COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2013

Diane M. Fremgen
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. 2012AP1818-CR **Cir. Ct. No. 2006CF5455**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAMON G. GONZALEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, and DAVID A. HANSHER, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Ramon G. Gonzalez appeals from a judgment of conviction entered after a jury found him guilty of one count of

battery by prisoners as party to a crime, and from an order denying his postconviction motion.[1] For the reasons which follow, we affirm.

BACKGROUND

¶2 In October 2006, the State filed a criminal complaint, alleging that on September 27, 2006, Gonzalez, while an inmate at the Milwaukee County Jail, assisted by several other inmates, attacked and severely beat fellow-inmate Fredrick Brown.

¶3 In June 2008, a three-day jury trial took place, at which Gonzalez and a co-defendant were tried. The central issue at trial was the identity of the inmates who attacked Brown. The State called several witnesses, including Brown, and Milwaukee County Sheriff's Department employees Sergeant James Criss and Detective Kenneth Mohr.[2] The State also played a surveillance tape that reflected portions of the fight.

¶4 The State called Brown to testify, but he proved to be a reluctant witness. Immediately upon taking the stand he told the trial court, "I don't want to do this." Several times throughout his testimony he repeated to the trial court that "I don't want to be here, do this, Man." He testified that he had no specific recollection of Gonzalez being involved in the attack.

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[1] The Honorable William W. Brash, III, presided over the majority of pretrial proceedings, trial, sentencing, and entered the judgment of conviction. The Honorable David A. Hansher presided over the vast majority of the postconviction proceedings and entered the order denying Gonzalez's motion for postconviction relief.

[2] The State called other witnesses whose testimony is irrelevant to the issues raised by Gonzalez on appeal.

¶5 Sergeant Criss, a supervisor at the jail at the time of the attack, testified, over the defense's objection, that minutes after the attack Brown identified one of his attackers as being the inmate housed in cell ten. Gonzalez was an inmate in that cell at the time of the attack.

¶6 Detective Mohr testified that he was dispatched to the jail immediately after the fight to investigate what happened. He told the jury that upon his arrival at the jail he went to the infirmary to interview Brown. Detective Mohr testified, over the defense's objection, that Brown told him that he had been in his cell with inmates from cells four and fourteen, when the two inmates started accusing him of stealing a radio and then attacked him. According to Detective Mohr, Brown told him that he tried to push his way out of his cell and hit the emergency button to alert the deputy of a problem. Brown stated that once he was outside of his cell an inmate with platinum teeth from cell ten joined in on the attack.[3] Detective Mohr identified Gonzalez as the inmate staying in cell ten with platinum teeth. During Detective Mohr's testimony, at the State's request and over defense objection, the trial court ordered Gonzalez to open his mouth and display his platinum teeth to the jury.

¶7 The jury returned guilty verdicts for both Gonzalez and his co-defendant. Gonzalez was sentenced to a five-year bifurcated prison term, consecutive to any other sentence.

¶8 In June 2012, Gonzalez filed a postconviction motion seeking a new trial on the grounds that: (1) the trial court's order that Gonzalez display his teeth

[3] Detective Mohr testified that Brown identified several other participants in the fight whose roles in the fight are irrelevant to the issues raised by Gonzalez on appeal.

to the jury violated his right against self-incrimination and his right not to testify; (2) the prosecutor improperly shifted the burden of proof to the defense in his closing statement; and (3) the trial court erroneously admitted prejudicial hearsay testimony. Subsequently, the postconviction court ordered briefing.

¶9 In its response, the State argued that: (1) ordering Gonzalez to display his teeth did not implicate the Fifth Amendment right against self-incrimination; (2) the prosecutor's remarks during rebuttal were permissible in the context of the entire record; and (3) the alleged hearsay testimony was admissible as a prior inconsistent statement and even if inadmissible, was harmless error.

¶10 The postconviction court issued a decision and order denying Gonzalez's postconviction motion. The postconviction court's order simply stated: "The court has reviewed the record as well as the parties' arguments as set forth in their briefs and concurs with the State's analysis as to all issues. Accordingly, for the reasons set forth by the State, the defendant's motion for a new trial is denied."

¶11 Gonzalez appeals. Additional facts relevant to Gonzalez's claims are included below.

DISCUSSION

I. The postconviction court's adoption of the State's brief was not an error requiring remand.

¶12 First, Gonzalez contends that the postconviction court erroneously exercised its discretion when it adopted the State's brief as its decision and asks us to remand the case back to the postconviction court for a more thorough

explanation of its decision. While we agree that the postconviction court's wholesale adoption of the State's brief does not comport with recommended practice, we cannot conclude that it provides a basis for us to remand the case back to the postconviction court.

