STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2010AP2516 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LESHURN HUNT,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Order Denying Post-Conviction Relief, Entered in Kenosha County Circuit Court, Honorable Bruce E. Schroeder, Presiding

---

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

RANDALL E. PAULSON
Assistant State Public Defender
State Bar No. 1010266
Email: paulsonr@opd.wi.gov

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026
Email: lambk@opd.wi.gov

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805

Counsel for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

Page

SUPPLEMENTAL ARGUMENT

I. This Court's Order Correctly States That an Evidentiary Hearing Is Required When a Defendant Properly Raises a Claim That the Right to Testify Was Not Knowingly, Intelligently, and Voluntarily Waived.

A. Introduction and background.

Mr. Hunt alleges that he did not knowingly and voluntarily waive his right to testify. (Defendant-Appellant's Initial Brief, 10 (quoting post-conviction motion)). Mr. Hunt challenges his waiver of the right to testify on two grounds: (1) the circuit court's waiver colloquy was defective; and (2) the circuit court, prosecutor, and trial counsel unduly coerced and pressured Mr. Hunt into waiving his right to testify for reasons not apparent on the record. (Defendant-Appellant's Initial Brief, 18-30; Defendant-Appellant's Reply Brief, 1-3). Mr. Hunt raised both of these issues in his postconviction motion, which was denied without an evidentiary hearing. (Defendant-Appellant's Initial Brief, 10-13 (quoting postconviction motion)).

Mr. Hunt agrees with this court's order that when a defendant properly raises a claim that a waiver of the right to testify was not knowing, intelligent, and voluntary, an evidentiary hearing is required. Because Mr. Hunt properly challenged his waiver of the right to testify, an evidentiary hearing must be conducted.[1]

---

[1] In light of ***State v. Denson***, 2011 WI 70, __ Wis. 2d ___, 799 N.W.2d 831, Mr. Hunt agrees that when a defendant properly raises a claim that the right to testify was not knowingly, intelligently, and voluntarily waived, the court should first hold an evidentiary hearing, as opposed to immediately granting a new trial.

B. An evidentiary hearing must be conducted because Mr. Hunt alleged that the waiver colloquy was invalid and that he did not knowingly and voluntarily waive his right to testify.

1. An evidentiary hearing is required when a defendant properly claims that the right to testify was not knowingly, intelligently, and voluntarily waived.

In ***State v. Weed***, 2003 WI 85, ¶¶40-41, 263 Wis. 2d 434, 666 N.W.2d 485, the Wisconsin Supreme Court mandated that a circuit court should conduct an on-the-record colloquy when a defendant desires to waive the *right to testify*. ***Id.*** ¶43. The court stated that the colloquy should consist of a "basic" inquiry to ensure that "(1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel." ***Id.*** The court declined to dictate a remedy for all situations: it "conclude[d] that Weed waived her right to testify based on the record and the evidence presented at the post-conviction hearing," but "decline[d] to determine whether a post-conviction hearing would always be sufficient to ensure that a criminal defendant has waived his or her right to testify." ***Id.*** ¶47.

The issue of remedy was next addressed in ***State v. Garcia***, 2010 WI App 26, ¶4, 323 Wis. 2d 531, 779 N.W.2d 718. ***Garcia*** concluded that in the absence of a ***Weed*** colloquy, an evidentiary hearing is required at which the State carries the burden. ***Id.*** ¶¶4, 9. The court stated:

> The State offers, by way of analogy, the remedy that has been crafted to address a court's failure to engage in a colloquy with a defendant when the person waives the right to a jury trial, waives the right to counsel, or enters

> a guilty plea. Each of these events requires an on-the-record colloquy to ensure the protection of specific constitutional rights. *See* ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) (right to counsel); ***State v. Anderson***, 2002 WI 7, ¶23, 249 Wis. 2d 586, 638 N.W.2d 301 (right to trial by jury); ***State v. Bangert***, 131 Wis. 2d 246, 270-72, 389 N.W.2d 12 (1986) (waiver of multiple constitutional rights by entry of guilty or no contest plea). *When the circuit court neglects its duty to hold the appropriate colloquy*, the State carries the burden to show that the defendant's waiver was knowing and voluntary and must do so by clear and convincing evidence. If the State carries the burden, the conviction will stand; however, if it does not, the defendant is entitled to a new trial. *We agree that this procedure is appropriate when a defendant waives the right to testify at trial*. [***Id.*** ¶9 (citations omitted) (emphases added).]

