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DISTRICT II

May 5, 2021

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

2020AP901-CR State of Wisconsin v. Gilbert R. Rodriguez (L.C. #2017CF394)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

Summary disposition orders 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).

Gilbert R. Rodriguez appeals from a judgment of the circuit court. Upon reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).[1] We affirm.

Rodriguez was charged with one count of theft of movable property of value greater than $2500 and less than $5000, as a party to the crime, and one count of obstructing an officer. *See* WIS. STAT. § 943.20(1)(a), (3)(bf); WIS. STAT. § 946.41(1). Following a jury trial, Rodriguez was convicted on both counts. On the morning of the trial, Rodriguez requested that the circuit court exclude all evidence extracted from his cell phone on the ground that some of it had been disclosed belatedly, and only days before trial, in violation of WIS. STAT. § 971.23(1). The court denied the motion, and Rodriguez challenges this ruling on appeal.

The charges against Rodriguez mainly concern brass valves reported stolen from AmeriGas, a propane supplier in Elkhorn, Wisconsin. Police had visited the house of Jason Potter, a recently fired AmeriGas employee, whose mother stated that Potter and Rodriguez had been taking apart valves and scrapping metal. At Potter's house, police found the plastic remnants of 950 valves; at Rodriguez's house, they found 1030 plastic valve remnants. Police performed a data extraction on Rodriguez's phone, in which they found messages relating to scrapping brass valves and Google searches for scrap yards. Rodriguez was charged based on this evidence, and the case proceeded to trial.

The State timely disclosed to Rodriguez the cell phone records it intended to introduce at trial, in a document labeled (at trial) Exhibit 9. A few days before trial, however, the State added

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

to Exhibit 9 by sending additional pages to defense counsel: four pages of what was now, in total, a twelve-page document.[2] The record does not indicate which four of the twelve pages were sent as part of the last-minute discovery. Rodriguez, however, requested that the circuit court exclude *all* information extracted from the phone, asserting that the State violated WIS. STAT. § 971.23 and that to admit the phone records "would be a violation of [his] constitutional right to a fair trial."

WISCONSIN STAT. § 971.23 governs the discovery procedures parties must follow during criminal proceedings. In part, the statute requires that the state disclose to the defense certain "materials and information" that are "within the possession, custody or control of the state" within a "reasonable time before trial." *See* § 971.23(1). The parties agree that where a defendant claims the state violated its discovery obligations under § 971.23, the court must determine: (1) whether the state failed to disclose information it was required to disclose under § 971.23(1); (2) whether the state had good cause for any such failure; and (3) whether the admission of the evidence was harmless. *See* ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517 (2007).

As to step one, the record indicates that the State failed to disclose required information pursuant to WIS. STAT. § 971.23. Four of the twelve pages of Exhibit 9 were not sent to defense counsel until approximately three days before trial. During trial, the State admitted, "The pages

[2] The record and briefing is confusing, and at times contradictory, both as to how many printed pages from the cell phone extraction were timely versus belatedly disclosed *and* as to whether the error Rodriguez complains of on appeal concerns only Exhibit 9 or also (or instead) cell phone extraction data that was not introduced at trial. This order interprets the record in Rodriguez's favor, meaning that we assume that the exhibit introduced at trial (Exhibit 9) contained some number of pages, likely four, that were not timely disclosed.

that are on [Exhibit 9] are either what Detective Bushey attached in the original reports that he sent up and there are … about four pages that he referenced in his report that … had not been sent up and those ones I sent to defense counsel last week." These four pages of phone records clearly fall within the breadth of the discovery statute.

The State also violated step two, as it never asserted good cause for the late discovery. When challenged on the issue pretrial, the prosecutor stated, "Detective Lambert did a full data retrieval of the defendant's phone … in 2017. I don't know why it wasn't included with the information … sent up to us."

