No. _____

SUPREME COURT OF THE UNITED STATES

JESUS C. GONZALEZ,

PETITIONER,

vs.

JASON BENZEL,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by,

Jesus C. Gonzalez
Dodge Correctional Institution
P.O. Box 700
Waupun, WI 53963

INDEX TO APPENDIX

Wisconsin Court of Appeals Decision dated March 8, 2016.....A-1-9

Order of Wisconsin Supreme Court dated June 15, 2016.....A-10

Wisconsin Court of Appeals Decision dated June 25, 2019...A-11-17

Milwaukee County Circuit Court Decision dated June 29, 2021..A-18-30

Wisconsin Court of Appeals Decision dated August 30, 2022..A-31-37

Wisconsin Court of Appeals Order dated September 21, 2022.....A-38

Order of Wisconsin Supreme Court dated January 18, 2023.....A-39

United States District Court Decision dated November 1, 2023..A-40-52

Seventh Circuit Court of Appeals Order dated May 20, 2024.....A-53

Appellant's Brief pages 1 - 7.....A-54-60

Appellant's Reply Brief pages 1 - 6.....A-61-66

Petition for Review to Wisconsin Supreme Court.....A-67-76

A-53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 16, 2024
Decided May20, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

~~THOMAS L. KIRSCH II, *Circuit Judge*~~

No. 23-3263

JESUS C. GONZALEZ,
Petitioner-Appellant,

v.

JASON BENZEL,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 22-C-1448

William C. Griesbach,
Judge.

ORDER

Jesus Gonzalez has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

A-53

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Accordingly, the request for a certificate of appealability is DENIED.

A-40

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JESUS C. GONZALEZ,

Petitioner,

v. Case No. 22-C-1448

JASON BENZEL,

Respondent.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Petitioner Jesus C. Gonzalez filed a petition for federal relief from his state court conviction pursuant to 28 U.S.C. § 2254 on December 2, 2022. He was convicted in the Circuit Court of Milwaukee County of one count of first-degree reckless homicide and one count of second-degree recklessly endangering safety. He was sentenced to 20 years of initial confinement and five years of extended supervision on the first-degree reckless homicide count and five years of initial confinement and five years of extended supervision on the second-degree recklessly endangering safety count, to be served concurrent with the first-degree reckless homicide count.

Petitioner is currently incarcerated at Dodge Correctional Institution. He asserts that his conviction and sentence were imposed in violation of the United States Constitution. On June 1, 2023, Respondent filed a motion to dismiss the petition. For the reasons below, Respondent's motion will be granted and the case dismissed.

BACKGROUND

The State of Wisconsin charged Petitioner with first-degree intentional homicide with use of a dangerous weapon and attempted first-degree intentional homicide with use of a dangerous

weapon. The charges stemmed from the shootings of Danny John and another man, whose initials are J.C., that occurred on May 9, 2010. After shooting the victims, Petitioner called 911 and reported that two individuals tried to assault him and that he shot them in self-defense. No weapons were found on either victim or in the vehicle. Petitioner had no injuries, and there was no evidence that he had been involved in a struggle or that he had been attacked. John died as a result of gunshot wounds from the shootings and J.C. was left paralyzed.

The case proceeded to a four-day jury trial, and Petitioner was convicted of first-degree reckless homicide on the first charge and a lesser included offense of the second charge, first-degree reckless injury. At sentencing, the court and the parties determined that first-degree reckless injury was not a proper lesser included offense of the original attempted first-degree intentional homicide charge. As a result, the court vacated the conviction of first-degree reckless injury, and Petitioner pled no contest to second-degree recklessly endangering safety. Petitioner, who was represented by counsel, appealed to the Wisconsin Court of Appeals. He argued that the trial court erred when (1) it struck a juror as an alternate without following the procedure prescribed in Wis. Stat. § 972.10(7) for selecting the alternate juror by lot, thereby violating due process and (2) it allowed jurors to take notes during closing arguments, contrary to Wis. Stat. § 972.10(1)(a)1. The Wisconsin Court of Appeals affirmed his conviction. Petitioner subsequently filed a petition for review with the Wisconsin Supreme Court, which the court denied on June 16, 2016.

Petitioner, proceeding *pro se*, then filed a second appeal from his conviction, arguing that the circuit court erroneously denied without a hearing his postconviction motion alleging ineffective assistance of both his trial counsel and his postconviction counsel. In particular, Petitioner argued that his trial counsel was ineffective in (1) advising him not to testify at trial; (2) failing to call certain defense witnesses; (3) failing to make certain arguments concerning the

physical evidence presented at trial; and (4) failing to use an expert. He also argued that his postconviction counsel was ineffective for failing to raise these allegations in his first appeal. The court of appeals concluded that Petitioner sufficiently alleged that he was entitled to a hearing on his allegation that trial counsel was ineffective for advising him not to testify at trial but that Petitioner had not met his burden with respect to his remaining allegations as to trial counsel. The court remanded the matter for an evidentiary hearing on Petitioner's allegation that his trial counsel was ineffective for advising him not to testify at trial and that postconviction counsel was ineffective for not raising that issue in his first appeal.

On August 30, 2021, Petitioner filed a third appeal, arguing that the circuit court erred in denying his Wis. Stat. § 974.06 motion because his trial counsel rendered ineffective assistance when she advised him not to testify at trial and his postconviction counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness during his direct appeal. The court of appeals affirmed. Petitioner subsequently filed a petition for review with the Wisconsin Supreme Court, which the court denied on January 18, 2023.

ANALYSIS

As an initial matter, the court will address Petitioner's motion to hold Respondent in contempt for filing a false certificate of service. On June 26, 2023, Petitioner asserted that he did not receive a copy of the exhibits attached to Respondent's motion to dismiss. On July 5, 2023, the court directed the Clerk to mail Petitioner a copy of the exhibits attached to Respondent's motion to dismiss, and on July 27, 2023, extended Petitioner's time to respond to the motion. In his motion for contempt, Petitioner asserts that Respondent filed a false certificate of service that certified that Respondent sent Petitioner a copy of the exhibits attached to the motion to dismiss. "To prevail on a request for a contempt finding, the moving party must establish . . . that (1) a

A-43

court order sets forth an unambiguous command; (2) the alleged contemnor violated that command; (3) the violation was significant, meaning the alleged contemnor did not substantially comply with the order; and (4) the alleged contemnor failed to make a reasonable and diligent effort to comply." *United States SEC v. Hyatt*, 621 F.3d 687, 692 (7th Cir. 2010). "Sanctions for civil contempt are designed either to compel the contemnor into compliance with an existing court order or to compensate the complainant for losses sustained as a result of the contumacy." *United States v. Dowell*, 257 F.3d 694, 699 (7th Cir. 2001) (citation omitted). While it is unclear whether Respondent provided Petitioner of copies of the exhibits attached to his motion to dismiss, in the end, Petitioner received copies of the exhibits and ultimately was not prejudiced by any delay in receiving them. Accordingly, Petitioner's motion for contempt is denied. The court will now turn to the merits of Respondent's motion to dismiss.

This petition is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. Under AEDPA, a federal court may grant habeas relief only when a state court's decision on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" decisions from the Supreme Court, or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d); *see also Woods v. Donald*, 575 U.S. 312, 315–16 (2015). A state court decision is "contrary to . . . clearly established Federal law" if the court did not apply the proper legal rule, or, in applying the proper legal rule, reached the opposite result as the Supreme Court on "materially indistinguishable" facts. *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state court decision is an "unreasonable application of . . . clearly established Federal law" when the court applied Supreme Court precedent in "an objectively unreasonable manner." *Id.* That is, and was meant to be, an "intentionally" difficult standard to meet. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). "To satisfy this high bar, a habeas petitioner

is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 575 U.S. at 316 (quoting *Harrington*, 562 U.S. at 103).

In addition to the merits of Petitioner's claims, the court must consider whether his claims have been procedurally defaulted. A state prisoner can procedurally default a federal claim in one of two ways. *See Thomas v. Williams*, 822 F.3d 378, 384 (7th Cir. 2016). First, the state may decline to address a claim because the prisoner did not meet certain state procedural requirements. A state prisoner may also procedurally default a federal claim by failing to exhaust his remedies in state court before seeking relief in federal court. *See Snow v. Pfister*, 880 F.3d 857, 864 (7th Cir. 2018) (citing *Thomas*, 822 F.3d at 384; 28 U.S.C. § 2254(b)(1)(A)). "State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). To exhaust state remedies in the Wisconsin courts, the state prisoner must include his claims in a petition for review to the Wisconsin Supreme Court. "Procedural default may be excused . . . where the petitioner demonstrates either (1) 'cause for the default and actual prejudice' or (2) 'that failure to consider the claims will result in a fundamental miscarriage of justice.'" *Thomas*, 822 F.3d at 386 (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

Petitioner asserts in his petition that his due process rights were violated when the trial court failed to follow the procedures set forth in Wis. Stat. § 972.10(7) to select the alternate juror; that his due process rights were violated when the trial court allowed jurors to take notes during closing arguments; and a number of ineffective assistance of post-conviction counsel claims. The court will address Petitioner's claims in turn.

A-45

A. Due Process Claims

Petitioner asserts that his due process rights were violated when the trial court used a procedure contrary to Wis. Stat. § 972.10(7) to select the alternate juror which had the effect of giving the state one more preemptory challenge than Petitioner (Ground One) and when the trial court allowed jurors to take notes during closing arguments (Ground Two). Respondent argues that Ground One is procedurally defaulted because Petitioner failed to raise it in his petition for review in the Wisconsin Supreme Court. "[A] petitioner must fairly present his federal claims at each level of the state's established review process." *Johnson v. Pollard*, 559 F.3d 746, 751 (7th Cir. 2009). A petitioner fairly presents "his federal claims to the state courts by arguing both the law and the facts underlying them." *Byers v. Basinger*, 610 F.3d 980, 985 (7th Cir. 2010) (citation omitted). The court considers four factors in evaluating whether a petitioner has "fairly presented" his claim: "(1) whether the petitioner relied on federal cases that engage in a constitutional analysis; (2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; (3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and (4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation." *White v. Gaetz*, 588 F.3d 1135, 1139 (7th Cir. 2009). Failure to fairly present federal claims to the state courts constitutes procedural default that precludes review by federal courts. *Johnson*, 559 F.3d at 752.

Even though Petitioner presented his claim that his due process rights were violated when the trial court used a procedure contrary to Wis. Stat. § 972.10(7) to select the alternate juror to the Wisconsin Court of Appeals, he did not present it to the Wisconsin Supreme Court in his petition for review. Petitioner asserts that he presented his claim to the Wisconsin Supreme Court by attaching a copy of the Wisconsin Court of Appeals' decision to his petition for review and

stating that the issue presented was "whether basic Due Process was violated" by the violation of the state statute. Dkt. No. 26 at 7. But the petition for review itself does not rely on federal or state cases that engage in a constitutional analysis. Simply asserting that "basic due process" was violated without any argument or citation to legal authority did not fairly present the federal claim to the Wisconsin Supreme Court. *See Hicks v. Hepp*, 871 F.3d 513, 531 (7th Cir. 2017) ("While Hicks does identify this claim as its own stand-alone issue in his petition for review, his petition contains no argument whatsoever to support it."). Petitioner has not met his burden of fairly presenting the claim to the Wisconsin Supreme Court. Because his petition for review did not allow the Wisconsin Supreme Court the opportunity to address his federal constitutional claim, Ground One is procedurally defaulted. "When a petitioner has not properly asserted his federal claims at each level of review and it is clear that the state courts would now hold those claims procedurally barred, federal courts may not address those claims unless the petitioner demonstrates cause and prejudice or a fundamental miscarriage of justice if the claims are ignored." *Byers*, 610 F.3d at 985 (citation omitted). In this case, Petitioner has not argued that an exception to procedural default exists.

Even if he had not procedurally defaulted the claim, it would nevertheless fail. As the Court of Appeals explained, the juror that was excused as an alternate was in fact struck for cause. He had, by his own admission, not been candid in his response to a question about prior felony convictions during voir dire. By removing that juror instead of choosing the alternate by lot, the trial court properly exercised its discretion. No violation of due process was shown. Accordingly, this claim must be dismissed.

Respondent argues that Ground Two is a state law claim concerning juror note-taking that is not cognizable in habeas corpus. Petitioner argues in his petition that the trial court told the

jurors about Wisconsin's law prohibiting note taking during closing arguments but then proceeded to allow the jurors to take notes during closing arguments. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see also Dellinger v. Bowen*, 301 F.3d 758, 764 (7th Cir. 2002) (noting that federal habeas relief is "unavailable to remedy errors of state law"). Petitioner's assertion of due process does not transform the state law claim into a federal claim. *See Dellinger*, 301 F.3d at 764 (noting that even though the petitioner phrased his claim under due process and equal protection, the claim was ultimately a non-cognizable challenge to the application of Illinois' sentencing statute). Because Petitioner's state law claim is not cognizable in habeas corpus and because he was not deprived of due process as a result of the jurors' notetaking during closing argument, this claim must also be dismissed.

B. Ineffective Assistance of Post-conviction Counsel Claims

Petitioner asserts that post-conviction counsel provided ineffective assistance by failing to raise trial counsel's ineffectiveness in not calling Petitioner as a witness at trial and unreasonably advising him that he must not testify at trial (Ground Three); not investigating and calling important defense witnesses (Ground Four); not developing a proper defense strategy or properly cross-examining the State's witnesses at trial (Ground Five); and not proving through indisputable evidence that the State's case was fatally flawed (Ground Six).

Respondent argues that Ground Three is procedurally defaulted because the state court denied the claim on two recognized independent and adequate state law grounds: *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and *State v. Romero-Georgana*,

A-48

2014 WI 83, 360 Wis. 2d 552, 849 N.W.2d 668. The Wisconsin Court of Appeals noted that, "[a]bsent a sufficient reason, a defendant is procedurally barred from using a Wis. Stat. § 974.06 postconviction motion to bring claims that could have been raised earlier." *State v. Gonzalez*, 2022 WI App 52, ¶ 9, 980 N.W.2d 494 (citing *Escalona-Naranjo*, 185 Wis. 2d at 184–85). It also cited *Romero-Georgana* for the proposition that Petitioner's new motion had to demonstrate that "his ineffective assistance of counsel claim is clearly stronger than the claims his postconviction counsel brought in his direct appeal." *Id.* ¶ 13 (citing *Romero-Georgana*, 360 Wis. 2d 522, ¶ 4). Applying these principles, the court of appeals concluded that Petitioner's ineffective assistance of counsel claim was not clearly stronger than the claims postconviction counsel brought in his direct appeal and that Petitioner was barred from obtaining relief by way of a Wis. Stat. § 974.06 motion as a result. *Id.*

Petitioner argues that *Escalona-Naranjo* and *Romero-Georgana* cannot be used as procedural bars and that his claim is not procedurally defaulted in any event because the Wisconsin Court of Appeals made a ruling on the merits of his claim. The Seventh Circuit rejected these arguments in *Garcia v. Cromwell*, 28 F.4th 764 (7th Cir. 2022), however. There, the court recognized *Escalona-Naranjo* and *Romero-Georgana* as adequate and independent state-law grounds for procedural default. *Id.* at 767. The court also rejected the petitioner's argument that application of the procedural standard is "too entangled with the merits of [the] federal claims to be an independent basis for the state court's decision." *Id.* at 774.

In this case, the Wisconsin Court of Appeals summarily affirmed Petitioner's claim as procedurally barred under *Escalona-Naranjo* and *Romero-Georgana*. Therefore, federal relief is barred for this claim. A procedural default can be excused if a petitioner can show cause and prejudice or that failure to review the claim would result in a miscarriage of justice. *See Love v.*

A-49

Vanihel, 73 F.4th 439, 446 (7th Cir. 2023) (citation omitted). Petitioner has not argued that an exception to procedural default exists. Accordingly, this ineffective assistance of counsel claim must be dismissed.