¶13 In Wisconsin, a circuit court is not prohibited from adopting a party's brief as its decision in the case, so long as the court otherwise indicates the factors on which it relied when making its decision and states those reasons on the record. *See* ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 544, 504 N.W.2d 433 (Ct. App. 1993). However, even when the circuit court's adoption of a party's brief is without such adequate explanation, we typically do not remand when the issues raised are otherwise addressed by us *de novo*. *See* ***State v. McDermott***, 2012 WI App 14, ¶9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237.

¶14 That is the case here. Two of the issues raised by Gonzalez—whether his constitutional rights against self-incrimination and to due process were violated—present issues we review *de novo*. *See* ***State v. Schaefer***, 2008 WI 25, ¶17, 308 Wis. 2d 279, 746 N.W.2d 457. And as will be seen, we also independently review the record to determine Gonzalez's third issue: whether the trial court erroneously exercised its discretion when it admitted Detective Mohr's testimony regarding Brown's statement following the attack. *See* ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. As such, there is no harm and we need not determine if the postconviction court's opinion here was otherwise sufficient. *See* ***McDermott***, 339 Wis. 2d 316, ¶9 n.2.

¶15 We noted in ***McDermott***, however, and do so again here for emphasis, that while we do not have explicit rules prohibiting the wholesale adoption of a party's brief, the following admonition from the United States Court

of Appeals for the Seventh Circuit is a good reminder on why circuit courts should avoid wholesale adoption of a party's brief:

> From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own…. Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views. Unvarnished incorporation of a brief is a practice we hope to see no more.

Id., ¶9 n.2 (citing ***DiLeo v. Ernst & Young***, 901 F.2d 624, 626 (7th Cir. 1990)) (ellipses in ***McDermott***).

¶16 For the reasons set forth above, however, we do not remand this case and instead review the issues Gonzalez raises on appeal.

II. Gonzalez's right against self-incrimination was not violated when the trial court ordered him to show his platinum teeth to the jury.

¶17 Next, Gonzalez complains that the trial court violated his right against self-incrimination when it required him to show his platinum teeth to the jury. He argues that the act of showing his teeth amounted to nonverbal conduct that contained a testimonial component, in violation of his right not to testify under the Fifth Amendment of the United States Constitution and Article I, Section 8 of the Wisconsin Constitution. We review constitutional questions, both state and federal, *de novo*. ***Schaefer***, 308 Wis. 2d 279, ¶17.

¶18 The Fifth Amendment specifically protects an individual from being "compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. As the United States Supreme Court has explained, use of the word "'witness'" in the Fifth Amendment "limits the relevant category of compelled

incriminating communications to those that are 'testimonial' in character." ***United States v. Hubbell***, 530 U.S. 27, 34 (2000).

¶19 The Fifth Amendment privilege does not protect a suspect from being compelled "to produce 'real or physical evidence.'" ***Pennsylvania v. Muniz***, 496 U.S. 582, 588-89 (1990) (citation omitted). That is, the privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." ***Schmerber v. California***, 384 U.S. 757, 764 (1966). Nor does the Fifth Amendment protect a defendant from being compelled to provide a blood sample to police. ***Hubbell***, 530 U.S. at 35.

¶20 Here, the trial court's request that Gonzalez reveal his teeth to the jury falls squarely within the category of "'real or physical evidence'" that is not protected by the Fifth Amendment. *See* ***Muniz***, 496 U.S. at 589 (citation omitted). Like a fingerprint, a photograph, or a blood sample, Gonzalez's revelation of his platinum teeth to the jury was not testimonial but merely a showing of physical evidence.

¶21 We also reject Gonzalez's argument that requiring him to show his teeth to the jury was unfair and prejudiced him because he alleges that platinum teeth are commonly associated with drug dealing and gang affiliation and cast him in a bad light. His arguments in that regard are entirely conclusory. Furthermore, Gonzalez was charged with battery while incarcerated. It was already clear to the jury that Gonzalez had a criminal history based upon his status as an inmate in the Milwaukee County Jail. Even if the jurors did associate Gonzalez's platinum teeth

with drug dealing or gang affiliation, any such association was harmless in view of Gonzalez's obvious status as a convicted person.

III. The prosecutor's remarks in rebuttal during closing statements did not improperly shift the burden of proof to the defense.

¶22 Gonzalez argues that the prosecutor's remarks in rebuttal during closing statements improperly shifted the burden of proof to the defense, and that consequently, he is entitled to a new trial. We disagree.