The parties' positions diverge significantly at the third step. Rodriguez contends that admitting the totality of his messages and Google searches was not harmless error because it was the "most damning evidence." The State, citing other evidence it introduced at trial, argues that the phone records submitted last minute were inconsequential, but that this court should not reach the harmless error inquiry because "the record does not reveal what evidence (if any) was improperly admitted." In his reply brief, Rodriguez does not respond to the State's argument by pointing to any specific evidence, but instead asserts that the State must prove beyond a reasonable doubt that a rational jury would have found Rodriguez guilty absent the court's error. *See* ***State v. Rockette***, 2005 WI App 205, ¶26, 287 Wis. 2d 257, 704 N.W.2d 382.

Whether an error is harmless is a question of law that we review de novo. ***State v. Magett***, 2014 WI 67, ¶29, 355 Wis. 2d 617, 850 N.W.2d 42. An error is not harmless where it "affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial." WIS. STAT. § 805.18(2). A criminal "defendant's substantial rights remain unaffected (that is, the error was harmless) if it is clear beyond a reasonable doubt that a rational

jury would have come to the same conclusion absent the error." ***State v. Stietz***, 2017 WI 58, ¶63, 375 Wis. 2d 572, 895 N.W.2d 796.

Rodriguez is correct that the State, as the beneficiary of the error, bears the burden of proving beyond a reasonable doubt that the complained-of error did not contribute to the verdict. *See* ***Rockette***, 287 Wis. 2d 257, ¶26. As the appellant, however, Rodriguez bears the initial burden of identifying which specific evidence was belatedly disclosed. Without such allegation, a harmless error analysis becomes impossible, because many of the factors we employ require assessing the weight of the evidence allegedly admitted in violation of WIS. STAT. § 971.23. *See* ***Rockette***, 287 Wis. 2d 257, ¶26. In applying a harmless error analysis to an evidentiary ruling, we may consider, among other factors, "the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the improperly admitted evidence duplicates untainted evidence, the nature of the defense, and the nature and overall strength of the State's case." ***Id.***

We are able to discern from the record that the State introduced Rodriguez's cell phone records through Exhibit 9, a twelve-page document; that four pages of Exhibit 9 were sent to defense counsel just a few days prior to trial; and that, according to Rodriguez, "[i]ncluded in some of that [timely] discovery were text messages [and web history] allegedly recovered from [his] phone." Without more, we are unable to ascertain not only "the importance of the erroneously admitted evidence," but also "the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, [and] whether the improperly admitted evidence duplicates untainted evidence." *See* ***Rockette***, 287 Wis. 2d 257, ¶26. Weighing the importance of the evidence admitted in error is a key part of the harmless error inquiry. Here, we

cannot determine whether any four pages of Exhibit 9 are important enough that their exclusion could have produced a different verdict.

To be clear, Rodriguez's failure, on appeal, to point to specific pages in Exhibit 9 stems from the fact that the record simply does not reveal which pages are which. It appears that defense counsel did not have access to the belatedly disclosed evidence until a couple days before trial, and possibly not until the morning of trial. Therefore, it seems reasonable to us that, as counsel asserted to the circuit court, it did not have time to review the belatedly disclosed pages. But when, on the day of trial, the State asked if counsel "wanted to take time" to do so, counsel did not take up this offer. Instead, counsel insisted that all cell phone discovery be excluded; counsel also appeared to argue that the very act of not turning over the full cell phone extraction data (even those data the State did not intend to introduce) constituted a discovery violation. Thus, there is no record of which specific pages or data should be excluded, thereby preventing us from evaluating Rodriguez's claim on appeal.

That said, we note that almost every page of Exhibit 9 contains incriminating text messages, location data, and internet search history. In such case, it is unclear whether any one page or pages was important to his conviction.

We conclude that Rodriguez is not entitled to relief because we cannot identify, with specificity, which cell phone evidence was introduced in violation of WIS. STAT. § 971.23. Accordingly, we affirm.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals