STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2012AP2513-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAPHFEAL LYFOLD MYRICK,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
REBECCA F. DALLET, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this case involves only the application of settled law to the facts of this case.

ARGUMENT

I. THE STATUTE THAT EXCLUDES EVIDENCE OF STATEMENTS MADE IN CONNECTION WITH AN OFFER TO PLEAD GUILTY OR NO CONTEST IS NOT APPLICABLE IN THIS CASE.

A. Myrick Did Not Make Any Offer To Plead Guilty Or No Contest To Which The Statements He Sought To Exclude Could Have Been Connected.

Wisconsin Statute § 904.10 (2011-12) is not applicable in this case.

That statute provides in relevant part that "[e]vidence of statements made in court or to the prosecuting attorney in connection with" "an offer to the court or prosecuting attorney to plead guilty or no contest to . . . any . . . crime . . . is not admissible . . . against the person who made the . . . offer." Wis. Stat. § 904.10.

Although the defendant-appellant, Raphfeal Lyfold Myrick, made statements in court which were arguably related to a letter written by the prosecutor, those statements were not related to any offer to the court or prosecuting attorney to plead guilty or no contest.

Under the terms of the letter written by Assistant District Attorney Mark Williams, Myrick would make statements to the police and give testimony in court in cases involving his codefendant, Justin Winston (12:1, A-Ap. 130). But nothing in the letter would require Myrick to enter any plea of guilty or no contest to any criminal charges.

To the contrary, the letter advises that in return for Myrick's statements and testimony the state would be

willing to reduce the charge against Myrick to felony murder and to recommend a term of twelve to thirteen years of initial confinement (12:1, A-Ap. 130). But no such offer was actually conveyed to Myrick by Williams's letter. Rather, the letter stated that this offer could be conveyed to Myrick to settle the case short of a trial at the discretion of the district attorney's office only after Myrick had made the statements and given the testimony desired by the state (12:2, A-Ap. 131).

Thus, Williams's letter was not a plea negotiation. A plea negotiation obviously requires negation for a plea. *State v. Nicholson*, 187 Wis. 2d 688, 697-98, 523 N.W.2d 573 (Ct. App. 1994). Here, the letter contemplated statements and testimony, but no plea, by Myrick in exchange for the mere possibility that there might be a plea offer and plea negotiations later if Myrick cooperated fully with all the terms of the letter.

Section 904.10 does not apply to negotiations that are not for a plea. *Nicholson*, 187 Wis. 2d at 698.

Besides, there was no offer to the court or to the prosecuting attorney by Myrick. Rather, William's letter contained an offer by the prosecutor to Myrick. Section 904.10 applies to offers made to the prosecutor, not offers made by the prosecutor.

Furthermore, this section bars evidence of statements made by the person who made the offer. In this case that was not Myrick. No statements of his were barred from evidence by this statute.

Finally, there is no evidence in the record before this court that Myrick ever accepted the non-plea offer made by the prosecutor. The letter states that Myrick and his attorney should sign the letter if they agreed to abide by its terms, but neither signature appears on the letter in the record (12:2).

Admittedly, the prosecutor asserted in argument that Myrick testified at Winston's preliminary hearing in response to the state's sentence recommendation on a reduced charge to which Myrick was willing to plead guilty (69:43). The prosecutor also asserted that the transcript of the preliminary hearing indicated there was a plea agreement (69:48-50).

But these assertions appear to be contrary to, not only the express terms of the prosecutor's letter, but also to the prosecutor's express position that Myrick's testimony had nothing to do with the letter, which did not offer any guarantees for that testimony (62:4-5). These contradictions were never explained.

In any event, whatever the explanation, assertions by an attorney are not evidence. *State v. Jeannie M.P.*, 2005 WI App 183, ¶ 15 n.4, 286 Wis. 2d 721, 703 N.W.2d 694; *State v. Eugenio*, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997), *aff'd,* 219 Wis. 2d 391, 579 N.W.2d 642 (1998); *Merco Distrib. Corp. v. O & R Engines, Inc.*, 71 Wis. 2d 792, 795-96, 239 N.W.2d 97 (1976).

Since reviewing courts are limited to the record, *State v. Parker*, 2002 WI App 159, ¶ 12, 256 Wis. 2d 154, 647 N.W.2d 430; *Verex Assur., Inc. v. AABREC, Inc.*, 148 Wis. 2d 730, 734 n.1, 436 N.W.2d 876 (Ct. App. 1989), if it's not in the record it didn't happen.

Because there is no evidence in the appellate record that Myrick accepted the prosecutor's offer, there is no way it could be concluded that he agreed to plead guilty or no contest in response to that offer, much less that he offered to plead guilty or no contest.