¶23 In his closing statement, Gonzalez's trial counsel attempted to argue that the State lacked proof against Gonzalez, stating:

> You heard some witnesses. I am going to talk about those witnesses.
>
> I am also going to mention, though, what is instructive about this case is what you have not heard and not seen.
>
> You heard testimony that there were 62 inmates in that pod back on that autumn day in 2006. 62 people.
>
> In fact, [during the State's] presentation, you saw a good number of them mill about. Some of them congregating around that cell where the ruckus occurred, and yet the only eye witness, the only people who have been produced that you have seen who actually were in that room, the only people who have been produced as witnesses, was Fred Brown and an Officer Szymborski.

In rebuttal, the prosecutor asserted:

> And the one instruction that the judge gave you, which is one of the important things in terms of the search for the truth, not engaging in speculation, you know, he has the same subpoena power that I do.
>
> I could march 61, 62, 63, how many other people on the floor, and if they have nothing to offer in terms of testimony saying, well, this is what I say, or, I don't remember, or, I don't remember, it doesn't do me any good.

> ….
>
> As I was saying, the ability to subpoena individuals, such as other inmates, who have something germane to offer, [defense counsel] has that same power, as does the State, and it doesn't do any good to call witnesses who don't want to talk, who have nothing to say.

¶24 Gonzalez alleges that the prosecutor's references to defense counsel's subpoena power improperly shifted the burden of proof to the defense because the prosecutor did not also clarify for the jury that the defense need not present any witnesses. As such, he argues that the State violated his right to due process. The State responds that the prosecutor's remarks were a reasonable response to Gonzalez's own argument, and that, even if the remarks were improper, any error was harmless because the trial court's instructions to the jury informed the jurors that the burden of proof belonged to the State and put the prosecutor's remarks into proper prospective. We agree with the State.

¶25 Gonzalez properly states that in a criminal case, the State bears the burden of proving all elements of a crime beyond a reasonable doubt. *See* ***Marquez v. Mercedes-Benz USA, LLC***, 2012 WI 57, ¶36, 341 Wis. 2d 119, 815 N.W.2d 314. However, a conviction is not to be reversed for erroneous prosecutorial remarks unless those remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Burns***, 2011 WI 22, ¶49, 332 Wis. 2d 730, 798 N.W.2d 166 (citations and quotation marks omitted). We must evaluate the prosecutor's remarks in light of the entire trial record to determine whether they denied the defendant a fair trial. ***Id.*** Whether Gonzalez's right to due process was denied is a question we decide *de novo*. *See* ***id.***, ¶23.

¶26 In ruling that the prosecutor's remarks were a reasonable response to Gonzalez's trial counsel's closing, the trial court relied on ***State v. Jaimes***, 2006 WI App 93, 292 Wis. 2d 656, 715 N.W.2d 669. In ***Jaimes***, during closing statements, the defendant's counsel questioned why the State failed to call the defendant's alleged collaborators, Octavio Velazquez and Jose Albiter. ***Id.***, ¶18. The prosecutor responded in rebuttal, as relevant here: "And if he was interested in presenting testimony exonerating him, he's got subpoena power the same way I do to ask people to come here – Mr. Velazquez and Mr. Albiter … if these guys are so critical, but, no. You know, focus on the evidence." ***Id.***, ¶¶18-19 (ellipses in ***Jaimes***).

¶27 The defendant in ***Jaimes*** argued "that the prosecutor misstated both the law and fact regarding the absence from trial of codefendants Octavio Velazquez and Jose Luis Albiter." ***Id.***, ¶25. He went on to complain "that the prosecutor made a legally false claim when stating that the State 'did not have the means to compel Albiter, Velazquez or anyone else to testify.'" ***Id.***

¶28 We noted that the defendant misstated the record, explaining that the prosecutor did not tell the jury that he lacked the ability to compel Albiter or Velazquez to testify. ***Id.***, ¶26. Rather, the "prosecutor simply stated that [the defendant] has 'got subpoena power the same way I do to ask people to come here.'" ***Id.*** We went on to explain that "[i]t has been held previously that it is not improper for a prosecutor to note that the defendant has the same subpoena powers as the government, particularly when done in response to a defendant's argument about the prosecutor's failure to call a specific witness." ***Id.*** (citations and quotations marks omitted).