Most recently, the Wisconsin Supreme Court in ***State v. Denson***, 2011 WI 70, ¶¶68, 70, ___Wis. 2d ___, 799 N.W.2d 831, held that an evidentiary hearing *must* be conducted when a defendant raises the issue of an *invalid waiver* of the *right not to testify*. ***Denson*** stated:

> …we conclude that circuit courts are not required to conduct an on-the-record colloquy to determine whether a defendant is knowingly, voluntarily, and intelligently waiving his or her right to testify. While we recommend such a colloquy as the better practice, we decline to extend the mandate pronounced in ***Weed.*** In any case, once a defendant *properly raises* in a postconviction motion the issue of an *invalid waiver* of the right not to testify, *an evidentiary hearing is an appropriate remedy* to ensure that the defendant knowingly, voluntarily, and intelligently waived his or her right not to testify.
>
> …

> …we conclude that once a defendant properly raises in a postconviction motion the issue of an *invalid waiver* of the right not to testify, the circuit court *must conduct an evidentiary hearing* to determine whether the defendant knowingly, voluntarily, and intelligently waived his or her right not to testify. The initial burden rests with the defendant to make a *prima facie* showing that he or she did not know or understand that he or she had the right not to testify. *See* ***Bangert***, 131 Wis. 2d at 274. [***Id.*** ¶¶8, 70 (emphases added).]

Explaining why an evidentiary hearing was appropriate, the court stated:

> …when there is no statute that provides for a specific remedy for an invalid waiver of a fundamental right, as is the case with *the right to testify and the right not to testify*, it may be that "the ends of justice…can be served by allowing the defendant a postconviction hearing, [and] a new trial would be inappropriate."[***Id.*** ¶69 (citing ***State v. Livingston***, 159 Wis. 2d 561, 572, 464 N.W.2d 839 (1991)) (emphasis added).]

Although ***Denson*** involved the right *not to testify*, ***Denson*** is applicable to cases involving the right *to testify*. The right *not to testify* and the right *to testify* are treated as equivalents. As ***Denson*** notes, the right to testify and the right not to testify are "corollary" to each other. ***Denson***, 2011 WI at ¶49. The United States Supreme Court has described the relationship between the right to testify and the right not to testify as follows:

> The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony.… "[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'… The choice of whether to testify in one's own defense…

> is an exercise of the constitutional privilege."[***Rock v. Arkansas***, 483 U.S. 44, 52-53 (1987) (citations omitted).]

Therefore, under ***Garcia*** and ***Denson*****,** an evidentiary hearing must be held whenever a defendant properly challenges a waiver of the right to testify or the right not to testify.

2. Mr. Hunt properly claimed that he did not knowingly and voluntarily waive the right to testify.

In his postconviction motion, Mr. Hunt alleged that his waiver of the right to testify was unknowing and involuntary because the circuit court engaged in a protracted exchange that coerced Mr. Hunt into surrendering his right to testify. (Defendant-Appellant's Brief, 10-12 (quoting postconviction motion)). This violated the "simple and straightforward" colloquy mandated by ***State v. Weed***, 2003 WI 85, ¶41, 263 Wis. 2d 434, 666 N.W.2d 485. *See also*, Wis. JI—Criminal SM-28 (2005).[2]

---

[2] The Wisconsin Criminal Jury Instructions Committee has suggested a "simple and straightforward" colloquy, within the meaning of ***Weed***, that covers both situations—when the defendant elects to testify or elects not to testify. Wis. JI—Criminal SM-28 states:

> [To the defendant]: Do you understand that you have a constitutional right to testify?; And do you understand that you have a constitutional right *not* to testify?; Do you understand that the decision whether to testify is for you to make?; Has anyone made any threats or promises to you to influence your decision?; Have you discussed your decision whether or not to testify with your lawyer?; Have you made a decision?; What is that decision?

Under ***Garcia*** and ***Denson*****,** because Mr. Hunt properly alleged that the circuit court conducted an invalid waiver colloquy and that he did not knowingly or voluntarily waive his right to testify, Mr. Hunt is entitled to an evidentiary hearing.

C. In addition to ***Denson*** and ***Weed***, an evidentiary hearing is warranted by analogy to plea withdrawal case law.

Although there does not appear to be published law addressing a situation similar to Mr. Hunt's, an analogy can be made to cases involving plea withdrawal. This analogy finds support in ***Denson's*** and ***Garcia's*** reference to ***Bangert***. ***Denson***, 2011 WI 70, ¶¶68, 70, ___Wis. 2d ___, 799 N.W.2d 831; ***Garcia***, 2010 WI App 26, ¶9, 323 Wis. 2d 531, 779 N.W.2d 718.

