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Diane Fremgen, Clerk
Wisconsin Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Re: ***State of Wisconsin v. Eduardo Ivanez***
Case No. 2014AP1901-CR
District I/IV

Dear Ms. Fremgen:

Pursuant to the court of appeals' October 17, 2014, order, the State submits this supplemental letter brief regarding the *Harrison/Anson* analysis conducted by the circuit court on remand.

In *Harrison v. United States,* 392 U.S. 219, 224-25 (1968), the Supreme Court held that when statements later determined to be inadmissible are used at trial and the defendant takes the stand and testifies, there must be a determination whether the defendant's testimony at trial was impelled by the admission of the illegally obtained statements. In *State v. Anson,* 2005 WI 96, 282 Wis. 2d 629, 698 N.W.2d 776, the court held that the review required by *Harrison* is a paper review where the circuit court makes historical findings of fact based on the entire record. *Id.*, ¶13. Under *Anson,* the State must prove beyond a reasonable doubt the following:

> First, the circuit court must consider whether the defendant testified "in order to overcome the impact of [statements] illegally obtained and hence improperly introduced[.]" Second, even if the court concludes that the defendant would have taken the stand, it must determine whether the defendant would have repeated the damaging testimonial admissions "if the prosecutor had not already spread the petitioner's confessions before the jury."

Id., ¶14 (citations omitted).

In this case, both parties submitted to the circuit court proposed findings of facts and conclusions of law, together with supporting briefs (57:1-27; 58:1-9; 59:1-3). The State's submission included thirty-three detailed proposed findings of fact (57:19-24) and three proposed conclusions of law (57:24-27).

In its written decision and order, the circuit court adopted the findings of fact and conclusions of law set forth by the State (60:1). Those conclusions of law were: "FIRST, the State has proven, beyond a reasonable doubt, that the Defendant was not impelled to testify due to the admission of his confession in the State's case in chief at trial" (57:24); "SECOND, the State has proven, beyond a reasonable doubt, that, regardless of the admission of his confession by the State at his trial, the Defendant would have testified to the same content as he did at trial. The content of his statement was not impelled by the admission of his confession at trial. He would have testified to the same content anyway given he had no other viable defense" (57:25); and "THIRD, regardless, the admission of the Defendant's confession by the State at his trial is harmless error given the strength and totality of all of the State's other evidence presented at his trial" (57:26).

The circuit court's findings of fact are not clearly erroneous. In his supplemental brief, Ivanez acknowledges that this court reviews the circuit court's findings of historical fact under a clearly erroneous standard. *See* Ivanez's supplemental brief at 2 (citing *Anson*, 282 Wis. 2d 629, ¶18). But, he asserts, this standard of review is "unhelpful" in this case. *Id.* That is so, he contends, because the court adopted the State's proposed factual findings and did not make any factual findings that would support his contention that he was impelled to testify. *See id.* As a result, he contends, "there are no findings of historical fact that are reviewed under the clearly erroneous standard." *Id.* at 3.

Missing from Ivanez's argument is any citation to legal authority to support that argument. This court does not consider arguments unsupported by references to relevant legal authority. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Because Ivanez's blanket challenge to the circuit court's finding of fact is unsupported by any citation to legal authority, and because Ivanez does not argue that any particular finding of fact is clearly erroneous, this court should adopt the circuit court's factual findings. *See Anson*, 282 Wis. 2d 629, ¶18.[1]

[1]Although not cited by Ivanez, the State acknowledges that this court rejected the circuit court's adoption of a party's brief as its decision in a divorce case, *Trieschmann v. Trieschmann,* 178 Wis. 2d 538, 504 N.W.2d 433 (Ct. App. 1993). In that case, the court of

Ivanez's testimony was not compelled by the admission of his confession. This court independently applies the historical facts found by the circuit court to the question of constitutional fact whether Ivanez's trial testimony was "purged of the taint" of his allegedly improperly admitted statements to the police. *See id.*[2] As *Anson* explains, that is a two-part determination: 1) "whether the defendant testified in order to overcome the impact of [statements] illegally obtained and hence improperly introduced"; and 2) "whether the defendant would have repeated the damaging testimonial admissions if the prosecutor had not already spread the petitioner's confessions before the jury." *Id.*, ¶14 (quotation marks omitted). As previously noted, the circuit court found that the State had proven both of those matters beyond a reasonable doubt (57:24-25).

The circuit court first concluded that the State proved that Ivanez "was not impelled to testify due to the admission of his confession in the State's case in chief at trial" (57:24). The court found that Ivanez would have testified regardless of whether his statements had been introduced because his testimony was necessary to refute Augustin Santiago's "very convincing, strong and credible testimony" that Ivanez intentionally killed Romero and that Ivanez was not acting in self-defense because Romero was unarmed and was not fighting back, and because his testimony was necessary to bolster and provide a factual basis for his claim of self-defense (*id.*). The court also found, for substantially the same reasons, that "regardless of the admission of his confession by the State at his trial," Ivanez "would have testified to the same content as he did at trial" had his statements not been admitted (57:25-26).