Respondent asserts that Grounds Four, Five, and Six are likewise procedurally defaulted because the Wisconsin Court of Appeals denied them on state procedural grounds. "[A] claim will be procedurally defaulted—and barred from federal review—if the last state court that rendered judgment 'clearly and expressly' states that its judgment rests on a state procedural bar." *Lee v. Foster*, 750 F.3d 687, 693 (7th Cir. 2014) (citing *Harris v. Reed*, 489 U.S. 255, 263 (1989)). In *Lee*, the Seventh Circuit held that the rule set forth by the Wisconsin Supreme Court in *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, requiring specific allegations of fact needed to show relief in order to obtain an evidentiary hearing, is an adequate and independent state law basis that precludes federal review under § 2254. The court explained:

> The rule requires a petitioner to provide sufficient material facts, "e.g., who, what, where, when, why, and how—that, if true, would entitle him to relief he seeks." *Allen*, 682 N.W.2d at 436. Lee contends that the level of specificity in his postconviction motion—as an incarcerated defendant who was purportedly represented by ineffective counsel at both the trial and appellate levels—should be sufficient to withstand review under the *Allen* rule. Yet our review of the adequacy of a state ground is limited to whether it is a firmly established and regularly followed state practice at the time it is applied, not whether the review by the state court was proper on the merits. And the *Allen* rule is a well-rooted procedural requirement in Wisconsin and is therefore adequate. *See, e.g.*, *State v. Negrete*, 343 Wis. 2d 1, 819 N.W.2d 749, 755 (2012); *State v. Balliette*, 336 Wis. 2d 358, 805 N.W.2d 334, 339 (2011); *State v. Love*, 284 Wis. 2d 111, 700 N.W.2d 62, 68–69 (2005); *State v. McDougle*, 347 Wis. 2d 302, 830 N.W.2d 243, 247–48 (Ct. App. 2013). Consequently, we find the state procedural requirement relied upon by the Wisconsin Court of Appeals both independent and adequate. Lee's ineffective assistance claim is procedurally defaulted.

Lee, 750 F.3d at 693–94.

In this case, Petitioner's ineffective assistance of counsel claims were decided on state procedural grounds. With respect to Petitioner's claim that counsel was ineffective for failing to

call five different defense witnesses, the court of appeals concluded that Petitioner's allegations "concerning the five witnesses are conclusory and do not entitle him to a hearing." *See State v. Gonzalez*, 2019 WI App 39, ¶ 31, 388 Wis. 2d 256, 932 N.W.2d 181 (citing *Allen*, 274 Wis. 2d 568, ¶ 9). The court explained,

> Although the affidavits attached to the motion provide specifics of what the witnesses would have testified, the motion falls short in explaining "why" the witnesses' testimony is important. The motion does not explain why Gonzalez's "character," his "attitude" on the night of the shooting, or his "demeanor" after the shooting are material to the issue of whether he acted in self-defense. That is, the motion does not explain "the reason the evidence is important." As a result, the motion does not offer a reviewing court the opportunity to "meaningfully assess" whether the witnesses' testimony would affect the outcome of the trial. Accordingly, Gonzalez has not met his burden with respect to this issue.

Id. (cleaned up).

Petitioner also argued that counsel failed to make arguments concerning the physical evidence. He asserted, based on the evidence presented at trial, that (1) the vehicle operated by John was driving directly at Petitioner, (2) Petitioner then moved to his left to try to get out of the way; (3) as he did, Petitioner fired seven shots in one sudden burst; (4) at the same time, John swerved sharply to his left away from the shots; and (5) all seven shots struck the vehicle although at least two of them ricocheted and struck J.C., and that this evidence was improperly handled by counsel. *See id.* ¶¶ 33–34. The court found that because Petitioner's motion does not allege with any particularity the evidence that trial counsel mishandled or what additional evidence Petitioner would present, his allegation was conclusory and did not entitle him to a hearing on the issue. *Id.* ¶ 34 (citing *Allen*, 274 Wis. 2d 568, ¶ 9).

Petitioner further argued that counsel was ineffective for failing to "use an expert" to understand what the physical evidence showed and to demonstrate that the State's case was fatally flawed. *Id.* ¶ 35. Again, the court of appeals concluded that "Gonzalez's § 974.06 motion does

not allege what evidence an expert would have drawn upon to conclude that the State's case was 'fatally flawed,' nor does it propose a method by which Gonzalez could prove his allegation." *Id.* ¶ 36. It held that Petitioner's allegation was both speculative regarding what an expert would have testified to and conclusory and did not entitle him to a hearing on the issue. *Id.* (citing *Allen*, 274 Wis. 2d 568, ¶ 9).

Because it is clear from the Wisconsin Court of Appeals' decision that these claims were decided on independent and adequate state law grounds, federal relief is barred for these claims. Again, Petitioner has not argued that an exception to procedural default exists. Accordingly, these ineffective assistance of counsel claims must be dismissed.

CONCLUSION

For the reasons given above, Respondent's motion to dismiss (Dkt. No. 15) is **GRANTED**. Petitioner's motion for contempt (Dkt. No. 23) is **DENIED**. This case is dismissed. A certificate of appealability will be **DENIED**, as the court concludes that its decision is neither incorrect nor debatable among jurists of reason. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Clerk is directed to enter judgment accordingly.

A dissatisfied party may appeal this court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within 30 days of the entry of judgment. *See* Fed. R. App. P. 3, 4. In the event Petitioner decides to appeal, he should also request that the court of appeals issue a certificate of appealability. *See* Fed. R. App. P. 22(b).

SO ORDERED at Green Bay, Wisconsin this 1st day of November, 2023.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

A-52

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

JESUS C. GONZALEZ,

Petitioner,

v.

JUDGMENT IN A CIVIL CASE
Case No. 22-C-1448

JASON BENZEL,

Respondent.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that this case is DISMISSED. A certificate of appealability will be DENIED,

Approved: s/ William C. Griesbach
WILLIAM C. GRIESBACH
United States District Judge

Dated: November 1, 2023

GINA M. COLLETTI
Clerk of Court

s/ Mara A. Corpus
(By) Deputy Clerk

A-1

369 Wis.2d 73
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.
Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,

v.

Jesus C. GONZALEZ, Defendant–Appellant.

No. 2015AP784–CR.

March 8, 2016.

Appeal from a judgment and an order of the circuit court for Milwaukee County: Richard J. Sankovitz, Judge. *Affirmed.*

Before CURLEY, P.J., KESSLER and BRENNAN, JJ.

Opinion

¶ 1 BRENNAN, J.

*1 Jesus C. Gonzalez appeals from a judgment of convictions of first-degree reckless homicide and second-degree recklessly endangering safety.[1] Gonzalez contends that the trial court erred when: (1) it struck a juror as an alternate without following the procedure prescribed in WIS. STAT. § 972.10(7) (2013–14)[2] for selecting the alternate juror by lot, thereby violating due process; and (2) it allowed jurors to take notes during closing arguments, contrary to WIS. STAT. § 972.10(1)(a)1.

¶ 2 We affirm because we conclude that the trial court struck the juror for cause, not as an alternate, and even if that strike was error, Gonzalez was not prejudiced because he received a fair and impartial jury of twelve. *See State v. Mendoza,* 227 Wis.2d 838, 864, 596 N.W.2d 736 (1999). We also conclude that even if the trial court erred in permitting the jurors to take notes during closing arguments contrary to the statute, Gonzalez was not prejudiced. We discuss each issue in turn below.

BACKGROUND

¶ 3 On May 9, 2010, Gonzalez shot two men. One victim, J.C., survived and was rendered paraplegic. The other victim, D.J., died as a result of the gunshot wounds. After shooting the victims, Gonzalez called 911 and reported that two individuals tried to assault him and that he shot them. No weapons were found on either victim or in the vehicle. Gonzalez had no injuries, and there was no evidence that he had been involved in a struggle or that he had been attacked. Gonzalez admitted to shooting both men and was positively identified by the surviving victim.

¶ 4 Gonzalez was charged with first-degree intentional homicide and attempted first-degree intentional homicide and was tried by a jury October 24–27, 2011. *Voir dire* took place on October 24, 2011. During *voir dire,* the court asked the prospective jurors, *inter alia,* the following questions, to which Juror 24 made no response:

- "Is there anybody here who has ever been charged with any crime that involves taking somebody's life, attempting to take somebody's life or shooting at anybody with a gun?"
- "Is there anybody here who has been convicted of any kind of crime for which you're still serving the sentence, in other words, you're still on probation, extended supervision, still on parole, still under the terms of a deferred prosecution agreement or anything like that?"
- "Is there anybody on the jury panel who has any concern about whether you can be fair-minded and open-minded about this case and you figured with all the questions we were asking, sooner or later we would ask the question that would invite you to share your concern with us and you haven't shared it yet? In other words anybody have any concerns about being fair in this case or open-minded and they haven't told us yet?"

¶ 5 On the second day of trial, after the jury of twelve with one alternate was selected and sworn, Juror 24 volunteered that he had prior criminal convictions on his record. The court decided, and the parties agreed, to wait until the end of trial to decide whether to declare this juror as the alternate.

*2 ¶ 6 After reading the jury instructions and before closing arguments, the court revisited the issue, noting that Juror 24 had at least come forth with the information and was otherwise attentive. The court pointed out to the parties that

A-2

they had an extra juror and if Juror 24 was struck, they would still have their jury: "The second thing is, if we were to—if I was to be persuaded he's not qualified and should not serve, we would be left with 12 jurors." But the court also invited the parties to express their preferences as to whether a second juror, Juror 9, who may have been sleeping, should be designated the alternate:

> Among the 12 jurors, we have one juror, which I'm sure you've noticed and I have noticed too, has been nodding here and there. Every time I'm about ready to take action to make sure that she's paying attention again, she lifts her head and she is back with us. So one other issue that we should press to make sure it doesn't go unresolved is that potential for designating that juror as the alternate juror.

Neither party objected to the trial court's suggestion that one juror be struck as the alternate, but each requested a different juror be the one selected.

¶ 7 The State requested Juror 24 be designated the alternate, saying that the State would have struck Juror 24 if the information regarding his convictions had come to the State's attention during *voir dire*. The State did not object to Juror 9 continuing on the jury, pointing out that Juror 24 had nodded a few times as well.

¶ 8 Defense counsel requested Juror 9 be designated as the alternate because "[f]rom time to time, her eyes closed." On the other hand, defense counsel argued, Juror 24 appeared to be paying attention, was taking notes, and was more actively involved in asking questions. Defense counsel further argued, in defense of Juror 24's tardy report of criminal convictions, that it seemed Juror 24 did not perceive the questions asked during *voir dire* required him to "come forward at that time and present his convictions. And when he realized that he should, ... he did."

¶ 9 With regard to Juror 24, the court said it was concerned about two potential instances of incomplete candor:

> He also didn't respond to my last question. My last question was: "Do you have any other concerns about whether you could be fair and impartial in this case?" He didn't tell us, and waited until after we were done with jury selection and told the deputy. It's obviously something that concerned him, or he thought would concern us. He didn't tell us. *So we have potentially two instances of incomplete candor.*
>
> ....
>
> ... [H]e didn't tell us in time for the state to be able to make preemptive strikes. He didn't tell us at the same time is what makes the difference.

(Emphasis added.)

*3 ¶ 10 With regard to Juror 9, the court observed that her eyes were closed at times:

> I don't think that there was any more than, say, 90 seconds, maybe a full two minutes, of this juror's eyes being closed. I noticed it I would say a total of about half-a-dozen times during the course of the three days of evidence—two days of evidence and presentation. Her eyes were closed throughout jury selection.

¶ 11 The court then struck Juror 24 with the following reasoning:

> The reason I have decided ... to grant the state's objection is I think it's possible that I worded a question in such a way that a lawyer would have seen the question's scope broad enough to require a yes answer, although I'm not confident that a layperson would have.
>
> However, I think it's fairly clear on that last question about concerns the jurors had about whether they could be fair and impartial, I think that [Juror 24] had that concern. Even if it was only a concern that he believed we should have about him, that was the time he would have raised it. I think it's fair for us to expect him to raise that at that point rather than immediately after jury selection. And had he raised it at that point, I think the state would have the benefit of its preemptory strike.
>
> So I'm going to allow the state to exercise that strike now and move [Juror 24]—I'm going to designate—I can't say the state is exercising the preemptory now because that means the other preemptory strikes the state exercised

would have to be vacated, and we can't do that. I'm not doing that. I am designating [Juror 24] as the alternate.

I have considered whether Juror Number 9 should be designated the alternate, or whether her nodding off from time to time is something that prejudices Gonzalez. Because there were relatively few periods of time when she nodded off, because the times—the ratio—I should say the duration of her nodding off is relatively brief, and because her nodding off came during portions of the trial where the testimony—I wouldn't say perfunctory, but it was more in the background of the case, than the foreground of the case. I don't believe that she missed anything that would prejudice either party if she is included in these deliberations. So I'm going to grant the state's motion to designate [Juror 24] as the alternate juror and overrule the defense's objection to designate [Juror 24] as the alternate, and I am going to overrule the defense objection to Juror 9 of the panel and participate in the deliberations.

¶ 12 Also on the last day of trial, right before closing arguments, the court decided to permit the jurors to take notes during closing arguments despite acknowledging that the statute prohibits it. The court advised the jury:

During [the reading of jury instructions and then closing arguments] I'm allowing you to take notes. There's a statute which says that jurors are not allowed to take notes during the closing argument. Most judges believe that the state statute is one that gives us some discretion. We believe that it's a good exercise of our discretion for jurors to be able to take notes during the closing arguments so in their notes they can link ideas together based on what they hear from the attorneys.

But, I will remind you of what I had said to you previously. The notes are there to help you remember what has been said here, but they are not a substitute for what happened here. So make sure as you take notes you listen carefully so you can remember what you've heard and only rely on the notes as a fallback.

*4 ¶ 13 Trial defense counsel objected to the jurors taking notes during closing arguments, and the prosecution joined in defense counsel's objection. In response to the objection, the court stated:

Your arguments are important to [the jury] and you are helping them make sense of all this, and you want them to remember what you said. In this day and age, people write down things to remember. That's what we do in classrooms. That's what we do at work. You, both, during the trial I saw you taking notes undoubtedly to help you remember things, and that's a professional thing to do. That's something we admire in people who are doing their work, not something to distract from their work.

By all means, I'm going to let them take notes to make sure they encapture what they need to from your arguments to make sense of the evidence.

The court further explained that it did not "see any possible prejudice for either side" in allowing jurors to take notes.

¶ 14 After Gonzalez was convicted of both charges[3] and sentenced, he filed a postconviction motion raising the first issue here, his claimed error in striking Juror 24. The postconviction court was the same judge as the trial court judge, and it denied Gonzalez's postconviction motion. In the court's postconviction order, the court explained that it released Juror 24 for cause. The court explained that both parties were asking the court to discharge a juror for cause, not as an alternate: "The State essentially argued that Juror [24] should be discharged for lack of candor, and Mr. Gonzalez essentially argued that Juror [9] should be dismissed for failing to pay attention." In any event, citing *Mendoza,* the court found any error in striking Juror 24 harmless. *See Mendoza,* 227 Wis.2d at 864, 596 N.W.2d 736. This appeal follows.

DISCUSSION

¶ 15 On appeal, Gonzalez raises two issues, both of which he characterizes as matters of statutory construction, which we review independently of the trial court. *See State v. Delaney,* 2003 WI 9, ¶ 12, 259 Wis.2d 77, 658 N.W.2d 416. First, he contends the trial court violated his due process rights by striking Juror 24 as an alternate without following the statutory procedure for striking an alternate by lot set forth in WIS. STAT. § 972.10(7). Related to this first issue, he argues that in doing so, the trial court in effect gave the State an additional peremptory strike in violation of WIS. STAT. § 972.03. Gonzalez's second issue is whether the trial court erred by permitting the jury to take notes during closing arguments, contrary to WIS. STAT. § 972.10(1). He contends that because the trial court failed to follow the statutory procedures, he is entitled to a reversal of his convictions and a new trial.