Two routes exist to withdraw a plea. ***State v. Howell***, 2007 WI 75, ¶24, 301 Wis. 2d 350, 734 N.W.2d 48. A defendant can allege that the circuit court conducted a defective plea colloquy and that he or she did not know or understand the information that should have been provided at the plea colloquy. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

> [To defense counsel]: Have you had sufficient opportunity to thoroughly discuss this case and the decision whether to testify with the defendant? Are you satisfied that the defendant is making the decision knowingly, intelligently, and voluntarily? [Wis. JI—Criminal SM-28.]

This inquiry contrasts sharply with that administered to Mr. Hunt. *See* (Defendant-Appellant's Brief, 4-9).

Conversely, a defendant can concede the plea colloquy was proper, but seek plea withdrawal for reasons not apparent from the record. *See e.g.* ***State v. Bentley***, 201 Wis. 2d 303, 307, 548 N.W.2d 50 (1996) (defendant alleged that his plea was not voluntary or informed because his trial counsel erroneously advised him of his minimum parole eligibility); ***State v. Basley***, 2006 WI App 253, ¶9, 298 Wis. 2d 232, 726 N.W.2d 671 (defendant alleged that his plea was coerced because his trial counsel threatened to withdraw from representation if the defendant did not agree to accept the State's plea offer).[3]

Mr. Hunt's claim that he did not waive his right to testify knowingly and voluntarily is analogous to plea withdrawal. First, as discussed above, the waiver colloquy far exceeds the permissible scope of inquiry under ***Weed***, requiring an evidentiary hearing, as in ***Bangert***. Second, even if Mr. Hunt is not afforded a ***Weed/Denson/Bangert*** type hearing, he is entitled to a ***Bentley/Nelson*** hearing. *See* ***Howell*****,** 2007 WI 75 at ¶73. Just as Mr. Howell presented both ***Bangert*** and ***Bentley/Nelson*** claims, Mr. Hunt's claims include allegations that are analogous to both types of claims.

Mr. Hunt is entitled to a ***Bentley/Nelson*** hearing because he supports his claims with post-conviction allegations not apparent from the record. *See* ***Basley***, 2006 WI App at ¶15. In his postconviction motion, Mr. Hunt argues that a combination of judicial error, prosecutorial tactics, and his trial counsel's performance rendered his waiver of the right to testify unknowing and involuntary. (Defendant-Appellant's Initial Brief, 10). Nothing in the record

---

[3] This is referred to as a ***Bentley/Nelson*** claim. *See* ***Basley***, 2006 WI App at ¶4n.1 (citing ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996) and ***State v. Nelson***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)).

definitively establishes what Mr. Hunt discussed with his trial counsel, the exact information disclosed to trial counsel, or the extent of trial counsel's investigation into the other acts evidence[4] that the prosecutor threatened to disclose to the jury if Mr. Hunt testified.

When a defendant alleges that a plea was defective for reasons not apparent on the record, an evidentiary hearing is required unless the plea withdrawal motion fails to allege "facts sufficient to entitle the [defendant] to relief, or present[s] only conclusory allegations, or if the record otherwise conclusively demonstrates that [the defendant] is not entitled to relief." ***Id.*** ¶4 (citation omitted).

In this case, the circuit court should have held an evidentiary hearing because Mr. Hunt's postconviction motion presents more than conclusory allegations that he was coerced into waiving his testimony. Mr. Hunt alleged that the series of the threats by the prosecutor and the circuit court effectively dissuaded him from testifying because he was misled as to the consequences that would result if he testified (*e.g.*, the admission of damaging other acts evidence). (Defendant-Appellant's Initial Brief, 10-12 (quoting postconviction motion)).

