 Wis. 2d at 792. Thus, "[t]he conviction must be reversed unless the court is certain the error did not influence the jury." *Id.* The burden is on the state, as the beneficiary of the error, to establish that the error was harmless. *Id.* at 792-93.

The state cannot prove that the error was not harmless beyond a reasonable doubt where the circuit court itself was confused by the use of the evidence. The state argues that the court asked the question about whether one of the charges could relate to Osornio's alleged sale of heroin to Ryzner "in an attempt to resolve the multiplicity problem after the parties raised it in the middle of jury deliberations." (State's brief at 22). The court did first raise the question at trial. (127:150). The court asked the parties:

Do you not believe that the jury could find that there were two different deliveries? That there

was this particular -- there was evidence about a particular incident at Walgreens, but then there was also evidence presented that somehow there was DNA on what is alleged to have been the heroin that led to the death, which may not be mutually exclusive?

(127:150). As the state notes, this was wrong: the jurors could not find Osornio guilty of delivering heroin to Ryzner because they were given a limiting instruction. But the court's confusion demonstrates why Ryzner's testimony was a problem. If, as the state argues, the court was simply trying to work out the multiplicity problem in the middle of trial, the court would not have still continued to believe at the postconviction proceedings that Osornio's conviction for delivery of heroin could have been based on his alleged delivery to Ryzner. (171:1; Osornio's opening brief, App. 5). The fact that the court itself was confused about the use of Ryzner's testimony demonstrates how the jury could have been equally confused. The testimony was not proper context evidence and was unduly prejudicial.

II. Osornio is entitled to a new trial because the jury reached a conclusion before anyone realized he had gone to trial with multiplicitous charges and the additional jury instructions did not cure the error.

The state argues that the prosecution's charging mistake, the jury's deliberation of multiplicitous charges, and the court's disregard of the jury's conclusion that they could not reach agreement on the

homicide charge was harmless beyond a reasonable doubt. (State's br. at 31). Under the state's argument, the fact that the jury was eventually given proper jury instructions cured any harm to Osornio. (State's br. at 31-32). The state is wrong because its argument requires the court to assume a different set of circumstances than what actually occurred here.

- A. The court should have accepted the jury's conclusion as to both counts once it discovered that Osornio had been tried with multiplicitous charges.

The state argues that the jury's note "demonstrated only that the jury had yet [sic] reached a unanimous decision on the fourth element of reckless homicide, not that the jury was incapable of unanimously agreeing on that offense." (State's brief at 30.) Osornio reads the state's argument to mean that the jury had *not yet* reached a decision. But nothing about the jury's note indicates that they had not *yet* reached a unanimous decision on the reckless homicide charge. The note explained that they reached a conclusion on count two and *could not could not come to an agreement* on the homicide charge. (83:2; 127:140)(emphasis added).

The state argues that the jury only reached the conclusion it did at 3:45 because it had not yet received instruction that it must "make every reasonable effort to agree unanimously." (State's br. at 27). The state imagines that if the jury had received this instruction and the instruction on heroin as a lesser included

offense before beginning deliberations, it would not have acquitted Osornio of reckless homicide at 3:45. (State's brief at 30). The state argues that the continued deliberations after the jury received the *Allen* and modified lesser included instructions demonstrate the jury's reasonable uncertainty about one of the two primary factual disputes—whether the heroin caused Jared's death. (State's br. at 30).

Moreover, the state is certain that if Osornio had not been improperly charged the jury would have deliberated and ultimately reached the same conclusion that it did. (State's br. at 30). But this argument does not reflect what actually occurred in this case. Osornio was not properly charged with one count of reckless homicide and given a lesser included instruction on delivery of homicide. We cannot know what the jury would have done if they had been properly instructed. We can only know what the jury did after the case was not properly tried and after the jury was not properly instructed, which was to inform the court after three hours of deliberation that they could not agree unanimously on the homicide charge. (83:2; 127:140).

B. The error was not harmless.

The state does not disagree with Osornio's argument that his constitutional right to be protected from double jeopardy was violated when he was made to stand trial for multiplicitous charges constituted plain error. (Osornio's opening brief at 39). Instead, the state argues that "the initial omission of the lesser

included offense instruction” did not constitute plain error. (State’s br. at 31). But that is not Osornio’s argument. Osornio argued in his opening brief that it was plain error to subject Osornio to multiplicitous charges and for the court to then disregard the jury’s note that they reached a conclusion on one charge and could not reach a conclusion on the other. (Osornio opening br. at 39).

The state has not proven that the court’s disregard of the jury’s conclusion and additional piecemeal instructions that the jury continue to deliberate did not prejudice Osornio under the standards of plain error or ineffective assistance of counsel. And, as argued in his opening brief, the fact that the jury told the court it reached a conclusion on the delivery charge and not the homicide charge also demonstrates that there is a reasonable probability of a different result on retrial.

CONCLUSION

For the reasons argued in his opening brief and above, Samuel Osornio requests that this Court reverse the judgment of conviction and the decision and order denying postconviction relief, and remand this case to the circuit court for a new trial.

Dated this 17th day of April, 2025.

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 this brief is 2,354 words.

Dated this 17th day of April, 2025.

Signed:

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