¶ 16 We review matters of statutory construction independently of the trial court. *See Delaney,* 259 Wis.2d

A-4

77, ¶ 12, 658 N.W.2d 416. Whether a defendant has been denied due process is a constitutional issue that we also review independently. *See State v. Tiepelman,* 2006 WI 66, ¶ 9, 291 Wis.2d 179, 717 N.W.2d 1. We review questions of jury selection for an erroneous exercise of discretion. *See State v. Lehman,* 108 Wis.2d 291, 299–300, 321 N.W.2d 212 (1982).

1. Gonzalez waived any objection to the process used for striking Juror 24 by acquiescing in it below.

*5 ¶ 17 Gonzalez argues on appeal that the trial court failed to follow the correct statutory process in removing Juror 24. The State correctly points out that Gonzalez failed to object to the use of the alternate process for striking the juror below and therefore has waived this issue. We agree.

¶ 18 At the conclusion of testimony, the trial court invited the parties to discuss what should be done with Juror 24, who had failed to report his prior criminal conviction during *voir dire* but then belatedly revealed it the next day. The court pointed out that they had an extra juror, the alternate, so they could strike Juror 24 and still have a jury of twelve. But the court also invited the parties to consider whether they wanted to use the alternate strike for Juror 9, who had been seen with her eyes closed. A discussion ensued about the relative merits of using the alternate process for striking either Juror 24 or Juror 9. Trial defense counsel expressed a preference for striking Juror 9, *but never objected to using the alternate process itself.*

¶ 19 After the court made its decision, saying, "So I'm going to grant the state's motion to designate [Juror 24] as the alternate ....", trial defense counsel once again *did not object to using the alternate process.* The first time Gonzalez raised the due process issue of using the alternate process for striking Juror 24 was in his postconviction motion.

¶ 20 It is well-established law that even a claim of constitutional right must be timely raised at the trial court level or it is waived. *See State v. Gove,* 148 Wis.2d 936, 940–41, 437 N.W.2d 218 (1989). Had Gonzalez raised this argument timely, the trial court would have had the opportunity to address it and, at that point in the trial, could have eliminated any issue. We conclude that Gonzalez is foreclosed from objecting to the process used by the trial court on appeal when he acquiesced to it below.

¶ 21 However, waiver is a rule of judicial administration which we have the authority to ignore. *Olmsted v. Circuit Court for Dane Cty.,* 2000 WI App 261, ¶ 12, 240 Wis.2d 197, 622 N.W.2d 29. We choose to do that here because of the importance of the issue of a fair and impartial jury.

2. Striking Juror 24 was neither a strike of an alternate nor a peremptory strike but, rather, a strike for cause.

*6 ¶ 22 Gonzalez claims his due process rights were violated by the trial court's procedure for striking Juror 24, which he claims violated both the statute on drawing alternates by lot, WIS. STAT. § 972.10(7), and the peremptory strike statute, WIS. STAT. § 972.03. He frames this issue as one of statutory construction, which we review *de novo. See Delaney,* 259 Wis.2d 77, ¶ 12, 658 N.W.2d 416.

¶ 23 Gonzalez bases his argument on the trial court's admittedly poor choice of words. The court used both the terms "peremptory strike" and "alternate" in making the strike. In ruling on the strike, the trial court lamented the fact that Juror 24 failed to report his prior convictions *during voir dire,* which would have permitted the State to use a peremptory strike to remove him. Instead, he reported his criminal record *after* the jury had been selected and sworn. The court said:

> I think it's fair for us to expect him to raise that at that point rather than immediately after jury selection. And had he raised it at that point, I think the state would have the benefit of its preemptory strike.
>
> So I'm going to allow the state to exercise that strike now and move [Juror 24]—I'm going to designate—*I can't say the state is exercising the preemptory now because that means the other preemptory strikes the state exercised would have to be vacated, and we can't do that. I'm not doing that.* I am designating [Juror 24] as the alternate.

(Emphasis added.)

¶ 24 Gonzalez focuses on those words to argue that the trial court effectively gave the State one more peremptory challenge than the accused in violation of WIS. STAT. § 972.03. We disagree. At the end of the testimony, after first saying it was allowing the State to exercise a peremptory strike, the court corrected itself and specifically stated it was not giving the State a peremptory strike.

¶ 25 And the context of the trial court's decision supports its statement that this was not a peremptory strike. The difference between a peremptory strike and one for cause has been set forth by our supreme court in *Mendoza:*

A-5

> A peremptory challenge entails the right to challenge a juror without assigning, or being required to assign, a reason for the challenge. BLACK'S LAW DICTIONARY 1136 (6th ed. 1990).... Challenges for cause, on the other hand, seek a legal determination by the circuit court that the prospective juror in question is, under the law, unqualified or biased and should not serve on the jury. These are two very distinct occurrences.

Mendoza, 227 Wis.2d at 859–60, 596 N.W.2d 736.

¶ 26 Here there was a reason articulated by the trial court: "incomplete candor." For that reason, the record supports the trial court's statement that this was not a peremptory strike. Alternatively, Gonzalez argues, if the court was striking Juror 24 as the alternate, the court should have followed the procedure set forth in WIS. STAT. § 972.10(7), which provides that "[i]f additional jurors have been selected ... and the number remains more than required at final submission of the cause, the court shall determine by lot which jurors shall not participate in deliberations and discharge them." Admittedly, the trial court did say it was striking Juror 24 as an alternate, but the court's own explanation at the postconviction hearing, as well as the entire context from the trial, shows otherwise. In its postconviction order, the court, which was the same judge as the judge who presided at trial, explained: "In reality, neither party was asking me to merely determine how to discharge an unneeded juror. Both parties were asking me in essence to discharge a juror for cause."

¶ 27 The court's reasoning correctly highlighted the key distinction between strikes of an alternate and strikes for cause. An alternate juror is selected "by lot" under WIS. STAT. § 972.10(7). No reason for the strike is needed. *See Mendoza,* 227 Wis.2d at 859–60, 596 N.W.2d 736. But when a juror is excluded for a reason, namely "incomplete candor" or the objective appearance of bias, a different process ensues —one where the trial court must show a proper exercise of discretion. *See id.* In *State v. Gonzalez,* 2008 WI App 142, 314 Wis.2d 129, 758 N.W.2d 153, we upheld a strike for cause despite a challenge that the alternate process of drawing by lot was required, saying that a trial court is not compelled to use the alternate process if it properly exercises its discretion. *See id.* ¶¶ 20–21.[4] We discuss next whether the trial court properly exercised its discretion in striking Juror 24 for cause.

3. Even if the trial court erred in striking Juror 24 for cause, the error is harmless.

*7 ¶ 28 We review the trial court's decision to strike a juror for cause for a proper exercise of discretion. *See Lehman,* 108 Wis.2d at 299, 321 N.W.2d 212. If there is a reason to discharge a juror for cause, the court need not follow the procedure for selecting an alternate by lot: "A trial court has the discretion to remove a juror for cause during a trial proceeding." *Gonzalez,* 314 Wis.2d 129, ¶ 10, 758 N.W.2d 153. "If the discretionary determination is based upon facts in the record, application of the correct law, and a rational mental process arriving at a reasonable result, the discretionary determination will be sustained." *Larry v. Harris,* 2007 WI App 132, ¶ 17, 301 Wis.2d 243, 733 N.W.2d 911, *rev'd in part on other grounds,* 2008 WI 81, 311 Wis.2d 326, 752 N.W.2d 279.

¶ 29 A prospective juror should be removed if he or she demonstrates a statutory bias, a subjective bias, or an objective bias. *See Mendoza,* 227 Wis.2d at 848, 596 N.W.2d 736. The process for analyzing whether a juror is biased in lack-of-candor cases, such as this one, is set forth in *State v. Faucher,* 227 Wis.2d 700, 596 N.W.2d 770 (1999). The second point in the *Faucher* analysis requires the trial court to make a finding as to whether "it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party." *See id.* at 726, 596 N.W.2d 770. Here, the trial court made no such finding. The closest the trial court came was to find that Juror 24 was incompletely candid in response to two questions. But the trial court's analysis stopped there.

¶ 30 The trial court acknowledged this shortcoming in its postconviction decision, where it said that the State had not proven bias, and the court had not made the requisite finding that "it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party." *Id.* But even so, the error is harmless.

*8 ¶ 31 The trial court is required to disregard any error that does not affect the substantial rights of a party under WIS. STAT. § 805.18(2), which provides, in pertinent part, as follows:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury ... unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

" 'The legislature intended the doctrine of harmless error to apply to jury selection.' " *State v. Lindell,* 2001 WI 108, ¶ 80, 245 Wis.2d 689, 629 N.W.2d 223 (citation omitted). WISCONSIN STAT. § 805.18 is applicable to criminal cases. *See State v. Dyess,* 124 Wis.2d 525, 547, 370 N.W.2d 222 (1985).

¶ 32 We review whether a trial court juror selection error is harmless under WIS. STAT. § 805.08 for a proper exercise of discretion. *See Gonzalez,* 314 Wis.2d 129, ¶ 20–21, 758 N.W.2d 153. However, as the supreme court stated in *Mendoza,* not every error requires reversal. *See id.,* 227 Wis.2d at 863–64, 596 N.W.2d 736. After observing that "[a] defendant is entitled to fair and impartial jurors, not jurors whom he hopes will be favorable towards his position[,]" and "[a] defendant's rights go to those who serve, not to those who are excused[,]" the supreme court held that reversal was not required because any error in striking the juror for cause was harmless as it did not affect Mendoza's substantial right to a fair and impartial jury of twelve. *See id.* at 863–64, 596 N.W.2d 736. The supreme court noted that Mendoza conceded that an impartial jury convicted him. *See id.* at 864, 596 N.W.2d 736. Similarly here, Gonzalez has not disputed that the twelve jurors who found him guilty were fair and impartial. Accordingly, any error in striking Juror 24 was harmless beyond a reasonable doubt.

¶ 33 Additionally, the record indicates there were sufficient facts to convict Gonzalez beyond a reasonable doubt. Specifically, Gonzalez admitted to shooting two individuals, one of the victims identified Gonzalez at the scene on the night of the shooting, and there was no evidence to support Gonzalez's contention that he had been attacked.

¶ 34 Here, after an examination of the entire proceeding, it is clear that the error complained of has not affected the substantial rights of Gonzalez, and, accordingly, we affirm the trial court.

4. Allowing the jury to take notes during closing argument was harmless error.

*9 ¶ 35 Gonzalez next argues that the trial court erred by permitting the jurors to take notes during closing arguments contrary to WIS. STAT. § 972.10(1)(a)1. The State concedes this was error but argues it was harmless beyond a reasonable doubt. The State relies on WIS. STAT. § 805.18(1)[5] and *Mendoza,* where the supreme court applied the harmless error test to jury selection in a criminal case and concluded the error was harmless because Mendoza received an impartial jury of twelve. *See Mendoza,* 227 Wis.2d at 864, 596 N.W.2d 736. The State argues that the harmless error analysis of *Mendoza* applies here.

¶ 36 With regard to the State's anticipated harmless error argument, Gonzalez first contends in his opening brief that the harm here was the potential that the jurors would misuse their notes. This "potential misuse" argument was hypothetical and undeveloped. Gonzalez abandoned the "potential misuse" argument in his reply brief and instead asserted that the harm was *to the legal system* from a judge refusing to follow a statutory proscription such as the ban on notetaking during closing arguments.

¶ 37 But Gonzalez's "harm to the legal system" argument has no basis in law. He fails to cite any authority to support it. The statutory harmless error analysis is whether the *defendant* 's substantial rights were affected by the error. *See* WIS. STAT. § 805.18. While we acknowledge, as the State did, that neither we nor the trial courts may ignore the specific command of the legislature, that error here did not harm Gonzalez's substantial rights.

¶ 38 Consequently, we agree with the State that the error was harmless for four reasons.

¶ 39 First, Gonzalez does not dispute the State's argument that no new evidence or new or improper argument occurred during the closing arguments. Even if the jurors took notes, nothing they heard during closing arguments was any different from what they heard during the trial, so notetaking during closing arguments could not have possibly affected Gonzalez's substantial rights. Indeed, Gonzalez does not present any claim of misuse of notes by jurors.

¶ 40 Second, Gonzalez does not dispute that the trial court carefully and repeatedly instructed the jury as to what constituted proper evidence and how to properly use their notes. For example, during the preliminary instructions the court told the jury that what lawyers say is not evidence:

> What the attorneys say is not evidence. If the attorneys say something to you that isn't backed up by evidence, then disregard what they say and draw no inference or conclusion from it.

And again in the closing instructions, the court told the jury: "What the attorneys say is not evidence."

*10 ¶ 41 Regarding the proper use of notes, in the preliminary instructions the trial court instructed the jury not to let the notes get in the way of listening carefully to the evidence: "First of all, don't let the notes get in the way of you remembering what was said during the trial." The court emphasized that a juror's memory trumps the notes: "If there's a disagreement among jurors about what happened, you should go with what you all remember. And if the notes help you, great. If they get in the way, put them aside. Your memory comes first and then the notes."

¶ 42 Then at the beginning of closing arguments, when the trial court informed the jurors that they could take notes during the arguments, the court again cautioned the jury about improper use of the notes:

> But, I will remind you of what I had said to you previously. The notes are there to help you remember what has been said here, but they are not a substitute for what happened here. So make sure as you take notes you listen carefully so you can remember what you've heard and only rely on the notes as a fallback.

We presume jurors follow the instructions they have been given. *See State v. Gary M.B.*, 2004 WI 33, ¶ 33, 270 Wis.2d 62, 676 N.W.2d 475. Thus, Gonzalez's "potential misuse" argument fails, given the trial court's careful jury instructions. [6]

¶ 43 Third, Gonzalez does not dispute that the jury that convicted him was composed of twelve fair and impartial jurors. Just as in *Mendoza,* wherein the supreme court concluded that the error of striking a juror for cause was harmless because an impartial jury convicted Mendoza, so do we also conclude that the note-taking error here was harmless. *See Mendoza* 227 Wis.2d at 864, 596 N.W.2d 736. Gonzalez received a fair and impartial jury of twelve and does not argue otherwise.

¶ 44 Fourth, Gonzalez does not dispute that there was substantial evidence presented at trial to convict him.

¶ 45 Because we find both claimed errors to be harmless, we affirm the trial court. *See* WIS. STAT. § 805.18(2).

Judgment and order affirmed.

Not recommended for publication in the official reports.

¶ 46 KESSLER, J. (concurring).

I agree that under the facts of this case, the Majority appropriately relied on our holding in *Gonzalez,* 314 Wis.2d 129, ¶ 21, 758 N.W.2d 153. ("The trial court properly exercised its discretion when it designated [a juror] as an alternate based on its concern regarding her potential impartiality."); *see* Majority, ¶ 30. Because Gonzalez has failed to show that he was prejudiced by the court permitting the jurors to take notes during closing arguments, *see* Majority, ¶ 37, and he bears the burden of producing evidence to make that showing, I have no choice but to concur in the outcome.

¶ 47 However, I write separately as to the note-taking issue because when the trial court permitted the jurors to take notes during closing arguments, it did so in direct contradiction of the specific provisions of WIS. STAT. § 972.10(1)(a)1. Section 972.10(1)(a)1. provides:

> *11 **Order of trial. (1)**(a) After the selection of a jury, the court shall determine if the jurors may take notes of the proceedings:
>
> 1. If the court authorizes note-taking, the court shall instruct *the jurors* that they *may make written notes of the proceedings, except the opening statements and closing arguments,* if they so desire and that the court will provide

materials for that purpose if they so request. The court shall stress the confidentiality of the notes to the jurors. The jurors may refer to their notes during the proceedings and deliberation. *The notes may not be the basis for or the object of any motion by any party. After the jury has rendered its verdict, the court shall ensure that the notes are promptly collected and destroyed.*

(Emphasis added.)