Mr. Hunt also properly asserted in his postconviction motion that trial counsel's ineffectiveness coerced him into waiving his right to testify. *See* ***Washington v. Strickland***, 466 U.S. 668, 687 (1984) (in order to establish ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient and prejudicial). Mr. Hunt argued

---

[4] In his previous briefs, Mr. Hunt alleges that he was threatened with the admission of a 1984 armed robbery and murder in Illinois and the disclosure that he previously had falsely claimed the police had beaten him. (Defendant-Appellant's Initial Brief, 4-8, 10-12).

that his counsel was deficient because his failure to do additional investigation rendered trial counsel unable to properly object on the record to the court's and prosecutor's onslaught of threats. Counsel's failure to investigate meant that counsel could not adequately explain to Mr. Hunt whether or not the threats held any legal merit. Mr. Hunt alleged the following:

> Mr. Hunt's desire to testify was overborne as the prosecutor kept adding possible lines of attack that could flow from his testimony…[Mr. Hunt] felt he had no real choice but to forego his testimony which, the court knew, was his entire defense.
>
> …
>
> Mr. Hunt was not able to obtain his attorney's help in this regard: defense counsel had told Mr. Hunt that he had not even read all the trial transcripts from the Waukegan case, much less had he obtained any information…and defense counsel had lacked adequate information to challenge the prosecutor when he falsely informed the court that Mr. Hunt's sister and wife had testified in Illinois, or to challenge the prosecutor's false claims that the federal courts had adjudicated adversely to Mr. Hunt his lawsuit alleging police brutality regarding his statements in this and the Waukegan case…Under the duress of these threats, Mr. Hunt changed his mind and decided against testifying.
>
> …
>
> When the threats were issued, Mr. Hunt came to believe he had been tricked, and this contributed to his decision to merely give up on his desire to testify. [Defendant-Appellant's Initial Brief, 11-12 (quoting his postconviction motion)].

Consequently, trial counsel's failure to investigate was prejudicial because it was a primary contributor to Mr. Hunt's feelings of coercion and duress, ultimately resulting in Mr. Hunt forfeiting his right to testify.

II. This Court's Order Correctly Notes That, Under ***Denson,*** Harmless Error Does Not Apply to Violations of the Right to Testify or to Not Testify.

As a threshold matter, by precluding harmless error analysis, ***Denson*** avoids having to decide whether violating the right to testify or to not testify is trial error or structural error. Trial errors occur during the presentation of the case to the jury and are subject to harmless error analysis, which requires an appellate court to examine whether there is a reasonable possibility that the error contributed to the conviction. ***State v. Grant***, 139 Wis. 2d 45, 52-53, 406 N.W.2d 744 (1987). In contrast, structural errors "defy analysis by 'harmless-error.'"***Arizona v. Fulminante***, 499 U.S. 279, 309 (1991). A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." ***State v. Ford***, 2007 WI 138, ¶42, 306 Wis. 2d 1, 742 N.W.2d 61. Such errors "infect the entire trial process and necessarily render a trial fundamentally unfair." ***Id.*** (*quoting* ***Neder v. United States***, 527 U.S. 1, 8 (1999)).

Denson found that harmless error did not apply to the case at hand. 2011 WI 70, ¶ 69 n.13, ___ Wis.2d ___, 799 N.W.2d 831. Instead, it mandated an evidentiary hearing:

> …the *harmless error rule* has *no application to this case.*… As a preliminary matter, we have concluded that a circuit court does not err by failing to engage a criminal defendant in an on-the-record colloquy regarding his or her right not to testify. More to the

> point, however, the State does not argue, and *we do not adopt*, the position that a circuit court's failure to conduct such a *colloquy is harmless*. Rather we conclude that whether or not a circuit court conducts an on-the-record colloquy, once a defendant properly raises in a postconviction motion the issue of an invalid waiver of the right not to testify, *the circuit court must conduct an evidentiary hearing* to determine whether the defendant knowingly, intelligently, and voluntarily waived his or her right not to testify.

Id. (emphases added).

While other cases suggest that harmless error applies in this area, they are distinguishable from Mr. Hunt's case, and do not conclusively establish that harmless error applies categorically. *See* (Defendant-Appellant's Reply Brief, 3-5.)

For instance, in ***State v. Flynn***, 190 Wis. 2d 31, 51-58, 527 N.W.2d 343 (Ct. App. 1994), the court discussed harmless error and the right to testify in the context of an ineffective assistance of counsel claim. In ***Flynn***, the defendant alleged his trial counsel was ineffective because trial counsel threatened to withdraw from the case if the defendant testified. ***Id.*** at 49-50. In analyzing ineffective assistance of counsel, the court stated that it was discussing harmless error "only to determine whether it is appropriate to apply the 'prejudice' component of ***Strickland*** in cases where a defendant claims that trial counsel prevented the defendant from testifying at trial." ***Id.*** at 51n.7, 52-54. In doing so, ***Flynn*** noted that applying ***Strickland*** does not automatically imply that an error is a trial error. The court stated, "even certain *structural defects* in the trial mechanism are subject to ***Strickland's*** prejudice prong if those defects were caused by defense counsel… even though a harmless error analysis

would not be appropriate…" ***Id.*** at 56 (emphasis added) (citations omitted).