The statements made in court by Myrick were not rendered inadmissible in evidence in any subsequent proceedings by § 904.10 because those statements were not in any sense made in relation to any offer by Myrick to plead guilty or no contest.

B. The Statements Myrick Sought To Exclude Would Not Have Been Made In Connection With An Offer To Plead Guilty Or No Contest Even If There Had Been Any Such Offer.

Even if Myrick had offered to plead guilty or no contest, the statements he made in court would not have been made in connection with any such offer.

Assuming for the sake of argument that Myrick made an offer to plead guilty or no contest, this case would be controlled by *State v. Nash*, 123 Wis. 2d 154, 366 N.W.2d 146 (Ct. App. 1985).

Under the supposed set of facts, Myrick would have offered to plead guilty or no contest under the terms of the prosecutor's letter. The prosecutor would have agreed to allow Myrick to plead guilty or no contest under those terms. Pursuant to those agreed terms, Myrick would have testified at the preliminary hearing of another defendant. The offer to plead would then have been withdrawn. With no offer to plead anymore, Myrick's case would have gone to trial. At Myrick's ensuing trial his testimony at the preliminary hearing would have been admitted into evidence against him.

Nash similarly gave testimony against other defendants at their trials pursuant to a plea agreement. *Nash*, 123 Wis. 2d at 158. After Nash withdrew his plea, his prior testimony was used against him at his trial. *Nash*, 123 Wis. 2d at 158.

Concluding that the prior testimony was admissible notwithstanding § 904.10, this court cited two federal cases that involved similar facts, i.e. the defendants testified before grand juries pursuant to plea agreements, the defendants then withdrew from the agreements before pleading guilty, and they argued that their prior testimony

could not be used against them at their trials because of the federal equivalent of § 904.10. *Nash,* 123 Wis. 2d at 159. The federal courts concluded that the prior testimony could be used against the defendants who gave it because it was not given in connection with their plea offers. *Nash*, 123 Wis. 2d at 159.

This court noted that the purpose of both the federal and state statutes is to promote the disposition of criminal cases by compromise. *Nash*, 123 Wis. 2d at 159. The evidentiary exclusion was created to allow for free and open discussions between the prosecution and defense during attempts to reach a compromise. *Nash*, 123 Wis. 2d at 159. So exclusion of testimony given after all the negotiations had been completed and the plea agreement had been finalized would not serve the purpose of the rule. *Nash*, 123 Wis. 2d at 159.

This court ruled that Nash's prior testimony, given after the plea agreement had been reached, should be admissible at his trial because the negotiations were over when he gave his testimony, and there was no more reason to promote negotiation by excluding his testimony. *Nash*, 123 Wis. 2d at 159-60.

The court added that while statements made during negotiations between the two parties should be protected, the defendant's failure to tell the truth under oath at a trial or other proceeding involving the liberty of a third person should be subject to sanction. *Nash*, 123 Wis. 2d at 160.

Myrick tries to distinguish *Nash* by pointing out that the trial court allowed the state to use Nash's testimony for impeachment rather than in its case in chief. Brief for Defendant-Appellant at 31.

But that is merely factual background of the *Nash* case that is not relevant to its legal analysis. Nothing in this court's decision suggests it was approving the admission of Nash's prior testimony because it was used only to impeach him.

Indeed, the court could not have done that because statements which are covered by § 904.10 are not admissible for any purpose, including impeachment. *State v. Mason*, 132 Wis. 2d 427, 393 N.W.2d 102 (Ct. App. 1986).

The court ruled in *Nash* that statements which are made after the conclusion of plea negations are not made in connection with an offer to plead and are therefore not covered by § 904.10. Under *Nash*, statements which are not protected by § 904.10 because they are not made in connection with an offer to plead are admissible at any phase of a subsequent trial, either as prior inconsistent statements under Wis. Stat. § 908.01(4)(a)1. (2011-12) if the defendant testifies, or as admissions by a party opponent under Wis. Stat. § 908.01(4)(b)1. whether or not the defendant testifies.

The comment in *Nash* that untruthful testimony given at a prior proceeding should be subject to sanction was not necessary to the courts conclusion, but was simply an added rationale in that case. *Nash* does not suggest that testimony which is not given in connection with an offer to plead because it is given after the conclusion of plea negotiations should be admissible at a subsequent trial only if the testimony was untruthful.

Myrick argues that the plea negotiations in his case were not completed because the prosecutor's letter contemplated that Myrick would testify at future proceedings involving Justin Winston. Brief for Defendant-Appellant at 32.