¶ 48 Here, without advance notice to either counsel, the trial court told the jury it could take notes during closing arguments, acknowledging that this permission was in direct conflict with the language of the statute. The trial court told the jury:

> During this process I'm allowing you to take notes. *There's a state statute which says that jurors are not allowed to take notes during the closing argument.* Most judges believe that the state statute is one that gives us some discretion. *We believe that it's a good exercise of our discretion for jurors to be able to take notes during the closing arguments* so in their notes they can link ideas together based on what they hear from the attorneys.

(Emphasis added.) The trial court was correct that the statute gives the court discretion, but the statute clearly limits that discretion to whether to authorize note-taking at all. In the same sentence allowing the court to authorize notetaking, the statute limits the court's discretion by *excluding* permission to take notes during the opening statements or the closing arguments. Here, the trial court exercised the grant of discretion (to take notes during trial) and ignored the specific limitation on that discretion (exclusion of opening statements and closing arguments).

¶ 49 Later, out of the presence of the jury, defense counsel promptly objected to the jury taking notes during closing arguments. The following exchange occurred:

> [Defense Counsel]: I do object to the jury taking notes during closing argument. I think that our statements are exactly that: They're argument. They are inferences from the evidence. Because they have to make their own inferences, I don't think it's appropriate for them to take notes. I realize the court will probably disagree with me....
>
> ....
>
> [The Court]: ... I'm going to let them take notes to make sure they encapture what they need to from your arguments to make sense of the evidence.
>
> Any other record on the instructions?
>
> *12 [State]: ... For the record, had this issue been brought up before the court told the jury, I would have joined in the objection with [Defense Counsel].

¶ 50 The State continued, reminding the trial court of WIS. STAT. § 972.10(1)(a)1.'s specific language prohibiting note-taking during closing arguments. The trial court responded: "I made my record of why I am allowed to use my discretion to allow the jurors to take notes. Further, I don't see any possible prejudice for either side."

¶ 51 The trial court's inability to imagine prejudice from ignoring the mandate of a statute is not the question. Proof of actual prejudice based on the jury notes will always be difficult under this statute, because this statute mandates that the court arrange for the prompt destruction of the jurors' notes when the trial is completed. *See* WIS. STAT. § 972.10(1)(a)1. ("The notes may not be the basis for or the object of any motion by any party. After the jury has rendered its verdict, the court shall ensure that the notes are promptly collected and destroyed."). Thus, any evidence of prejudice or juror misconduct which might appear in the notes will never be available to establish prejudice to either side.

¶ 52 Where, as here, no constitutional challenge to the statute was being made, the proper question before the court was whether a legislative determination of policy may be disregarded based on the court's "discretion," *i.e.,* the court's belief that its policy is superior to the policy chosen by the legislature. When a court deliberately disregards a specific procedural policy of the legislature because the court believes it has a better view of public policy, the entire judicial system is diminished in the public perception. A reasonable person might well ask under such circumstances: "If judges do not have to follow the law, why do the rest of us have to do so?" When the trial court believes the legislative policy is unwise, the remedy is to pursue legislative change, not to exercise "discretion" to ignore the policy.

A-9

All Citations

369 Wis.2d 73, 879 N.W.2d 809 (Table), 2016 WL 870665,
2016 WI App 34

Footnotes

1 Although not an issue in this appeal, we note in the interest of completeness that Gonzalez was originally charged with first-degree reckless homicide and attempted first-degree intentional homicide. The jury found Gonzalez guilty of the original charge of first-degree reckless homicide and a lesser included offense of the second charge, first-degree reckless injury. At sentencing, however, the court and parties realized that first-degree reckless injury was not a proper lesser included offense of the original second charge, attempted first-degree intentional homicide. Accordingly, after negotiations with the State, the court vacated the conviction of first-degree reckless injury, and Gonzalez pled no contest to second-degree recklessly endangering safety.

2 All references to the Wisconsin Statutes are to the 2013–14 version unless otherwise noted.

3 *See* supra note 1.

4 Jose F. Gonzalez, not the Jesus C. Gonzalez in this case.

5 WISCONSIN STAT. § 805.18(1) provides: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."

6 We caution trial courts against disregarding the clear statutory proscription against notetaking during closing arguments. Although we have concluded here that the error was harmless, in part due to the court's careful instructions, we would caution against reliance on that conclusion on a different record in the future.

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A-10

371 Wis.2d 613
This disposition of a Petition for Review is referenced in the North Western Reporter.
Supreme Court of Wisconsin.

State
v.
Gonzalez

NO. 2015AP784-CR

June 15, 2016

Opinion

Disposition: Petition for Review Denied.

Disposition: 06/15/2016.

All Citations

371 Wis.2d 613, 887 N.W.2d 896 (Table), 2016 WI 81

End of Document

388 Wis.2d 256
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.
Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).
Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,
v.
Jesus GONZALEZ, Defendant-Appellant.

Appeal No. 2018AP257
DATED AND FILED June 25, 2019

APPEAL from an order of the circuit court for Milwaukee County, Cir. Ct. No. 2010CF2323: JEFFREY A. CONEN, Judge. *Reversed and cause remanded for further proceedings.*

Before Kessler, Kloppenburg and Dugan, JJ.

Opinion

PER CURIAM.

*1 ¶1 This is Jesus Gonzalez's second appeal from his convictions for first-degree reckless homicide and second-degree recklessly endangering safety. Both convictions were entered following a jury trial. In this appeal, Gonzalez argues that the circuit court erroneously denied without a hearing his postconviction motion alleging ineffective assistance of both his trial counsel and his postconviction counsel.

¶2 We conclude that Gonzalez's postconviction motion alleges facts that entitle him to a *Machner*[1] hearing on only one of his allegations of ineffective assistance of counsel, namely, that his trial counsel was ineffective for advising him not to testify at trial and that postconviction counsel was ineffective for not raising that issue in his first appeal. Accordingly, we reverse and remand to the circuit court for an evidentiary hearing on Gonzalez's allegation that trial counsel was ineffective for advising him not to testify at trial and that postconviction counsel was ineffective for not raising that issue in his first appeal.

BACKGROUND

¶3 We summarized the basic factual background of the incident leading to this appeal in *State v. Gonzalez*, No. 2015AP784, unpublished slip op. (WI App Mar. 8, 2016):

> On May 9, 2010, Gonzalez shot two men. One victim, J.C., survived and was rendered paraplegic. The other victim, D.J., died as a result of the gunshot wounds. After shooting the victims, Gonzalez called 911 and reported that two individuals tried to assault him and that he shot them. No weapons were found on either victim or in the vehicle. Gonzalez had no injuries, and there was no evidence that he had been involved in a struggle or that he had been attacked. Gonzalez admitted to shooting both men and was positively identified by the surviving victim.
>
> Gonzalez was charged with first-degree intentional homicide and attempted first-degree intentional homicide and was tried by a jury[.]

Id., ¶¶3-4.

¶4 At the jury trial, Gonzalez argued that he had shot D.J. and J.C. in self-defense. Gonzalez based his self-defense argument on the 911 call he had made following the shooting, the recording of the 911 call that was played for the jury, and the transcript of the 911 call that was admitted into evidence. Gonzalez did not testify.

¶5 The jury found Gonzalez guilty of first-degree reckless homicide and first-degree reckless injury, both as lesser included offenses of the charged crimes. Subsequently, the parties informed the circuit court that the jury had been incorrectly instructed that first-degree reckless injury is a lesser included offense of attempted first-degree intentional homicide. Pursuant to an agreement between the parties, the court vacated the jury's conviction for first-degree reckless injury, and Gonzalez pled no contest to a charge of second-degree recklessly endangering safety.

¶6 Gonzalez retained new counsel and filed a postconviction motion for a new trial under WIS. STAT. § 809.30 (2017-18).[2] The circuit court denied the motion. Gonzalez appealed, arguing that the court erred by striking a juror at the close of trial and by allowing the jury to take notes during

A-12

closing arguments. This court affirmed. *See Gonzalez*, No. 2015AP784.

*2 ¶7 Gonzalez, proceeding *pro se*, filed the present, second postconviction motion under WIS. STAT. § 974.06. We will refer to the second motion as "the § 974.06 motion" to distinguish it from Gonzalez's first postconviction motion. In his § 974.06 motion Gonzalez alleges that he received ineffective assistance of counsel at trial in multiple respects, and that he received ineffective assistance of postconviction counsel when his postconviction counsel failed to raise the ineffective assistance of counsel issue during the direct appeal. The circuit court denied the motion without an evidentiary hearing. Gonzalez appeals.

DISCUSSION

¶8 In his motion, Gonzalez alleges that his trial counsel was ineffective in the following ways: (1) advising him not to testify at trial; (2) failing to call certain defense witnesses; (3) failing to make certain arguments concerning the physical evidence presented at trial; and (4) failing "to use an expert." Gonzalez also alleges that his postconviction counsel was ineffective for failing to raise these allegations in his first appeal. Gonzalez argues that the circuit court erred in rejecting his motion without a hearing.

¶9 In the sections that follow, we first set out the law relating to Gonzalez's allegations of ineffective assistance of trial counsel. We then explain the standard that governs postconviction motions made under WIS. STAT. § 974.06 that raise different grounds for relief from those addressed during a prior appeal. We next address each of Gonzalez's allegations of ineffective assistance in turn. As we explain, we conclude that Gonzalez has shown that he is entitled to a hearing on his first allegation of ineffective assistance of trial and postconviction counsel, but he has not met his burden with respect to his other allegations. Accordingly, we remand for a hearing on Gonzalez's first allegation of ineffective assistance only.

I. Law Relating to Ineffective Assistance of Counsel Claims

¶10 Our supreme court has summarized the ineffective assistance of counsel standards as follows:

> Whether a defendant was denied effective assistance of counsel is a mixed question of law and fact. The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous; whether counsel's conduct constitutes ineffective assistance is a question of law, which we review *de novo*. To demonstrate that counsel's assistance was ineffective, the defendant must establish that counsel's performance was deficient and that the deficient performance was prejudicial. If the defendant fails to satisfy either prong, we need not consider the other.
>
> Whether trial counsel performed deficiently is a question of law we review *de novo*. To establish that counsel's performance was deficient, the defendant must show that it fell below "an objective standard of reasonableness." In general, there is a strong presumption that trial counsel's conduct "falls within the wide range of reasonable professional assistance." Additionally, "[c]ounsel's decisions in choosing a trial strategy are to be given great deference."
>
> Whether any deficient performance was prejudicial is also a question of law we review *de novo*. To establish that deficient performance was prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

State v. Breitzman, 2017 WI 100, ¶¶37-39, 378 Wis. 2d 431, 904 N.W.2d 93 (citations omitted and italics added).

*3 ¶11 To prevail on a claim of ineffective assistance of counsel, a defendant must present the testimony of trial counsel at a *Machner* hearing. *See Machner*, 92 Wis. 2d 797. However, not every postconviction motion alleging ineffective assistance of counsel requires a *Machner* hearing. *State v. Allen*, 2004 WI 106, ¶10, 274 Wis. 2d 568, 682 N.W.2d 433. The standard for whether a defendant is entitled to a *Machner* hearing is summarized as follows:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review

> *de novo*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

Allen, 274 Wis. 2d 568, ¶9 (citations omitted and italics added). To provide nonconclusory allegations, a postconviction motion must present the "who, what, where, when, why, and how" with sufficient particularity for the circuit court to meaningfully assess the claim of ineffective assistance. *Id.*, ¶23. Further, a circuit court may not deny a motion for a hearing based on the proposition that the allegations "seem to be questionable in their believability," because credibility "is best resolved by live testimony." *Id.*, ¶12 n.6 (citation omitted).

II. Law Relating to § 974.06 Motions

¶12 Where, as here, a defendant alleges ineffective assistance of trial counsel in a motion under WIS. STAT. § 974.06, without having first raised the issue in a prior postconviction motion or appeal, an additional procedural bar must be surmounted. Generally, "without a sufficient reason, a movant may not bring a claim in a § 974.06 motion if it 'could have been raised in a previously filed sec. 974.02 motion and/or on direct appeal.' " *State v. Romero-Georgana*, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668 (citing *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994)).

¶13 Ineffective assistance of postconviction counsel may constitute a "sufficient reason" for not previously raising an issue in a prior postconviction motion or appeal. *Romero-Georgana*, 360 Wis. 2d 522, ¶36; *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To show that postconviction counsel was ineffective, a defendant must show that postconviction counsel performed deficiently and that the deficient performance prejudiced the defendant. *Romero-Georgana*, 360 Wis. 2d 522, ¶¶39-41. A defendant who alleges that postconviction counsel was ineffective for failing to raise certain issues must show that "a particular nonfrivolous issue was *clearly stronger* than issues that counsel did present." *Id.*, ¶¶45-46 (citation omitted).

¶14 "Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law subject to *de novo* review. Similarly, whether a § 974.06 motion alleges sufficient facts to require a hearing is a question of law that this court reviews *de novo*." *Id.*, ¶30 (citations omitted and italics added).

III. Ineffective Assistance of Counsel Allegation One: Advice Not to Testify at Trial

*4 ¶15 Gonzalez alleges that his trial counsel was ineffective for advising him not to testify at trial. Gonzalez alleges that trial counsel performed deficiently by inaccurately informing him that, if he did not testify, the State could not disprove his self-defense argument, and that he was prejudiced by counsel's advice not to testify because his testimony was "absolutely critical and necessary" to his self-defense argument. The State asserts that Gonzalez's allegations are conclusory and, therefore, the postconviction court properly denied his motion without a hearing.

¶16 As we explain, we conclude that, taking the allegations in the postconviction motion as true, Gonzalez has shown that he is entitled to a *Machner* hearing on the alleged ineffective assistance of trial counsel for advising him not to testify at trial. We first provide additional background concerning the evidence and argument presented at trial. We then review the allegations in Gonzalez's motion as to what trial counsel advised him and what testimony Gonzalez would have given but for trial counsel's advice.

A. Additional Background

¶17 We briefly summarize the pertinent trial evidence and argument bearing on Gonzalez's self-defense theory. At trial, the evidence established that prior to the shooting, D.J. and J.C. had been drinking at a bar located within one block of Gonzalez's house. After the shooting, J.C. was found lying on the ground in the bar's parking lot, and D.J. was found near his vehicle several blocks away from the bar. The parties stipulated that D.J. had been in the vehicle when he was shot.

¶18 J.C. was the sole eyewitness to the shooting who testified at trial. J.C. testified that, as he and D.J. left the bar, he decided to walk to a friend's house nearby, while D.J. decided to drive. J.C. testified that as he reached the edge of the bar parking lot, he encountered Gonzalez walking towards him. J.C. testified that, from ten to fifteen feet away, Gonzalez pulled out a pistol and told J.C. to "get the F-back." J.C. testified that after he

A-14

stepped back, the next thing he remembered was lying on the ground with a gunshot wound. J.C. also testified that as he sat up, he saw D.J.'s vehicle pull out of the bar parking lot and drive away.

¶19 The State presented the 911 call that Gonzalez made after the shooting, which provided the basis for Gonzalez's self-defense theory. In the 911 call, Gonzalez stated, "I just had two individuals try to assault me when I was going outside to move my car." He also stated, "I just had two individuals try to assault me on ... the corner of my street." In addition, he stated that he was armed, that he saw one of the assailants in a vehicle, that he "shot out the window" of the vehicle, and that he "might have hit [them] both."

¶20 The police officers who responded to the 911 call testified that Gonzalez cooperated with the police, was not combative or argumentative, and did not attempt to hide the gun involved in the shooting.