¶29 In other words, the prosecutor's comments here, which were virtually identical to those in ***Jaimes*** and in response to a similar defense argument during closing statements, were proper. Gonzalez's argument that ***Jaimes*** is not on point because the defendant in that case did not raise the exact issue here—whether the prosecutor's comments improperly shifted the burden of proof—is without merit. We addressed whether such comments were proper in ***Jaimes***, and concluded they were. ***Id.***

¶30 Furthermore, even if the prosecutor's remarks were improper, when viewed in light of the entire trial, we conclude that the remarks were harmless. The jury was repeatedly instructed that Gonzalez is presumed innocent and that the State bears the burden of proving his guilt beyond a reasonable doubt. We presume that jurors follow the instructions they are given.[4] ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994).

IV. Brown's statement to Detective Mohr after the attack was admissible as a prior inconsistent statement.

¶31 Finally, Gonzalez contends that the trial court erroneously exercised its discretion when it permitted Detective Mohr to testify regarding the statement Brown made to him hours after the attack. Gonzalez argues that the testimony

[4] Gonzalez fails to respond to the State's argument that even if the prosecutor's remarks were in error, any error was harmless because the trial court properly and repeatedly instructed the jury that the State carried the burden of proof. Unrefuted arguments are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

was hearsay and was not admissible as a prior inconsistent statement under WIS. STAT. § 908.01(4)(a)1.[5] We disagree.

¶32 The admission of evidence is generally reviewed for an erroneous exercise of discretion. ***State v. Guzman***, 2001 WI App 54, ¶19, 241 Wis. 2d 310, 624 N.W.2d 717. "A [trial] court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and uses a demonstrably rational process to reach a conclusion that a reasonable judge could reach." ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶43, 319 Wis. 2d 397, 768 N.W.2d 729. We generally look for reasons to sustain the trial court's discretionary decisions. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). "Although the proper exercise of discretion contemplates that the [trial] court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." ***Randall***, 235 Wis. 2d 1, ¶7.

¶33 When the State asked Detective Mohr to testify regarding Brown's statement to him following the attack, the defense objected on hearsay grounds. The trial court overruled the objection concluding: "It was his testimony with regards to information provided based on Mr. Brown's statements and prior testimony." The State argues that the trial court admitted the testimony as a prior inconsistent statement under WIS. STAT. § 908.01(4)(a)1. While the trial court's reasoning for admitting the evidence is unclear to us based on the record, we will affirm its ruling because the evidence is admissible as a prior inconsistent

[5] Sergeant Criss also testified that immediately after the attack Brown identified several of his attackers, including Gonzalez. On appeal, Gonzalez does not raise a challenge to Sergeant Criss's testimony.

statement. *See* ***Randall***, 235 Wis. 2d 1, ¶7 ("we may search the record to determine if it supports the court's discretionary decision").

¶34 WISCONSIN STAT. § 908.01(4)(a)1. provides that a prior statement by a witness is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... [i]nconsistent with the declarant's testimony." Prior inconsistent statements under this provision are not hearsay and are admissible as substantive evidence and not merely to impeach. RALPH ADAM FINE, FINE'S WISCONSIN EVIDENCE ch. 908 at 319 (2d ed. 2008); *see also* ***State v. Horenberger***, 119 Wis. 2d 237, 247, 349 N.W.2d 692 (1984). When "a witness denies recollection of a prior statement, and where the trial [court] has reason to doubt the good faith of such denial, [it] may in [its] discretion declare such testimony inconsistent and permit the prior statement's admission into evidence." ***State v. Lenarchick***, 74 Wis. 2d 425, 436, 247 N.W.2d 80 (1976).

¶35 Brown was, perhaps understandably, a very reluctant witness for the State, repeatedly stating at trial, "I don't want to be here, Man," "I don't want to do this," and "I just want to do my time." On the stand, while Brown recalled some details of the fight, he claimed he was unable to recall who attacked him. While the trial court did not explicitly find Brown's lack of recall to be in bad faith, the record amply supports such a finding. As such, Brown's statement to Detective Mohr immediately following the attack was inconsistent with his testimony that he did not recall who attacked him. To the contrary, he told Detective Mohr that the individual in cell ten with platinum teeth was one of the men who attacked him. Because Brown was a declarant, who testified at trial subject to cross-examination, and because his prior statement to Detective Mohr

was inconsistent with his testimony, Brown's statement to Detective Mohr was admissible under WIS. STAT. § 908.01(4)(a)1.

¶36 Because we conclude that Detective Mohr's testimony regarding Brown's statement was not hearsay and was admissible, we need not address whether admission of the statement was harmless. However, we note that Detective Criss, whose testimony Gonzalez does not challenge on appeal, testified that immediately after the attack Brown identified an inmate in cell ten to have been involved in the fight, and one of the correctional officers on duty at the time of the fight testified that he personally witnessed Gonzalez "stomp" on Brown while Brown was on the floor. As such, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.