COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP784-CR **Cir. Ct. No. 2010CF002323**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESUS C. GONZALEZ,

DEFENDANT-APPELLANT.

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.

¶1 BRENNAN, J. 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

[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.

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.

¶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 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.)

¶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.

¶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. 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

[3] *See* supra note 1.

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 77, ¶12. 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.

¶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.

¶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.

¶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 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.

¶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. 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.

¶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. 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. "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. 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

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

against the moving party." *See* ***id.*** at 726. 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.

¶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. However, as the supreme court stated in ***Mendoza***, not every error requires reversal. *See* ***id.***, 227 Wis. 2d at 863-64. 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. The supreme court noted that Mendoza conceded that an impartial jury convicted him. *See* ***id.*** at 864. 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.

¶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. 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.

[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."

¶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."

¶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. 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).

[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.

By the Court.—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. ("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:

> **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 note-taking, 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?
>
> [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.