¶21 Gonzalez's car was 144 feet from the scene of the shooting, located in the opposite direction from the bar relative to Gonzalez's house.

¶22 Seven bullet casings were recovered in the bar parking lot. No casings were recovered near D.J. and his vehicle. There were multiple bullet holes in the sides of D.J.'s vehicle, the windows on the passenger side had been shot out, and two bullets were embedded in the side doors of the vehicle. Based on the bullet holes in the vehicle, an officer testified that the shooter was "to the side of the" vehicle when the shots were fired, not in front.

*5 ¶23 Medical examiners discovered three bullets in D.J.'s body and one bullet in J.C. Dr. Brian Peterson, who conducted the autopsy of D.J., testified that three bullets had entered D.J.'s right arm, moving from right to left. One of those bullets also penetrated D.J.'s torso, causing his death. Dr. Peterson testified that the trajectories of these bullets were consistent with D.J. being "perpendicular" to the source of the bullet. In addition, Dr. Peterson testified that a fourth bullet struck D.J. in the front of his leg, suggesting that there was a direct line between the front of D.J.'s leg and the gun, but that D.J.'s upper body could have been "perpendicular" to the gun even while the leg was facing the gun.

¶24 In his closing argument Gonzalez maintained that he had shot J.C. and D.J. in self-defense. Specifically, Gonzalez pointed to the 911 call, in which he had stated that two people had tried to assault him. Gonzalez asserted that the vehicle was a "weapon" and that the bullet wound on D.J.'s leg showed he had been facing the gun when that shot was fired. Gonzalez also pointed to the fact that D.J. had been drinking and was "behind the wheel of an operable" vehicle. Finally, Gonzalez argued that his cooperation with police showed he had no intent to kill anyone.

B. Whether Gonzalez's Allegations in the § 974.06 Motion Suffice to Entitle Him to a Hearing

¶25 In his § 974.06 motion Gonzalez alleges that trial counsel advised Gonzalez not to testify because "if the State was deprived of an opportunity to elicit testimony from [Gonzalez] on cross-examination, it could not possibly meet its burden to disprove that [Gonzalez] acted in self-defense." Gonzalez alleges, however, that without Gonzalez's testimony the jury heard "only one side of the story" that was contrary to his self-defense theory. Gonzalez alleges that trial counsel's advice, that the State could not disprove Gonzalez's self-defense theory if he did not testify, was incorrect because the State was able to present undisputed evidence that negated his self-defense theory. The motion alleges that but for counsel's advice, Gonzalez "absolutely would have" testified, as follows:

- he had gone outside to move his car after celebrating a family birthday;
- he took a gun with him because he customarily does so in the neighborhood at night;
- he walked towards his car but noticed that somebody was walking towards him from the bar in a "suspicious and alarming" way;
- the individual made "specific and direct threats" to him that "caused him to believe" he was in imminent danger;
- he drew his gun and chased the individual towards the bar parking lot;
- a second individual, who was in a vehicle, "revved the engine and drove the [vehicle] at a high rate of speed directly at" him;
- he moved to his left to avoid the vehicle and fired seven shots at the vehicle;
- "all seven rounds were fired in an instant and without pause" and "all seven rounds struck the vehicle."

¶26 Gonzalez alleges that his testimony was necessary to bolster the 911 call, which was the only evidence contesting

A-15

the State's version of the events but which, without Gonzalez's testimony, appeared to be inconsistent with other evidence presented by the State.

¶27 We conclude that Gonzalez alleges sufficient facts that entitle him to a *Machner* hearing on his allegation that trial counsel provided ineffective assistance by advising him not to testify. He has alleged as follows: (1) the "who" is trial counsel; (2) the "what" is trial counsel's advice that he not testify; the "where" and "when" are before and during trial; (4) the "why" is because his proffered testimony as to the physical details of his self-defense theory was necessary to corroborate and explain the contents of the 911 call, which was cryptic and inconsistent with testimony by J.C. but consistent with some physical evidence presented by the State; and (5) the "how" is through his detailed account of what transpired before and during the shooting, which he would have testified to but for trial counsel's advice, to counter the testimony by the only other eyewitness to the shooting, J.C. Gonzalez has made these allegations of deficient performance and prejudice with sufficient particularity to allow the circuit court to meaningfully assess his claim. *See Allen*, 274 Wis. 2d 568, ¶¶21-22.

*6 ¶28 On the issue of prejudice, the State argues that Gonzalez cannot *prove* that he was prejudiced by trial counsel's advice not to testify. However, the State's argument is more properly directed at the evidence to be presented at the *Machner* hearing. The State does not persuasively argue that Gonzalez has failed to sufficiently *allege* facts that could support a showing of prejudice.

¶29 We conclude that Gonzalez has met his burden of alleging facts that, if true, entitle him to a *Machner* hearing on both the issues of deficiency and prejudice with respect to his allegation that trial counsel was ineffective in advising him not to testify. To be clear, this court is not concluding either that trial counsel was deficient or that Gonzalez suffered any prejudice. We are merely concluding that Gonzalez has alleged sufficient facts to entitle him to a *Machner* hearing.

IV. Ineffective Assistance of Counsel Allegation Two: Failure to Call Defense Witnesses

¶30 Gonzalez alleges that his trial counsel was ineffective for failing to call five different defense witnesses. According to his § 974.06 motion and attached affidavits, the five witnesses comprise certain of Gonzalez's friends and family who were in the house at the time of the shooting. Gonzalez alleges that these witnesses would have "testified very favorably and very strongly respecting [Gonzalez's] character"; that "they would have testified to his attitude and behavior during the course of the night in question"; and that "they ... would have been able to describe his behavior and demeanor [after the shooting]." In addition, Gonzalez attached affidavits from each of the five witnesses to his § 974.06 motion indicating the content of their testimony.

¶31 We conclude that Gonzalez's allegations concerning the five witnesses are conclusory and do not entitle him to a hearing. *See Allen*, 274 Wis. 2d 568, ¶9 (circuit court may deny a hearing "if the motion ... presents only conclusory allegations"). Although the affidavits attached to the motion provide specifics of what the witnesses would have testified, the motion falls short in explaining "why" the witnesses' testimony is important. *See id.*, ¶23 (the motion must allege "why" the evidence is important). The motion does not explain why Gonzalez's "character," his "attitude" on the night of the shooting, or his "demeanor" after the shooting are material to the issue of whether he acted in self-defense. That is, the motion does not explain "the reason the [evidence] is important." *Id.*, ¶24. As a result, the motion does not offer a reviewing court the opportunity to "meaningfully assess" whether the witnesses' testimony would affect the outcome of the trial. *Id.*, ¶23. Accordingly, Gonzalez has not met his burden with respect to this issue.

V. Ineffective Assistance of Counsel Allegation Three: Failure to Make Arguments Concerning the Physical Evidence

¶32 Gonzalez alleges that trial counsel was ineffective for failing to make certain arguments concerning the evidence presented at trial. In his § 974.06 motion Gonzalez couches this allegation in terms of trial counsel's "failure to perform proper cross-examinations and to retain a defense forensic expert witness." However, the crux of his allegation appears to be that trial counsel did not "demonstrate" that the physical evidence supported certain inferences beneficial to Gonzalez's case, and we, therefore, interpret his allegation to comprise complaints concerning trial counsel's failure to draw certain inferences from the evidence and present those inferences to the jury.

*7 ¶33 Regardless of how we classify Gonzalez's allegation, he only makes conclusory allegations concerning the inferences to be drawn from the trial evidence and, therefore, he has not shown that he is entitled to a hearing. In his § 974.06 motion, Gonzalez alleges that "the physical evidence completely supports" five separate conclusions: (1) "the

vehicle operated by D.J. was driving directly at" Gonzalez; (2) Gonzalez "then moved to his left to try to get out of the way"; (3) "as he did this, [Gonzalez] fired [seven] shots in one sudden burst"; (4) "at the same time, D.J. swerved sharply to his left away from the shots"; and (5) "all seven shots struck the vehicle although at least two of them ricocheted and struck J.C."

¶34 Prominently lacking from Gonzalez's § 974.06 motion is any allegation regarding what physical evidence compels these conclusions or how Gonzalez would set about proving them. Instead, Gonzalez's motion merely asserts, without pointing to any evidence in the trial record, that "Gonzalez has [reviewed] the trial transcripts (and police reports) and has [determined] that the physical evidence completely supports the above [five] conclusions and that this evidence was improperly handled by [trial counsel]." Because Gonzalez's motion does not allege with any particularity the evidence that trial counsel mishandled or what additional evidence Gonzalez would present, the allegation is conclusory and does not entitle Gonzalez to a hearing on this issue. *See Allen*, 274 Wis. 2d 568, ¶9 (a motion that presents only conclusory allegations does not require a hearing).

VI. Ineffective Assistance of Counsel Claim Allegation Four: Failure to Use an Expert

¶35 Finally, Gonzalez alleges that trial counsel was ineffective for failing "to use an expert." This appears to be a variant of the allegation in his § 974.06 motion that trial counsel was ineffective for failing to make certain inferences and arguments concerning the physical evidence. In short, Gonzalez alleges that trial counsel should have obtained an expert "in order to understand" what the physical evidence showed and to "show that the [S]tate's case was fatally flawed."

¶36 Again, however, Gonzalez's § 974.06 motion does not allege what evidence an expert would have drawn upon to conclude that the State's case was "fatally flawed," nor does it propose a method by which Gonzalez could prove his allegation. In other words, Gonzalez's allegation is both speculative regarding what an expert would have testified to and conclusory. Thus, Gonzalez has not shown that he is entitled to a hearing on this issue. *See Allen*, 274 Wis. 2d 568, ¶9.

VII. Whether Gonzalez Has Sufficiently Alleged that Postconviction Counsel Was Ineffective

¶37 Gonzalez alleges that his postconviction counsel was ineffective because his claim of ineffective assistance of trial counsel is "clearly stronger" than the issues postconviction counsel raised during the direct appeal. In his first appeal, Gonzalez argued that the circuit court had erred by striking a juror at the close of trial and by allowing the jurors to take notes during closing arguments. *Gonzalez*, No. 2015AP784, ¶¶1-2. This court affirmed on the grounds that both errors were harmless, in part based on our determination that "there was no evidence to support" Gonzalez's self-defense theory. *Id.*, ¶¶32-35, 44. Given the allegations in Gonzalez's postconviction motion, that but for trial counsel's advice he would have provided such evidence in the form of the testimony detailed in his motion, on remand "[t]he [circuit] court can perform the necessary factfinding function and directly rule on the sufficiency of the reason," namely, ineffective assistance of postconviction counsel, for failing to raise that issue in Gonzalez's first appeal. *See Romero-Georgana*, 360 Wis. 2d 522, ¶36.

CONCLUSION

*8 ¶38 For the reasons stated above, we conclude that Gonzalez has sufficiently alleged that he is entitled to a hearing on his first allegation of ineffective assistance of trial counsel, which is that trial counsel was ineffective for advising Gonzalez not to testify at trial. However, we conclude that Gonzalez has not met his burden with respect to his remaining allegations as to trial counsel. Accordingly, we remand for an evidentiary hearing on Gonzalez's allegation that his trial counsel was ineffective for advising Gonzalez not to testify at trial and that postconviction counsel was ineffective for not raising that issue in his first appeal.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

All Citations

388 Wis.2d 256, 932 N.W.2d 181 (Table), 2019 WL 2588428, 2019 WI App 39

Footnotes

1 *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

2 All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

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STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY

BRANCH 10

STATE OF WISCONSIN,

Plaintiff,

-vs-

Case No. 10-CF-2323

JESUS C. GONZALEZ,

Defendant.

DECISION

June 29, 2021

THE HONORABLE MICHELLE A. HAVAS

Presiding Judge

APPEARANCES

PAUL L. TIFFIN, Assistant District Attorney, appeared via Zoom videoconferencing on behalf of the State of Wisconsin.

JOHN MONROE, Attorney at Law, appeared via Zoom videoconferencing on behalf of the Defendant.

JESUS C. GONZALEZ appeared in custody via Zoom videoconferencing.

EMILY S. SEXTON, Official Court Reporter

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A-19

TRANSCRIPT OF PROCEEDINGS

THE CLERK: Calling State of Wisconsin versus Jesus Gonzalez, 10-CF-2323.

Appearances.

MR. TIFFIN: Paul Tiffin appearing for the State for Grant Huebner.

MR. MONROE: John Monroe for the defendant who also appears on Zoom.

THE COURT: Mr. Gonzalez is also joining us from Dodge Correctional Institution. We had a chance to chat for just one second while we were waiting for other parties to log on, and he's apparently -- they do their Zoom appearances from some sort of closet. I indicated there was a lot of background noise, so I have unmuted him. I will be rendering my decision, and it's not really a conversational type of thing anyway, but I will unmute him before we are finished with the case to see if there is anything that he needs to indicate.

Mr. Tiffin is here for Mr. Huebner who is in trial. Obviously, Mr. Huebner participated in this, but he is here on behalf of the State. We are here on 2010-CF-2323 on a remand from the court of appeals. That is regarding Mr. Gonzalez's second appeal.

In that decision the matter was reversed and

remanded to the circuit court for an evidentiary hearing on only one of Mr. Gonzalez's claims; namely, that involving ineffective assistance of counsel. There were two parts to that, first that trial counsel was ineffective for advising him not to testify, and that post-conviction counsel was ineffective for not raising the issue in the first appeal.

To establish that counsel was deficient pursuant to Strickland v. Washington, there are two prongs of analysis that must be satisfied; that is, one, counsel's performance must fall below an objective standard of reasonableness; and, two, that there's a reasonable probability that but for counsel's unprofessional errors, the results of the proceedings would have been different.

By reasonable probability, that "is a probability sufficient to undermine confidence in the outcome." I'm citing that specific -- specifically from State v. Breitzman, 2017 WI 100 at paragraph 37 through 39.

Mr. Gonzalez brought the second appeal pursuant to Wisconsin Statute 974.06, and this Court, as successor Court for Judge Wall, held Machner hearings on the matter. Scheduling was impacted by the pandemic as everything has been in this past year, but

evidentiary hearings were held on this matter on November 2, 2020; February 15, 2021; and May 7, 2021.

First, I'm going to examine whether trial counsel's performance, Nelida Cortes, was ineffective. She represented Mr. Gonzalez at trial and testified at the November 2, 2020, Machner hearing. She testified the theory of defense was one of self-defense. The burden of production as to the self-defense she believed was met by using the 911 call placed by Mr. Gonzalez as well as testimony about how the vehicle was being used as a weapon.

Ultimately, Ms. Cortes recommended to Mr. Gonzalez he not testify. She indicated she believed if he did testify, the self-defense instruction would not be given. She knew Mr. Gonzalez's story, as she was his attorney, and believed his testimony would not lend itself to a self-defense claim. Her testimony at the Machner hearing is that that is why she opted to proceed in the manner that she did. Mr. Gonzalez told her that before the car could move in his direction, he shot immediately.

She further testified that she believed that the best evidence for the jury to acquit Mr. Gonzalez was for him not to testify but to present the 911 call.

A-22

Specifically, Mr. Gonzalez never saw a weapon, and he ran after Mr. Corn. To quote her testimony, she indicated -- and this is where the quote begins -- "What I saw was an individual who had approached Mr. Gonzalez, had not brandished a weapon, had not made any verbal threats, had stopped when Mr. Gonzalez pointed his gun at him. When Mr. Gonzalez told him to back the F up, the individual turned and ran away. Mr. Gonzalez pursued him." That is from the transcript of the November 2, 2020, hearing at page 54.

Mr. Gonzalez went on to say to Ms. Cortes that he chased Mr. Corn to the parking lot when Mr. Corn ducked behind the back of a car. Mr. Gonzalez saw the driver reach across his chest, but Mr. Gonzalez did not see the driver's arm come back up and did not see a weapon. Mr. Gonzalez shot anyway according to what he told Ms. Cortes.