But that argument confabulates the making of a plea agreement, assuming there was one, with the execution of the terms of the agreement. While the things Myrick had to do under the terms of the assumed agreement were continuing, the assumed agreement that Myrick had to continue to do those things would have been completed.

Myrick's assertion that the prosecutor's "letter additionally contemplated that negotiations would *continue* to occur," Brief for Defendant-Appellant at 32 (emphasis in Myrick's brief), ignores the plain language of the letter.

As noted above, the letter made clear that there were no plea negations at that time, but that there might be plea negotiations in the future if the district attorney decided in his discretion that there would be (12:2, A-Ap. 131). When the letter talked in the next paragraph about what might happen "should [the parties] ultimately reach a negotiation" (12:2, A-Ap. 131), it was not referencing ongoing and continuous negotiations, but possible negotiations that had not yet commenced and would not be commenced unless the district attorney decided to commence them. "Should" in this context meant "if," which meant that any negotiations were simply hypothetical rather than actual at that point.

Assuming that Myrick ever had an express written agreement with the state which limited how the information he gave could be used against him, as he asserts, Brief for Defendant-Appellant at 32-33, any such agreement would have been nullified by Myrick's refusal to fulfill his part of the agreement by testifying against Winston. Without acknowledging any agreement, the prosecutor told the circuit court, "He chose not to be a witness. He's uncooperative, and we need a trial date" (59:2).

Since Myrick did not do what he supposedly promised, the state was not obligated to do anything it supposedly promised. Any agreement would have been abrogated by Myrick's failure to perform his part of any such agreement.

Nash is not inconsistent with *Mason*, as Myrick claims. Brief for Defendant-Appellant at 33-34. Although *Mason* states that the intent of § 904.10 is to prohibit the use for any purpose, including impeachment, of

statements made in connection with a guilty plea, *Mason*, 132 Wis. 2d at 432-33, that case does not discuss in any way what *Nash* does, i.e. the circumstances in which a statement may or may not be in connection with a plea.

That discussion was not required in *Mason* because the statement in question was made at the hearing where Mason entered his guilty plea, *Mason*, 132 Wis. 2d at 429, and was therefore a statement made in connection with a plea of guilty later withdrawn, another of the circumstances in which § 904.10 does apply.

Nor is *Nash* inconsistent with *State v. Norwood*, 2005 WI App 218, 287 Wis. 2d 679, 706 N.W.2d 683.

Norwood did not hold, as Myrick erroneously suggests, that admissions "incidental" to an offer to plead are always impossible to segregate from the offer itself. Brief for Defendant-Appellant at 27.

Rather, *Norwood* held that under the circumstances of that case, where the defendant wrote a letter to the court offering to plead guilty because he did not want other people to have to suffer for what he caused to happen, the "incriminating statements in the letter were integrally intertwined with this offer" so that the court could not "feasibly separate a defendant's expressed willingness to enter a plea agreement from his or her reasons for wanting to do so." *Norwood*, 287 Wis. 2d 679, ¶¶ 13, 20.

Norwood did not purport to include in this comment the very different situation in *Nash* where the statements used against the defendant at his trial were made after the plea negotiations had been concluded.

If *Nash* was inconsistent with either the later *Mason* case or the later *Norwood* case, the court in those cases should have identified any such inconsistency and explained the effect of any such inconsistency on the later cases. But no such discussion appears in those cases.

Assuming that Myrick made an offer to plead guilty or no contest, the use of his subsequent testimony at his own trial after any such offer fell through would have been completely consistent with the rule enunciated in *Nash*. There is nothing absurd or unreasonable about the application of that case to the supposed facts posited on this appeal.

II. THE CIRCUIT COURT WAS NOT REQUIRED TO HOLD ANY ADDITIONAL HEARING ON THE ADMISSIBILITY OF MYRICK'S STATEMENTS BECAUSE HE NEVER OBJECTED TO THEIR ADMISSION ON THE GROUNDS THAT THEY WERE INVOLUNTARY OR OBTAINED IN VIOLATION OF THE CONSTITUTION.

A circuit court is not required to hold a hearing on the admissibility of a statement of the defendant under Wis. Stat. § 971.31(3) (2011-12) unless the defendant objects to the admission of the statement because it was involuntary or obtained in violation of his constitutional rights. *State v. Monje*, 109 Wis. 2d 138, 148-49, 325 N.W.2d 695 (1982); *Pickens v. State*, 96 Wis. 2d 549, 575-76, 292 N.W.2d 601 (1980). *See Upchurch v. State*, 64 Wis. 2d 553, 558-60, 219 N.W.2d 363 (1974). An objection on statutory grounds does not require a hearing under this statute. *See Monje*, 109 Wis. 2d at 149-50.