Nonetheless, ***Flynn*** appears to conclude—albeit erroneously—that violating the right to testify is a trial error:

> Although some constitutional errors that are structural defects—total deprivation of the right to counsel, trial by a biased judge, deprivation of the defendant's right to self-representation—have been held to so vitiate the jury-trial right that no harmless-error analysis is appropriate, ***ibid.***, contrary to what the Dissent argues, the harmless-error analysis does apply to the deprivation of a defendant's right to testify, *see* ***Crane v. Kentucky***, 476 U.S. 683, 691 (1986) (exclusion of defendant's attempted explanation of the circumstances of an alleged confession subject to harmless-error analysis); ***Ortega v. O'Leary***, 843 F.2d 258, 262 (7th Cir. 1988), *cert. denied*, 488 U.S. 841; *cf.* ***Nix v. Whiteside***, 475 U.S. 157 (1986) (trial counsel not deficient, and defendant not prejudiced by counsel's refusal to sanction perjured testimony by defendant). [***Id***. at 56.]

Flynn's reliance on the cases cited above is misplaced. ***Ortega*** and ***Nix*** are distinguishable—both are federal habeas corpus claims, not cases on direct appeal. *See,* (Defendant-Appellant's Brief, 3-5.) As ***Ortega*** notes: "[i]ndeed were this issue before us on direct review of a federal criminal case another outcome might obtain." 843 F.2d at 263.

Crane is also distinguishable. 476 U.S. 683, 691 (1986). Prior to trial, the defendant's motion to suppress his confession on the grounds that it was impermissibly coerced was denied. ***Id.*** at 684-85. Additionally, prior to the presentation of the evidence to the jury, the prosecutor moved *in limine* to prevent the defense from introducing *any* testimony bearing on the circumstances under which the

confession was obtained. ***Id.*** at 685-86 (emphasis added). The court granted the motion, holding that the defense could inquire into inconsistencies, but not develop any evidence about the duration of the interrogation or the individuals who were in attendance. ***Id.*** at 686. After the ruling, the defendant made an extensive record of the evidence he would have put before the jury. ***Id.*** Ultimately, the court held the "blanket exclusion of the proffered testimony about the circumstances of the petitioner's confession deprived him of a fair trial." ***Id.*** at 690.

Crane permitted the state court, on remand, to consider whether the erroneous exclusion of evidence was harmless. ***Id.*** at 691. However, the issue was a violation of the right to present a complete defense, not the defendant's right to testify.[5] The Court did not distinguish between the preclusion of the defendant's testimony and the preclusion of the police officer's testimony. The Court referred to the "blanket exclusion of the proffered testimony *about the circumstances* of petitioner's confession," not the petitioner's testimony. ***Id.*** at 690 (emphasis added). Moreover, there is no evidence that the defendant was completely precluded from testifying. Rather, it appears the defendant was only precluded from testifying as to the circumstances of his confession.

If the right to counsel is structural error not subjected to harmless error analysis, the right to testify should not be subjected to harmless error analysis. The right of an accused "to present his own version of events in his own words" is "[e]ven more fundamental to a personal defense than the right

---

[5] ***Crane*** was decided in 1986. The right to testify was not determined to be a fundamental right until the following year. ***Rock v. Arkansas***, 483 U.S. 44 (1987).

of self-representation..." ***Rock v. Arkansas***, 483 U.S. 44, 52 (1987). "[T]he right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others." ***McKaskle v. Wiggins****,* 465 U.S. 168, 177 (1984).

In sum, Mr. Hunt is aware of no authority that conclusively establishes that violating the right to testify or not to testify is structural error or trial error. In the meantime, ***Denson*** makes no provision for harmless error, but mandates an evidentiary hearing.

CONCLUSION

Mr. Hunt respectfully requests that this court reverse the judgment of conviction and order denying postconviction relief, and remand this case for an evidentiary hearing.

Dated this 31st day of August, 2011.

Respectfully submitted,

_____
RANDALL E. PAULSON
Assistant State Public Defender
State Bar No. 1010266
Email: paulsonr@opd.wi.gov

_____
KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026
Email: lambk@opd.wi.gov

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805

Counsel for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,383 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 31st day of August, 2011.

Signed:

_____

RANDALL E. PAULSON
Assistant State Public Defender
State Bar No. 1010266

_____

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805

Counsel for Defendant-Appellant