Additionally, she testified that three experts she spoke to would not testify that Mr. Gonzalez's actions were a lawful use of force. Ultimately, she testified in the Machner hearing that Mr. Gonzalez's testimony would not assist in creating a self-defense claim. Her goal was to present a self-defense theory based on what the State put in as its evidence.

Ultimately, Mr. Gonzalez waived his right to

A-23

testify. He and Judge Sankovitz had a colloquy, and Mr. Gonzalez agreed that he would not testify, not that -- that that was his choice, I should say, not that he agreed with Judge Sankovitz, but that was Mr. Gonzalez's choice.

Ms. Cortes went on to indicate that her client had told her that regardless of whether or not she was able to convince Judge Sankovitz to give the self-defense instruction, he would not testify. Mr. Gonzalez confirmed that that was true. That is in the trial court record. Ms. Cortes had, in fact, convinced Judge Sankovitz to give the self-defense instruction based on the 911 call. That was done over the strenuous objection of the State.

Mr. Gonzalez testified that he ran Mr. Corn off. His testimony is in direct conflict with Ms. Cortes's testimony about what Mr. Corn said to and did regarding threatening Mr. Gonzalez, but he testified that he pulled the gun, that Mr. Corn ran away from him, and that he ran him off. He confirmed that he never saw Mr. Corn or anyone else with a weapon. He continued by saying Mr. Corn ran faster than Mr. Gonzalez and that he got away. That was from Mr. Gonzalez's testimony at the Machner hearing.

Mr. Gonzalez said that he understood the

A-24

decision to testify or not testify was, in fact, his decision. He said he was following the advice of counsel, and he confirmed that he didn't think it was bad advice at the time. I agree. It wasn't bad advice. She was somehow able to argue self-defense without putting Mr. Gonzalez up to tell his story, which did not, at the time of trial, support a theory of self-defense. It didn't to her, and it didn't to the three experts that she consulted but ultimately could not use because they could not support the theory.

Based upon all the information received here, I am finding that trial counsel, Nelida Cortes, was not ineffective in her defense of Mr. Gonzalez. While the ultimate decision of whether or not to testify was squarely upon Mr. Gonzalez, she did give him advice based upon her experience, analysis of the pros and cons of putting him on the stand with a story he would present, and the fact that she could not find any expert to support her theory.

Mr. Gonzalez made it clear in his colloquy with Judge Sankovitz he wasn't being pressured to waive his right to testify. He admitted here during the Machner hearing that he thought it was good advice, and he confirmed to Judge Sankovitz during the trial his

A-25

decision was firm regardless of whether or not he got the self-defense instruction.

And somehow she managed to pull a rabbit out of a hat to get that instruction, and arguably it worked as the jury found him guilty of the lesser-included offense. I know that is not ultimately what he would have liked, but the -- the finding on the lesser-included offense does support that.

Now, it -- that could end the analysis because if she wasn't ineffective at trial, then appellate counsel, Mr. Provis, Tim Provis is his name, failing to say that she was on appeal, necessarily, fails as well. Mr. Huebner urged that the Court look at this from the appellate counsel first and then trial counsel. Mr. Monroe argued that it should be the opposite. Regardless of which approach, the ineffectiveness claim fails here.

As to Mr. Provis, he indicated he believed that Ms. Cortes should have been given a medal for her success in having managed to get the self-defense instruction without subjecting her client to cross-examination. He was impressed as to how she crafted the argument from the State's evidence including the 911 call. All of this was done over the strong objection of the State.

When Mr. Provis was looking at this record, he had mentioned that Mr. Gonzalez wouldn't testify regardless of what jury instruction decision, confirmation of that by Mr. Gonzalez, and a lengthy and thorough colloquy between Judge Sankovitz and Mr. Gonzalez regarding his right to testify or not testify. Mr. Gonzalez in his own testimony in this matter demonstrated he was aware of his right to testify and decided not to do so. Of course, there was the advice of counsel, but ultimately he was the one who makes the decision.

Mr. Provis had to select the issues that he felt presented the best opportunity and success on appeal. The issues he selected, although not successful, were strong arguments resulting in a lengthy decision including a concurrence, and that regard was mostly in regard to the statute not allowing jurors to take notes during the closing arguments.

The ineffective claim against trial counsel for failing to have Mr. Gonzalez testify with a record replete with references to it being Mr. Gonzalez's decision and, in his own words, affirmatively waiving his right to testify can in no way be construed as the clearly stronger argument for appellate counsel to pursue.

A-27

Accordingly, I find appellate counsel was not also -- also not deficient in his performance; therefore -- I believe we have lost Mr. Gonzalez. I don't know where he went. We can try and get him again.

THE CLERK: I'll dial him back in, Judge. One moment.

THE COURT: Thank you. We can be off the record. I have a question.

(Discussion off the record.)

THE COURT: I'm almost done. We are back on the record now. I'm finishing up my decision. I had just found that appellate counsel was also not deficient in their --

THE REPORTER: Judge, I can't hear you now. You're muted. Is anyone else experiencing that?

MR. MONROE: No. I can hear the Court.

THE CLERK: No.

THE REPORTER: I can't, so there's a problem somewhere.

THE COURT: That is a problem.

THE REPORTER: I can hear you now. Now I can hear you. You're good.

THE COURT: Accordingly and therefore, the matter is returned to the court of appeals as neither

A-28

trial counsel nor appellate counsel were ineffective in their representation of Mr. Gonzalez. I don't know that there's anything further.

Anything from the State, Mr. Tiffin?

MR. TIFFIN: No.

THE COURT: Anything from you, Mr. Monroe?

MR. MONROE: I just wonder, Your Honor, will you be doing a written order adopting what you've just said on the record, or what are you planning to do from here?

THE COURT: I do think we need a written motion. I think if you would just draft something that says that based on the transcript of today -- and I'm not going to make it a full order that types up everything that I just said. The transcript is available for that, but just that I denied the motion, found that they were not ineffective, and you can submit that to me for my signature.

MR. MONROE: Okay. Were you directing that request to me?

THE COURT: Yes, Mr. Monroe, I am.

MR. MONROE: Okay. All right. I will do so.

MR. TIFFIN: Thank you.

THE COURT: Thanks. Bye, Mr. Gonzalez.

Just before we go off the record, I do want to

A-29

make a record of that. Mr. Gonzalez is at Dodge. He -- they disconnected in some way, shape, or form right before we were done. He was gone. They could not get him back by video. The best they could do was that he called my clerk's phone, and I was yelling the last sentence of my decision because I was almost finished, and that is how we proceeded with that.

So there was a technical difficulty. He -- we did the best that we could given the circumstances, but it was essentially just that it was going back to the court of appeals. That is the only part he did not hear before he was logged off of Zoom for whatever reason.

(Discussion off the record.)

(Proceedings concluded.)

A-30

STATE OF WISCONSIN)
) SS:
COUNTY OF MILWAUKEE)

I, EMILY S. SEXTON, a Registered Professional Reporter and Official Court Reporter in and for the Circuit Court of Milwaukee County, do hereby certify that the foregoing is a true and correct transcript of all the proceedings taken in the above-entitled matter and is the same as contained in my original machine shorthand notes on the said trial or proceeding.

Dated at Milwaukee, Wisconsin, this 23rd day of August, 2021.

emily s sexton

Emily S. Sexton, RPR
Official Court Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under direct control and/or direction of the certifying reporter.

CA-31

COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2022

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2021AP1496 **Cir. Ct. No. 2010CF2323**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESUS GONZALEZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHELLE ACKERMAN HAVAS, Judge. *Affirmed.*

Before Brash, C.J., Donald, P.J., and Dugan, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

A-32

¶1 PER CURIAM. Jesus Gonzalez appeals the order denying his WIS. STAT. § 974.06 (2019-20)[1] motion for a new trial, entered following an evidentiary hearing. Gonzalez argues that the circuit court erred in denying his motion because his trial counsel rendered ineffective assistance when she advised him not to testify at his trial. Gonzalez also argues that his first postconviction counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness during his direct appeal. Upon review, we affirm.

BACKGROUND

¶2 We have previously discussed the facts of Gonzalez's case in ***State v. Gonzalez*** (***Gonzalez I***), No. 2015AP784-CR, unpublished slip op. (WI App Mar. 8, 2016), and ***State v. Gonzalez*** (***Gonzalez II***), No. 2018AP257, unpublished slip op. (WI App June 25, 2019), and accordingly, we need not repeat the facts in detail here. It suffices to say that the State charged Gonzalez with first-degree intentional homicide with use of a dangerous weapon and attempted first-degree intentional homicide with use of a dangerous weapon. The charges stemmed from the shootings of Danny John and J.C. John died as a result of the shootings and J.C. was left paralyzed. At trial, Gonzalez argued that he shot the victims in self-defense. *See* ***Gonzalez II***, No. 2018AP257, ¶4. Gonzalez himself did not testify. The trial court instructed the jury on self-defense, and the jury ultimately found Gonzalez guilty of first-degree reckless homicide and first-degree

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

reckless injury, as lesser-included offenses. ***Id.***, ¶5.[2] The trial court sentenced Gonzalez to twenty years of initial confinement and five years of extended supervision on the homicide count. On the reckless-injury count, the trial court concurrently sentenced Gonzalez to five years of initial confinement and five years of extended supervision.

¶3 Gonzalez, by postconviction counsel, filed a postconviction motion for a new trial pursuant to WIS. STAT. § 809.30 (2017-18). The circuit court[3] denied the motion. Gonzalez appealed, arguing trial court error in that the trial court failed to follow the statutory procedure for striking an alternate juror and permitted the jury to take notes during closing arguments. This court affirmed the judgment of conviction. *See* ***Gonzalez I***, No. 2015AP784-CR.

¶4 Gonzalez, *pro se*, then filed a WIS. STAT. § 974.06 motion seeking an evidentiary hearing on the grounds of ineffective assistance of counsel. As relevant to this appeal, Gonzalez argued that trial counsel was ineffective for advising him not to testify at trial in support of his self-defense theory. He argued that the motion was not procedurally barred because postconviction counsel was ineffective for failing to raise the issue on direct appeal. The circuit court denied the motion; however, this court remanded the matter for an evidentiary hearing on

[2] The jury found Gonzalez guilty of first-degree reckless homicide and first-degree reckless injury. Subsequently, the parties informed the circuit court that the jury had been incorrectly instructed that first-degree reckless injury is a lesser included offense of attempted first-degree intentional homicide. Pursuant to an agreement between the parties, the court vacated the jury's conviction for first-degree reckless injury, and Gonzalez pled no contest to a charge of second-degree recklessly endangering safety. ***State v. Gonzalez*** (***Gonzalez II***), No. 2018AP257, unpublished slip op. ¶5 (WI App June 25, 2019).

[3] We refer to the court that presided over Gonzalez's trial as the trial court, and the courts that presided over Gonzalez's postconviction motions as the circuit court.

the limited allegations that Gonzalez's trial counsel was ineffective for advising him not to testify at trial, and that postconviction counsel was ineffective for not raising that issue in his first appeal. *See* ***Gonzalez II***, No. 2018AP257, ¶38.

¶5 Both trial counsel and postconviction counsel testified at the hearing. Gonzalez's trial counsel, Nelida Cortes, testified that she did not believe she had any evidence that "would have benefitted a self-defense claim." Cortes also testified that Gonzalez's version of events did not support a self-defense claim. Cortes stated that she spoke "with local attorneys that are considered experts" and with "three individuals who are not attorneys who work in the area of self-defense who were referred to [her] as experts." Cortes said that "none of them believ[ed] he had a self-defense claim." Cortes also stated that she advised Gonzalez not to testify so as to prevent the State from poking significant holes in Gonzalez's testimony.

¶6 Gonzalez's first postconviction counsel, Timothy Provis, testified that he appealed Gonzalez's convictions based on what he felt were the strongest arguments. He testified that he sent a letter to Gonzalez, responding to each of the issues Gonzalez inquired about and explained that he found no basis to challenge trial counsel's performance. Provis also testified that the issues he chose for the appeal were "the best ones" and were "issues ... of basic fairness." He also testified that Gonzalez never mentioned Cortes's advice not to testify. Provis further stated that the record gave him no reason to raise the issue as the trial court conducted a thorough colloquy with Gonzalez regarding Gonzalez's decision not to testify.

¶7 Gonzalez also testified, telling the circuit court he would have testified, but for Cortes's advice. He also testified in detail about what his

testimony would have been; specifically, that he perceived a threat from J.C. who pointed a gun at him, he followed him back to the tavern parking lot, and then he perceived a mortal threat from John's car and fired seven shots.

¶8 The circuit court denied Gonzalez's motion for a new trial, finding that Cortes "knew Mr. Gonzalez's story, as she was his attorney, and believed his testimony would not lend itself to a self-defense claim." The circuit court stated that trial counsel was "somehow able to argue self-defense without putting Mr. Gonzalez up to tell his story, which did not, at the time of trial, support a theory of self-defense." The circuit court noted that "arguably it worked as the jury found him guilty of the lesser-included offense." The circuit court also found that the ineffective assistance of counsel claim was not "clearly stronger" than the issues postconviction counsel advanced in Gonzalez's direct appeal, thus rejecting Gonzalez's ineffective assistance of postconviction counsel claim. This appeal follows.

DISCUSSION

¶9 Absent a sufficient reason, a defendant is procedurally barred from using a WIS. STAT. § 974.06 postconviction motion to bring claims that could have been raised earlier. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994); § 974.06(4). The ineffective assistance of postconviction counsel may constitute a reason sufficient to overcome the procedural bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682-83, 556 N.W.2d 136 (Ct. App. 1996). In determining whether postconviction counsel was ineffective, we first examine trial counsel's performance. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶10 To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel performed deficiently and that this deficiency prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. Judicial review of an attorney's performance is "highly deferential" and the reasonableness of an attorney's acts must be viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. ***State v. Maloney***, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583. To prove prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. *See* ***id.*** at 697.

¶11 We conclude that Gonzalez cannot demonstrate that Cortes rendered ineffective assistance. Cortes testified that she made a strategic decision in advising Gonzalez not to testify because Gonzalez's factual rendition of events did not support a self-defense claim. We give great deference to trial counsel's decisions in choosing a trial strategy. *See* ***State v. Balliette***, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334. We will sustain counsel's strategic decisions, as long as they were reasonable under the circumstances. *See* ***id.*** Cortes stated that she consulted with multiple attorneys and self-defense experts, none of whom thought that Gonzalez had a strong self-defense claim. Indeed, counsel expressed concern that Gonzalez's testimony would weaken his defense. Cortes's strategy was not objectively unreasonable.

¶12 As to Gonzalez's claim that Provis rendered ineffective assistance as postconviction counsel, we again note that absent a sufficient reason, Gonzalez is procedurally barred from raising issues in a WIS. STAT. § 974.06 postconviction motion that he could have raised on direct appeal. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Where, as here, the ineffective assistance of postconviction counsel is alleged as the sufficient reason, the defendant must set forth with particularity facts showing that postconviction counsel's performance was both deficient and prejudicial. *See* ***Balliette***, 336 Wis. 2d 358, ¶¶58-59. In addition, the defendant must allege that his newly raised issue is "clearly stronger" than those raised previously. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶43-46, 360 Wis. 2d 522, 849 N.W.2d 668.

¶13 Because Gonzalez's ineffective assistance of counsel claim fails, his claim of ineffective assistance of postconviction counsel necessarily fails. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15. Accordingly, Gonzalez has not demonstrated that his ineffective assistance of counsel claim is clearly stronger than the claims his postconviction counsel brought in his direct appeal. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶4. As a result, Gonzalez is barred from obtaining relief by way of a WIS. STAT. § 974.06 motion. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185-86.

