

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

March 28, 1996

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

**NOTICE**

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

**No. 95-2611-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**PABLO Y. HERAS,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Jefferson County:  
JACQUELINE R. ERWIN, Judge. *Reversed and cause remanded with directions.*

SUNDBY, J. After a mistrial, the State retried the defendant-appellant Pablo Y. Heras on three counts of violating a domestic abuse restraining order, contrary to § 813.12, STATS. He appeals from a judgment of conviction entered April 21, 1994, entered on a jury verdict, convicting him on all counts. He claims that he was denied a fair trial because the trial court refused to appoint counsel for him and allowed him to proceed without counsel. He also claims that justice miscarried and this court should order a new trial in the interest of justice, pursuant to § 752.35, STATS. The State

confesses error. However, we<sup>1</sup> have an institutional responsibility to affirm a criminal conviction when we conclude that the State has erroneously conceded error. See *Rudolph v. State*, 78 Wis.2d 435, 447, 254 N.W.2d 471, 476 (1977), *cert. denied*, 435 U.S. 944 (1978). We conclude that the danger that Heras did not receive a fair trial requires that we exercise our discretion to grant him a new trial. We therefore reverse the judgment and remand for a new trial.

The State acknowledges that nothing in the record shows that Heras knew the seriousness of the charges he was facing and the penalties that might be imposed if he were found guilty. The transcript of his initial appearance shows that the complaint was not read to him. It is undisputed that Heras required an interpreter at trial. The State concedes that it would be pure speculation to conclude that because he received a copy of the complaint, Heras knew the nature and seriousness of the charges and the possible penalties. The State concludes therefore that Heras did not make a knowing, voluntary and intelligent waiver of his right to the assistance of counsel. See *Pickens v. State*, 96 Wis.2d 549, 555, 292 N.W.2d 601, 605 (1980). As the court stated in that case, "[n]either the state, nor the defendant, is in any sense served when a wrongful conviction is easily obtained as a result of an incompetent defendant's attempt to defend himself." *Id.* at 568, 292 N.W.2d at 611 (citing *Faretta v. California*, 422 U.S. 806, 839-40 (1975) (Burger, C.J., dissenting); *Carpenter v. Dane County*, 9 Wis. 249, 251 (1859)).

The State is as aware of its responsibilities to see that a criminal defendant receives a fair trial, as is this court. When the representative of the State who prosecuted the case concedes that defendant did not receive a fair trial, we will give great weight to the State's confession of error. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence...." SCR 20:3.8, *Comment*.

For these reasons, the court accepts the State's confession of error and reverses the judgment and remands this matter for a new trial. While we

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS. "We" and "our" refer to the court.

do not direct the trial court's exercise of its discretion, we agree with the State that it does not appear that Heras has sufficient knowledge of the English language and our criminal justice system to appear without counsel. If the court determines that Heras is not indigent and that the circumstances do not justify appointing counsel at county expense, the court may consider appointment of standby counsel or arrange a schedule of periodic payments which will permit Heras to retain counsel.

*By the Court.*—Judgment reversed and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.