Myrick objected to the admissibility of his prior testimony on the ground that it was inadmissible under § 904.10. Myrick never sought to suppress the statement on the ground that it was involuntary or obtained in violation of his constitutional rights (63:11). Indeed, it appears that Myrick may have expressly waived any right to a hearing on the admissibility of his statements on those grounds (68:22, 28-29).

Absent the requisite objection, no further hearing was required to determine whether Myrick's prior testimony was admissible.

III. ANY ERROR IN THE ADMISSION OF MYRICK'S PRIOR TESTIMONY WOULD HAVE BEEN HARMLESS.

An error is harmless when it appears beyond a reasonable doubt that the error did not contribute to the verdict convicting the defendant. *State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis. 2d 434, 666 N.W.2d 485; *State v. Harvey*, 2002 WI 93, ¶ 44, 254 Wis. 2d 442, 647 N.W.2d 189. There is no contribution when a rational jury would have found the defendant guilty if the error had not occurred. *Weed*, 263 Wis. 2d 434, ¶¶ 29, 32 (quoting *Neder v. United States*, 527 U.S. 1, 15, 18 (1999); *Harvey*, 254 Wis. 2d 442, ¶¶ 46, 49 (same).

Any error in admitting into evidence at Myrick's trial the testimony he had previously given at Winston's preliminary hearing would have been harmless primarily because that testimony was consistent with Myrick's defense, as articulated in his attorney's opening statement.

Counsel said that the victim, Marquise Harris, was shot and killed by Winston (64:33). Counsel said the question for the jury to decide was whether Winston had any help from Myrick (64:34).

Counsel said there was a melee the day before the shooting (64:34). Winston was going to retaliate against a person known as Coop (64:35).

Myrick went with Winston to the place where Coop lived (64:35). Winston had a Ruger pistol (64:35).

When they arrived at their destination, Winston went off by himself (64:36). A short time later Winston returned with another person who had a hood over his

head (64:36). This person was not Coop but Harris (64:36).

Winston put Harris in the back of the Tahoe he and Myrick were using and got in with Harris (64:36). Winston told Myrick to drive to an alley near 15th and Congress (64:36-37). Once there, Winston and Harris got out of the back of the vehicle (64:37).

Winston handed his pistol to Myrick and told him to shoot Harris (64:37). Myrick fired one shot, but shot wide so as not to hit Harris (64:38). Harris was not hit, but dropped down next to the rear driver's side wheel of the vehicle because he was frightened (64:38).

Winston saw that Harris was not shot, so he grabbed an assault rifle from the back seat of the vehicle and fired thirteen shots at Harris, killing him (64:39).

Winston drove away at high speed, but the vehicle was stopped by the police a few blocks away (64:40). Winston ran away while Myrick surrendered to the police (64:40).

Myrick's prior testimony, as repeated at his trial, was that he went with Winston in a black Tahoe to look for Coop (69:33, 52-53). Winston was driving (69:52).

Myrick testified that Winston, who had a 9 mm. pistol, got out of the vehicle for a while (69:33-34, 54). When Winston came back, he had someone with him who had something over his head (69:34-36). However, Myrick was able to determine that this person was not Coop (69:53). Myrick opened the back hatch of the Tahoe, and Winston and the person he had with him got into the rear storage area (69:34, 54).

Myrick got behind the wheel and at Winston's direction drove to the 4300 block of North 15th Street (69:35, 56-58). Myrick opened the back hatch of the

Tahoe, and Winston and the person he had with him got out (69:35).

Winston handed the pistol to Myrick and told him to take a shot at the victim (69:58-59). Myrick fired a shot toward the victim, but purposely pointed the gun away so he would not hit him (69:36, 60). The victim nevertheless went down because he heard a shot (69:59).

Winston grabbed an assault rifle from the back seat of the vehicle and shot the victim numerous times (69:36-37, 54).

Myrick and Winston drove down 15th Street to Keefe where they encountered a squad car (69:37). With the police in pursuit, Winston jumped out of the vehicle and ran (69:63). Myrick also got out of the vehicle but was apprehended by the police (69:63-64).

So it would seem that the prosecutor actually did Myrick a big favor by presenting his testimony in support of his defense without subjecting him to any cross-examination at his trial regarding his testimony.

CONCLUSION

It is therefore respectfully submitted that the judgment convicting Myrick of first-degree intentional homicide should be affirmed.

Dated: May 1, 2013.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,375 words.

Dated this 1st day of May, 2013.

_____
Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 1st day of May, 2013.

_____
Thomas J. Balistreri
Assistant Attorney General