¶14 For the foregoing reasons, we affirm the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

FILED
09-21-2022
CLERK OF WISCONSIN
COURT OF APPEALS

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DISTRICT I

September 21, 2022

To:

Hon. Michelle Ackerman Havas
Circuit Court Judge
Electronic Notice

Sonya Bice
Electronic Notice

John R. Monroe
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

You are hereby notified that the Court has entered the following order:

2021AP1496 State of Wisconsin v. Jesus Gonzalez (L.C. # 2010CF2323)

Before Brash, C.J., Donald, P.J., and Dugan, J.

Jesus Gonzalez, by Attorney John R. Monroe, moves the court to reconsider its August 30, 2022 decision. After reviewing the motion, this court concludes that reconsideration is not warranted.[1]

Therefore,

IT IS ORDERED that the motion for reconsideration is denied.

Sheila T. Reiff
Clerk of Court of Appeals

[1] Attorney Monroe also asks this court for "an extension of time to file his first brief." To the extent Attorney Monroe seeks an extension of time to file an additional brief with his motion for reconsideration, that request is denied.

A-39

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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January 18, 2023

To:

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You are hereby notified that the Court has entered the following order:

No. 2021AP1496 State v. Gonzalez, L.C. #2010CF2323

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Jesus Gonzalez, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

This document is a true and correct copy of the document on file in my office.

Clerk of Supreme Court/Court of Appeals, State of Wisconsin

01-24-2023
Date

A-54

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2015AP784-CR

JJESUS C. GONZALEZ,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE MILWAUKEE COUNTY CIRCUIT COURT
HONORABLE RICHARD J. SANKOVITZ, PRESIDING

APPELLANT'S BRIEF

ISSUES PRESENTED

1. Whether basic Due Process was violated when the court below used a procedure contrary to §972.10(7), *Wis. Stats.*, to select the alternate juror which had the effect of giving the State one more peremptory challenge than Mr. Gonzalez.

Over objection, the court below selected a specific juror as the alternate after evidence was closed and noted this was the same as allowing the State an additional peremptory challenge.

2. Whether allowing juror note taking of closing arguments contrary to §972.10(1)(a)1., *Wis. Stats.*, was prejudicial error.

In its closing instructions, the court below told jurors they could take notes during closing argument. Trial counsel objected.

A-55

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

STATEMENT ON PUBLICATION

Counsel requests publication because the opinion here is likely to apply established rules of law to a factual situation significantly different from those in previous opinions and therefore will clarify those rules.

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of Mr. Gonzalez' conviction of 1st Degree Reckless Homicide and 2nd Degree Recklessly Endangering Safety and of the denial of his postconviction motion.

2. Proceedings Below

On May 13, 2010, complaint no. 10-CF-2323 was filed in Milwaukee County Circuit Court charging Mr. Gonzalez with violations of §§940.01(1)(a) (1st Degree Intentional Homicide and 940.01(1)(a) & 939.32, *Wis. Stats.* (Attempted 1st Degree Intentional Homicide). (2).

On May 20, 2010, Mr. Gonzalez waived preliminary hearing and an information was filed making the same charges as in the complaint. (4)(5).

On January 25, 2011, trial counsel filed a motion to admit other acts evidence. (14).

On February 18, 2011, the State filed its motions *in limine* (15), witness list (16) and requested jury instructions. (20). On that date, defense counsel filed her motions *in limine* (18), witness list (19) and proposed jury instructions. (20).

On October 24, 2011 jury trial began with *voir dire.* (64). A jury was selected and sworn. (65:88).

On October 25, 2011, the court reported juror 24 "had

convictions on his record which did not come to the attention of the parties." (66:5). The court said, "We've decided to put this decision [on what to do about it] off." (66:6).

On October 26, 2011, the State continued presenting its evidence. (68). The State rested its case that day. (69:42). The defense motion to dismiss was denied. (69:43-45). Mr. Gonzalez waived his right to testify. (69:45-49). The defense presented its witness (69:50) and rested. (69:61).

On October 27, 2011, the court chose the alternate by hearing argument as to which of 2 jurors should be so designated and then, over objection, granting the State's motion to designated juror 24 as the alternate. (70:50-58). That afternoon, the jury came in with its verdicts, finding Mr. Gonzalez guilty of 1st Degree Reckless Homicide on Count 1 and 1st Degree Reckless Injury on Count 2. (71:13-15). The court entered judgment on the verdicts. (71:17-18).

By the time of sentencing on November 18, 2011, the parties and the court realized 1st degree reckless injury is not a lesser included offense of the attempted 1st degree intentional homicide charged in Count 2.. (72:2-8). The parties agreed the conviction on Count 2 would be vacated and Mr. Gonzalez would enter a no contest plea to 2nd Degree Recklessly Endangering Safety pursuant to a plea bargain providing the State would recommend concurrent time on that conviction. *Id.* The court accepted Mr. Gonzalez no contest plea and found him guilty of the new charge. (72:9-15).

The court sentenced Mr. Gonzalez to 20 years confinement and 5 years extended supervision on Count 1 and a concurrent sentence of 5 years confinement and 5 years extended supervision on Count 2. (72:79-82).

Notice of Intent was filed May 13, 2014 (43) and this Court retroactively extended the deadline to permit its filing. (45).

Present counsel's postconviction motion filed November 13, 2014 (46) was denied by written order filed March 31, 2015. (52).

A-57

Notice of Appeal was filed April 20, 2015. (53).

3. Facts of the Offenses

On May 9, 2011, Mr. Gonzalez made a 911 call, saying he had been assaulted and shot out the windows of a vehicle. (66:53-54). He also said he had shot someone and would wait in front of his house. (66:29 [lines 17-20]). When police arrived at his house, Mr. Gonzalez was unarmed and surrendered to them without resistance. ((66:55).

In a nearby parking lot, officers found J.C. lying down with a bullet hole in his neck. (66:18). On a sidewalk, officers found Danny John, bleeding from 2 wounds. Mr. John was later pronounced dead at Froedtert Hospital. (66:24-25).

Argument

I. BASIC DUE PROCESS WAS VIOLATED WHEN THE COURT BELOW SELECTED THE ALTERNATE JUROR CONTRARY TO §972.10(7), *Wis. Stats.*, EFFECTIVELY GIVING THE STATE ONE MORE PEREMPTORY CHALLENGE THAN MR. GONZALEZ RECEIVED.

A. Introduction

To narrow the issue, it may be helpful to note what this case is not about.

It is not about a circuit court's failure to allow the accused the statutorily required number of peremptory strikes before trial. *State v. Erickson*, 227 Wis.2d 758, 596 N.W.2d 749 (1999). Nor is it about an accused forced to expend a peremptory challenge to correct a circuit court's failure to excuse a juror for cause. *State v. Lindell*, 2001 WI 68, 245 Wis.2d 689, 629 N.W.2d 223. Neither is it about allowing prosecutors discriminatory peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79 (1986).

What this issue is about is effectively giving the State one more peremptory challenge than the accused by adopting a procedure for selecting the alternate contrary to statute.

B. Standard of Review

Issues of statutory interpretation are reviewed *de novo*, *State v. Hansen*, 2001 WI 53, ¶9, 243 Wis.2d 328, 627 N.W.2d 195, as are Due Process issues. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis.2d 179, 717 N.W.2d 1.

C. Additional Facts

During jury *voir dire*, neither the court nor the attorneys asked the jurors if any of them had been convicted of a crime. The court did ask if any juror had been charged with a crime involving "taking somebody's life, attempting to take somebody's life or shooting at anybody with a gun ?" (65:23). After the jury was selected and sworn, juror 24 went to the bailiff and revealed he had been convicted of a crime. (66:5-6)(70:50-51) Instead of reopening jury selection, the Court, with the acquiescence of the parties, decided to wait until after the evidence was closed to deal with this problem. *Id.*

After the evidence was closed, the Court suggested either juror no. 9, who had been nodding off, or the convicted juror 24 be designated the alternate and heard argument from the parties. (70:50-58). Defense counsel opposed the State's motion to designate juror 24 as the alternate and argued for juror 9. (70:54-55). Then the Court designated the convicted juror as the alternate. (70:56-58). As the court itself pointed out, this was the same as giving the State an additional peremptory challenge. (70:57 [line 17-57]).

The court denied the postconviction motion arguing Due Process error. (46)(52).

D. Discussion

The peremptory challenge "has its roots in [our] ancient common law heritage," *Swain v. Alabama*, 380 U.S. 202, 217, 85 S.Ct. 824 (1965), a fixture of jury trial in England since at least 1305. *Id.* at 213 (citing statute). Due to the "long and widely held belief that peremptory challenge is a necessary part of trial by jury," *id.* at 219, nearly every American state gives peremptories "by statute to both sides in both civil and

A-59

criminal cases . . ." *Id.* at 217.

So it is the highest Court has repeatedly declared the peremptory challenge "is 'one of the most important of the rights secured to the accused.' " *Id.* at 219 (citation omitted). And see *State v. Gesch*, 167 Wis.2d 660, 671, 482 N.W.2d 99 (1992)(same).

While the highest Court has yet to declare the peremptory challenge a constitutional right, *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273 (1988), it has made clear basic Due Process is denied "if the defendant does not receive that which state law provides." 487 U.S. at 89. *Cf. Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585 (1956)(though there is no constitutional right to appeal, where state grants right by statute, Due Process requires the right to be fairly administered).

The key legal principle of fair administration of peremptory challenges in Wisconsin is equality. The statutes provide "each side" the same number of challenges. §972.03, *Wis. Stats.* See *State v. Mendoza*, 227 Wis.2d 838, 860, ¶53, 596 N.W.2d 736 (1999)("We agree with the court of appeals on the importance of maintaining an equal number of peremptory strikes in two-party cases.").

Equality is required to satisfy Due Process as well. "[T]he relative rights of the prosecution and the accused [as to peremptories] must be at least equal." *U.S. v. Harbin*, 250 F.3d 532, 541 (7th Cir.2001)(where prosecution allowed to use peremptory to eliminate juror on 6th day of eight day trial, Due Process violated and conviction reversed). Because "[p]eremptory challenges are a significant means of achieving an impartial jury, . . .the 'balance' struck to achieve an impartial jury and a fair trial is one of equivalent rights . . ." *Id.*

Here, after the evidence was closed, the prosecutor was allowed to move the court to designate juror 24, who had told the bailiff after jury selection he had been convicted of crimes (66:5-6)(70:50-51), as the alternate. (70:53). The prosecutor stated his reason was, had he known of the convictions during jury selection, the State would have stricken him. (70:53

A-60

[lines 18-24]). The court granted the State's motion, saying, "And had [juror 24] raised [his convictions] at that point, I think the State would have the benefit of its peremptory strike. So I'm going to allow the State to exercise that strike now . . ." (70:57 [lines 16-20). The court then designated juror 24 as the alternate, understanding it was effectively giving the State another peremptory challenge.

Since this procedure violated both §972.10(7), *Wis. Stats.*, requiring selection of the alternate by lot, and §972.03, *Wis. Stats.*, requiring an equal number of challenges for "each side," Mr. Gonzalez did "not receive that which state law provides," *Ross, supra,* 487 U.S. at 89, and basic Due Process was violated. As in *Harbin, supra,* granting the State an extra challenge at the end of the trial "destroy[ed] the balance [of advantages] needed for a fair trial," 250 F.3d at 540, because it "skewed the jury selection process in favor of the prosecution, and adversely impacted the ability of the peremptory challenge process as a means of ensuring an impartial jury and a fair trial." *Id.* at 541.

The *Harbin* court reversed without consideration of prejudice because "such an error affects the fundamental fairness of the trial . . .," *id.* at 547, by "calling into question the impartiality of the jury because it cripples the device designed to ensure an impartial jury by giving each party an opportunity to weed out the extremes of partiality." *Id.* at 548. Counsel submits there was the same fundamental unfairness here when the State had more challenges than Mr. Gonzalez, creating an impermissible "shift in the total balance of advantages in favor of the prosecution . . ." *Id.* at 547.

But even if reversal depends on harmless error rules, counsel submits the State cannot meet its burden under *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985) "to establish that there is no reasonable possibility that the error contributed to the conviction." This is because the error "here is precisely the type of error that defies harmless error analysis." 250 F.3d at 545. "[I]t is impossible to determine what impact [the illegal granting of an extra peremptory to the State] had on the jury's ultimate decision," and so the possibility the error contributed to the verdict cannot be ruled out.

A-61

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2015AP784-CR

JESUS C. GONZALEZ,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE MILWAUKEE COUNTY CIRCUIT COURT
Honorable RICHARD J. SANKOVITZ, presiding

APPELLANT'S REPLY BRIEF

Argument in Reply

I. Alternate Juror Selection Error

Introduction

Nowhere disputing the procedure the court below used to select the alternate was contrary to the governing statute, §972.10(7), *Wis. Stats.*, requiring selection of the alternate by lot, respondent State makes four arguments to which counsel replies seriatim below.

A. The error was not "invited."

Respondent State claims trial counsel's failure to object to the procedure used waives the error by the doctrine of invited error. Respondent's

Brief at 4-5, hereinafter RB. Whether a party has invited error "is a question of law subject to *de novo* review." *State v. Gary M.B.*, 2004 WI 33, ¶11, 270 Wis.2d 62, 71, 676 N.W.2d 475.

Invited error "refers to the principle that a party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to commit." *Harvis v. Roadway, Exp. Inc.*, 923 F.2d 59, 60 (6th Cir.1991). In Wisconsin, the doctrine is known as "strategic waiver." *Gary M.B., supra, id.* It is clear from the cases the doctrine does not apply unless the party claiming error has taken some affirmative step to invite or induce the error. See, *e.g.*, *Gary M.B.*, ¶12 (following *State v. Ruud*, 41 Wis.2d 720, 723-724 [where counsel stipulated to admission of statements taken with defective *Miranda* warning, *Miranda* violation could not be argued on appeal]); *Zindell v. Central Mutual Ins. Co.*, 222 Wis. 575, 582, 269 N.W. 327, 330 (1936)(where defendant's objections prevented admission of plaintiff's diminished value evidence, they could not complain on appeal of insufficient evidence of such value); *Shawn B.N. v. State*, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct.App.1992) (where counsel requested psychological evaluation, any error in use of report was waived as invited).

Here, it was the court below suggesting, "it may be . . . he can be declared an alternate" (66:6 [lines 1-3]), Appellant's Appendix at 6, hereinafter AA, when the decision was put off at the beginning of the trial, not trial counsel. She simply acquiesced in the court's suggestion, as did the State. The error here was not "invited."

Furthermore, trial counsel did object to designating juror 24 as the alternate. See (70:54-55) (70:58 [lines 15-16 (court "overrule[s] the defense's objection to designate [juror 24] as the alternate)]); AA 15. Thus the error is preserved for review.

A-63

B. Juror 24 was designated as the alternate not stricken for cause.

Respondent State claims the court below wasn't really selecting an alternate, rather it was deciding on motions to strike for cause. RB 5-8.

First, this claim is belied by the record. Counsel has provided the relevant transcript excerpts in the appendix, see AA 5-6, 7-15, and nowhere in the record, either before the evidence began, AA 5-6, or after it was closed, AA 7-15, is there any mention by the court below or the parties that juror 24 is vulnerable to a challenge for cause. Indeed, when asked for his reason for wanting the juror designated as the alternate, the prosecutor said "if this information had come . . . had been presented to the state, that we would have . . . that we would have struck him." AA 10, lines 19-22. That is to say, the prosecutor was essentially asking for another peremptory strike and that is exactly what he got. AA 14, lines 16-25 (court rules: "And had [juror 24] raised [his convictions] at [voir dire], I think the State would have the benefit of its peremptory strike. So I'm going to allow the state to exercise that strike now and * * * I am designating [juror 24] as the alternate.").