The circuit court's legal conclusions follow logically and inexorably from its factual findings. Because Ivanez has provided no basis for this court to disregard those factual findings, the court should conclude, as did the circuit court, that the

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appeals concluded that, by adopting the wife's memorandum in its entirety, "the [circuit] court failed to articulate the factors upon which it based its decision as required" because the memorandum was "devoid of any explanation or reasoning as to why the court accepted [the wife's] views regarding the disputed facts and law over [the husband's] views." *Id.* at 542. That is not the situation here, as the state's memorandum provided an extensive discussion of the facts that supported its proposed findings (57:1-19).

[2]This court has not determined that Ivanez's statements to the police should have been suppressed. Rather, in its June 16, 2014, remand order, the court stated that "there is a substantial issue whether the circuit court's suppression ruling is correct."

State has met its burden of proving beyond a reasonable doubt that Ivanez's trial testimony was not tainted by the allegedly erroneous admission of his statements to the police.

Ivanez's argument to the contrary consists of three points. First, he argues that if he "had intended to testify there was no reason to seek suppression of his statement to police." Ivanez's supplemental brief at 4. That is so, he contends, because "[i]f the statement were suppressed, and Ivanez then testified, the confession to police would have been spread before the jury on cross-examination."

That argument assumes that when Ivanez filed his suppression motion on May 21, 2012 (8:2), less than three weeks after the preliminary hearing waiver (6:1; 38:1-6) and five months before trial began on October 29, 2012 (45:1), Ivanez already had made the decision not to testify if the suppression motion were granted. He provides no factual basis for that assumption.

Moreover, that argument ignores the fact if his suppression motion had succeeded, the motion would have achieved a benefit for the defense even if Ivanez were to testify. That is because his suppressed statement would not have been admissible for the truth, but only for its impeachment value. *See State v. Mendoza*, 96 Wis. 2d 106, 118, 291 N.W.2d 478 (1980). With the statement suppressed, Ivanez would have been entitled to a jury instruction that his statement "may be taken into consideration only to help you decide if what the defendant said in court was true. It must not be considered as proof of the facts in the statement." Wis-JI Criminal 320 (2001).

Second, Ivanez argues that "in his opening statement defense counsel did not tell the jury that Ivanez would testify. In fact, defense counsel did not even mention self-defense. The theory of defense at that point was that the state could not prove intent to kill." Ivanez's supplemental brief at 4.

In the State's view, the fact that defense counsel did not tell the jury in his opening statement that Ivanez would testify refutes rather than supports his contention that his testimony was compelled by the admission of his statement to police. That is because the prosecutor, in his opening statement, described to the jury Ivanez's statements to the police (46:28). If the prospect of the jury learning of

Ivanez's statements compelled him to testify, one would expect that defense counsel would have told the jury that Ivanez would testify.

Anson illustrates that point. In *Anson,* the State argued that one fact that supported the conclusion that Anson was not compelled to testify because of the admission of his statement was the fact Anson's attorney announced during opening statements that Anson would testify. *See Anson,* 282 Wis. 2d 629, ¶51. The court of appeals disagreed, noting that the prosecutor told the jury in its opening statement that the State would introduce Anson's statement. *See id.*, ¶52. In this case, in contrast, even though the State likewise told the jury in its opening statement about Ivanez's statements to the police, defense counsel did not tell the jury that Ivanez would testify (46:34-38).

Third, Ivanez finds support for his claim that he would not have testified absent the admission of his statement in the fact that "in his closing argument, defense counsel told the jury that the only reason Ivanez testified was because the confession introduced by the state only told 'half the story.'" Ivanez's supplement brief at 4. Ivanez provides no record cite for that assertion. He appears to be referring to defense counsel's argument that the police "[n]ever afforded [him] an opportunity to give an explanation until he got on the witness stand in front of you 13 individuals" (51:26). But counsel never told the jury that "the only reason Ivanez testified" was because the State introduced his statements to the police (51:21-35).

Harmless error. With the *Harrison/Anson* analysis completed, the court may proceed to a harmless error analysis. *State v. Lemoine*, 2013 WI 5, ¶36, 345 Wis. 2d 171, 827 N.W.2d 589. In its respondent's brief, the State noted that even without Ivanez's statements to the police, the evidence against him was compelling. Augustin Santiago testified at trial that he witnessed Ivanez choking and stabbing the victim (49:81-86). Ivanez's girlfriend, Jessica Hernandez, testified that around midnight on the night of April 13-14, 2012, Ivanez told her that he needed money for a bus because he had "stabbed a lady" (47:52-54). Ivanez's DNA was found on the victim's breast (49:53-55). And, because Ivanez's trial testimony was not compelled by the admission of his prior statement, the court also may consider his trial testimony, in which he admitted choking and stabbing the victim, while claiming that he did so in self-defense (50:54-55). Accordingly, even if the court were to find that Ivanez's statements to the police were inadmissible, it should conclude that the erroneous admission of those statements "did not contribute to the verdict obtained" and that it is "clear beyond a reasonable doubt that a rational jury

would have found the defendant guilty absent the error." *State v. Hunt*, 2014 WI 102, ¶26, __ Wis. 2d __, 851 N.W.2d 434 (citations omitted).

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CERTIFICATION

I certify pursuant to the court of appeals' October 17, 2014 order that the length of the supplemental letter brief not exceed 2,000 words that the length of this letter brief is 1,958 words.

Dated: November 26, 2014.

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Assistant Attorney General