Secondly, there is basic unfairness in an after-the-fact characterization of this alternate designating procedure as motions to strike for cause. The court below informed no one the alternate would be designated only if the juror's behavior justified a finding of cause to strike so trial counsel was not on notice she needed to develop facts and present argument about the bias necessary for such a strike. See *State v. Mendoza*, 227 Wis.2d 838, 848-850, ¶19-¶22, 596 N.W.2d 736 (1999)(discussing 3 types of bias justifying strike for cause).

Counsel is, of course, aware a discretionary

decision can be affirmed if there is a correct result based on the wrong reason, *State v. Alles*, 106 Wis.2d 368, 391-392, 316 N.W.2d 378 (1982), but that rule assumes a decision applying proper legal principles to a properly developed set of facts to make a "rational, legally sound conclusion." *Burkes v. Hales*, 165 Wis.2d 585, 590-591, 478 N.W.2d 37 (Ct.App.1991). Here, the court below was acting contrary to the statute requiring the alternate to be chosen at the end of the trial by lot. If it was inquiring as to cause to strike jurors as the State contends, the record shows no consideration of the types of bias outlined in *Mendoza*, *supra*, *id.*, nor any findings on these types. Furthermore, it conducted no additional *voir dire* of any juror. If juror 24 was so obviously vulnerable to a challenge for cause at the beginning of the trial, why did the court below wait until the end of the trial to protect the impartiality of the jury? *Cf. State v. Nantelle,* 2000 WI App 110, ¶10, 235 Wis.2d 91, 612 N.W.2d 356 (supreme court cases dictate no peremptory challenges may be exercised after the jury has been accepted by the parties).

C. *State v. Gonzalez*, 2006 WI App 142, 314 Wis.2d 129, 258 N.W.2d 153 does not control here.

In its third argument, the State claims *Gonzalez*, *supra*, controls here. RB 8-13. It does not because the circuit court there specifically found "I did strike [the juror] for cause," ¶13, whereas here, as noted above, the court below was allowing the State to exercise a peremptory challenge by designating juror 24 as the alternate. AA 14, lines 16-25.

Assuming *arguendo* juror 24 was stricken for cause, conspicuously absent from the State's brief is any argument it was a proper strike for cause and *Gonzalez* shows why it was not. There, the circuit court scrupulously followed the procedure mandated by *State v. Lehman*, 108 Wis.2d 291, 300, 321 N.W.2d 212 (1982), by making a "careful inquiry." See

A-65

Gonzalez at ¶13 ("The trial court followed the correct procedure in questioning [the juror] . . ."). Here, the court below never did any individual *voir dire* of juror 24 before striking him.

Furthermore, counsel questions whether the court below came to a "rational, legally sound conclusion." It designated the juror as the alternate based on his lack of candor because he did not answer a question never asked of him (No one asked the jurors if they had been convicted of a crime. The only question on the subject was about crime involving "taking somebody's life, attempting to take somebody's life or shooting at anybody with a gun. . ." (65:23)) and because he voluntarily brought his convictions to the bailiff's attention! AA 14. This despite finding juror 24 "deserved credit" for disclosing his convictions, AA 7, lines 23-24 and that his conduct as a juror was proper. AA 8, lines 10-13.

The gravamen of the court's reasoning was juror 24 "didn't tell us in time for the state to be able to make preemptive strikes. He didn't tell us at the same time *is what makes the difference.*" AA 12, lines 14-17, emphasis added. This is not a proper reason for striking a juror for cause as it is unfair to expect jurors to know jury selection procedures. Had the court bothered to *voir dire* him it might have found he was simply embarrassed to bring his convictions, (none of which fit the court's question about crime (AA 10, lines 3-9), see AA 14, lines 7-8 [court admits it is not sure a layperson would have understood its crime question to include juror 24's record]), out in public.

Therefore, the State's after-the-fact characterization of the alternate designation procedure used here as motions to strike for cause has no support in fact or law.

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A-66

D. The error justifies reversal.

The test for harmlessness set out in *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985) has stood the test of time. See generally, Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* (6th ed.2014), Appendix C at 78-79. An error, constitutional or not, is prejudicial if "there is a reasonable possibility that the error contributed to the conviction." 124 Wis.2d at 543. To show harmlessness the State must "establish" there is no such possibility. *Id.*

Here "it is simply impossible as a practical matter to assess the impact on the jury of [the] error" *U.S. v. Harbin*, 250 F.3d 532, 548 (7th Cir.2001), because the juror was erroneously excluded from deliberations. Justice Traynor's classic treatise found such errors "ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment." Roger J. Traynor, *The Riddle of Harmless Error* (1970) at 68. That is to say, the State cannot meet its burden.

Looking specifically at the constitutional rule, the *Harbin* court, after concluding violating the basic principle of equality was Due Process error, see Appellant's Brief at 6, hereinafter AB, found it was structural error justifying automatic reversal because "the framework in which the trial proceeded was fundamentally altered, with the jury selection mechanism transported to the trial stage for one party." 250 F.3d at 548. This is, of course what happened here when the State was allowed to exercise an extra peremptory at the end of the case in violation of statute and case law. *Nantelle, supra, id.*

So, the error is reversible either because the State cannot show it did not contribute to the verdict or because it was structural and so reversible without consideration of prejudice as in *Harbin* or both.

A-67

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SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2015AP784 CR

JESUS C. GONZALEZ,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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A-68

TABLE OF CONTENTS

	page
ISSUES PRESENTED	1
CRITERIA FOR REVIEW	2
STATEMENT OF THE CASE	2
1. Nature of the Case	2
2. Proceedings Below	2
3. Statement of Facts of the Offense	4
ARGUMENT	5
I. THIS CASE RAISES CONSTITUTIONAL AND STATUTORY ISSUES WORTHY OF SUPREME COURT CONSIDERATION.	5
A. Note-taking Error	5
1. Additional Facts	5
2. Discussion	5
B. Jury Selection Error	6
1. Additional Facts	6
2. Discussion	7
CONCLUSION	8
APPENDIX	ff. 8
CERTIFICATES	

A-69

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2015AP784 CR

JESUS C. GONZALEZ,

Defendant-Appellant.

PETITION FOR REVIEW

JESUS C. GONZALEZ, by and through his undersigned attorney, hereby petitions the Court, pursuant to RULE 809.62, *Stats.*, and complying with *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), for review of the decision of the Court of Appeals, District I, filed in this action March 8, 2016. A copy of this unpublished decision appears as the Appendix.

ISSUES PRESENTED

1. Where a circuit court openly and deliberately contradicts the legislative command of a statute regulating trial procedure, here §972.10(1)(a)1., *Wis. Stats.*, specifying when and how jurors may take notes, whether basic fairness has been denied to both parties and judicial integrity is compromised.

Without notice to the parties, the circuit court instructed the jurors they could take notes during closing argument and told them the statute prohibited this. After instructions, both parties objected. The court below affirmed.

2. Whether basic Due Process was violated when

the circuit court used a procedure contrary to §972.10(7), *Wis. Stats.*, to select the alternate juror which had the effect of giving the State one more peremptory challenge than Mr. Gonzalez.

Over objection, the circuit court selected a specific juror as the alternate after evidence was closed and noted this was the same as allowing the State an additional peremptory challenge. The court below affirmed.

CRITERIA FOR REVIEW

Real and significant questions of constitutional and statutory law are present, RULE 809.62(1r)(a), *Wis. Stats.*, which have statewide impact. RULE 809.62(1r)(c)(2), *Wis. Stats.*

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of Mr. Gonzalez' conviction of 1st Degree Reckless Homicide and 2nd Degree Recklessly Endangering Safety and of the denial of his postconviction motion.

2. Proceedings Below

On May 13, 2010, complaint no. 10-CF-2323 was filed in Milwaukee County Circuit Court charging Mr. Gonzalez with violations of §§940.01(1)(a) (1st Degree Intentional Homicide and 940.01(1)(a) & 939.32, *Wis. Stats.* (Attempted 1st Degree Intentional Homicide). (2).

On May 20, 2010, Mr. Gonzalez waived preliminary hearing and an information was filed making the same charges as in the complaint. (4)(5).

On January 25, 2011, trial counsel filed a motion

A-71

to admit other acts evidence. (14).

On February 18, 2011, the State filed its motions *in limine* (15), witness list (16) and requested jury instructions. (20). On that date, defense counsel filed her motions *in limine* (18), witness list (19) and proposed jury instructions. (20).

On October 24, 2011 jury trial began with *voir dire*. (64). A jury was selected and sworn. (65:88).

On October 25, 2011, the court reported juror 24 "had convictions on his record which did not come to the attention of the parties." (66:5). The court said, "We've decided to put this decision [on what to do about it] off." (66:6).

On October 26, 2011, the State continued presenting its evidence. (68). The State rested its case that day. (69:42). The defense motion to dismiss was denied. (69:43-45). Mr. Gonzalez waived his right to testify. (69:45-49). The defense presented its witness (69:50) and rested. (69:61).

On October 27, 2011, the court chose the alternate by hearing argument as to which of 2 jurors should be so designated and then, over objection, granting the State's motion to designated juror 24 as the alternate. (70:50-58). That afternoon, the jury came in with its verdicts, finding Mr. Gonzalez guilty of 1st Degree Reckless Homicide on Count 1 and 1st Degree Reckless Injury on Count 2. (71:13-15). The court entered judgment on the verdicts. (71:17-18).

By the time of sentencing on November 18, 2011, the parties and the court realized 1st degree reckless injury is not a lesser included offense of the attempted 1st degree intentional homicide charged in Count 2.. (72:2-8). The parties agreed the conviction on Count 2 would be vacated and Mr. Gonzalez would enter a no contest plea to 2nd Degree Recklessly

A-72

Endangering Safety pursuant to a plea bargain providing the State would recommend concurrent time on that conviction. *Id.* The court accepted Mr. Gonzalez no contest plea and found him guilty of the new charge. (72:9-15).

The court sentenced Mr. Gonzalez to 20 years confinement and 5 years extended supervision on Count 1 and a concurrent sentence of 5 years confinement and 5 years extended supervision on Count 2. (72:79-82).

Notice of Intent was filed May 13, 2014 (43) and this Court retroactively extended the deadline to permit its filing. (45).

Present counsel's postconviction motion filed November 13, 2014 (46) was denied by written order filed March 31, 2015. (52).

Notice of Appeal was filed April 20, 2015. (53).

On March 8, 2016, the court below affirmed in an unpublished opinion. See Appendix.

3. Facts of the Offenses

On May 9, 2011, Mr. Gonzalez made a 911 call, saying he had been assaulted and shot out the windows of a vehicle. (66:53-54). He also said he had shot someone and would wait in front of his house. (66:29 [lines 17-20]). When police arrived at his house, Mr. Gonzalez was unarmed and surrendered to them without resistance. ((66:55).

In a nearby parking lot, officers found J.C. lying down with a bullet hole in his neck. (66:18). On a sidewalk, officers found D. J., bleeding from 2 wounds. Mr. J. was later pronounced dead at Froedtert Hospital. (66:24-25).

A-73

ARGUMENT

I. THIS CASE RAISES CONSTITUTIONAL AND STATUTORY ISSUES WORTHY OF SUPREME COURT CONSIDERATION.

A. Note-Taking Error

1. Additional Facts

The facts of this error are concisely detailed in the concurring judge's opinion in the court below. See Slip Opinion at ¶¶ 47-52 attached as the Appendix

2. Discussion

Originating with Magna Carta, §39, the bedrock principle of Anglo-American jurisprudence is the rule of law. The rule of law means King John could not be above the law in 1215 and "in America the law is king . . ." Thomas Paine, *Common Sense* (1776) *reprinted in* Philip S. Foner, ed., *The Life and Major Writings of Thomas Paine* (1974) at 3, 29. It means no one, not even "a President is above the law," *U.S. v. Nixon*, 418 U.S. 683, 715, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), in our nation because "ours is a government of laws, not of men . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646, 72 S.Ct. 863, 96 L.Ed 1153, 26 A.L.R.2d 1378 (1952)(conc. opn. per Jackson, J.).

For judges, the rule of law means, *inter alia,* they must abide by the plain meaning of the text of statutes. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶45, 271 Wis.2d 633, 681 N.W.2d 110. Thus here, the circuit court egregiously violated "the solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature . . ." *Id.* at ¶44. But the appalling aspect of court's error is, not only did it deliberately contradict the statute, but it

A-74

did so openly, telling the jurors it was proceeding contrary to the statute! Slip Opinion at ¶48.

Long ago, in a different context, Justice Brandeis exposed the danger of such official action in a famous dissent, now followed.

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent ***teacher.*** For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. U.S., 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed 944 (1928), emphasis added. And so by its example the circuit court has taught these jurors judges may refuse to follow the law.

Counsel refuses to believe this Court condones such a departure from the rule of law and submits Mr. Gonzalez is entitled to a remedy. As the concurring judge in the court below noted, prejudice cannot be demonstrated from the error here because the statute requires the jurors' notes be destroyed. Slip Opinion at ¶51. Where "there is no way of evaluating whether or not [errors] affected the judgment" reversal is justified. Roger J. Traynor, *The Riddle of Harmless Error* (1970) at 68-69; *U.S. v. Harbin*, 250 F.3d 532, 545 (7th Cir.2001)(where error "is precisely the type of error that defies harmless error analysis," reversal is appropriate.

Therefore, review on this ground is amply justified.

B. Jury Selection error

1. Additional Facts

During jury *voir dire*, neither the court nor the attorneys asked the jurors if any of them had

A-75

been convicted of a crime. The court did ask if any juror had been charged with a crime involving "taking somebody's life, attempting to take somebody's life or shooting at anybody with a gun ?" (65:23). After the jury was selected and sworn, juror 24 went to the bailiff and revealed he had been convicted of a crime. (66:5-6)(70:50-51) Instead of reopening jury selection, the Court, with the acquiescence of the parties, decided to wait until after the evidence was closed to deal with this problem. *Id.*

After the evidence was closed, the Court suggested either juror no. 9, who had been nodding off, or the convicted juror 24 be designated the alternate and heard argument from the parties. (70:50-58). Defense counsel opposed the State's motion to designate juror 24 as the alternate and argued for juror 9. (70:54-55). Then the Court designated the convicted juror as the alternate. (70:56-58). As the court itself pointed out, this was the same as giving the State an additional peremptory challenge. (70:57 [line 17-25]).

The court denied the postconviction motion arguing Due Process error. (46)(52). The court below affirmed.

2. Discussion

When counsel called this error to the circuit court's attention in the postconviction motion, that court recharacterized the proceedings before it as ones to determine a challenge for cause. (52). The court below adopted this recharacterization and affirmed.

The problem with that is there is absolutely no support in the transcripts for this recharacterization. See Appellant's Reply Brief at 3-4, hereinafter ARB. During argument on the issue, the State stated its objection to the juror was it would have used a

A-76

peremptory challenge on him if it had known of his conviction. (70:53 [lines 18-24]). The circuit court said it was allowing the State to exercise that challenge by designating the juror as the alternate. (70:57 [lines 16-20]). Nowhere did the court inform the parties arguments on cause should be made. Thus, if the courts are allowed to backtrack in this manner, it is completely unfair to Mr. Gonzalez whose counsel could have addressed the cause issue if notice had been given. *Cf. State v. Nantelle,* 2000 WI App 110, ¶10, 235 Wis.2d 91, 612 N.W.2d 356 (supreme court cases dictate no peremptory challenges may be exercised after the jury has been accepted by the parties).

Furthermore, as noted at ARB 4-5, this case is distinguishable from *State v. Gonzalez*, 2006 WI App 142, 314 Wis.2d 129, 258 N.W.2d 153 because here the circuit court never *voir dired* the juror before striking him for cause as required by this Court's decisions. *State v. Lehman*, 108 Wis.2d 291, 300, 321 N.W.2d 212 (1982).

For these reasons, the Court should review this issue to clarify if, and, if so, when belated peremptory challenges are allowed

Conclusion

Counsel respectfully submits the foregoing demonstrates review of these issues should be granted.

Dated: April 3, 2016 Respectfully submitted,

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