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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2012AP002513CR

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

RAPHFEAL LYFOLD MYRICK Defendant-Appellant,

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE REBECCA F. DALLET PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Myrick made an offer to plead guilty or no contest; the parties had a plea agreement.

The State argues that Sec. 904.10 is not applicable in this case because there was no offer by Myrick to plead guilty or no contest. State's brief at p.2. The State additionally argues that "nothing in the letter would require Myrick to enter any plea of guilty or no contest to any criminal charges." State's brief at p.2. These arguments are without merit and should be rejected. First, both parties and the trial court recognized that a plea agreement existed between the State and Myrick. In discussing the particular sections of the preliminary hearing testimony to be related to the jury, the State expressly referred to the "plea agreement:"

MR. WILLIAMS: Where I am gonna end is 25, because then it goes into the *plea agreement* and what the plea agreement was, and that he had a *plea agreement* to testify. That is not relevant. 69:49. Italics added.

THE COURT: No, we're not getting into any *plea agreement*. 69:49. Italics added.

THE COURT: So, you really want the jury to hear that he had a *plea agreement*, negotiation to testify? 69:49. Italics added.

MR. WILLIAMS: And we would recommend 12 to 13 years and he was willing to plead guilty to the charge felony murder? 69:50.

Clearly, both the State's and the trial court's statements demonstrate a recognition that the letter constituted an agreement between the parties. The State acknowledged several times before the trial court that the parties had a "plea agreement." The State similarly acknowledged that under the "plea agreement," Myrick was willing to plead guilty to a charge of felony murder. The State's position below was not that a plea agreement or offer to plead did not exist. Rather, the State's position was that the preliminary hearing testimony "had nothing to do with" the plea agreement. 62:8. Of course, this position is contrary to the prosecutor's own express statement that Myrick "had a plea agreement to testify." 69:49. In any event, based on the State's express recognition below that the parties had a plea agreement and that as part of such plea agreement, Myrick was willing to enter a plea of guilty and testify, the State should be judicially estopped from now arguing otherwise. See **State v. Ryan**, 2012 WI 16,¶32, 338

Wis.2d 695, 809 N.W.2d 37. Judicial estoppel is intended "to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions" in different legal proceedings. **Id.** The doctrine precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position. **Id.** Such is the case here.

The State argues on appeal that the prosecutor's statements regarding the plea agreement were contrary to the express terms of the letter agreement. See State's brief at p.4. This is not so. The acknowledgements made by the prosecutor were consistent with the basic terms of the letter. In the letter, which by its own terms is noted as an "offer of resolution," the State offers to amend the charge to felony murder and recommend at sentencing a period of 12-13 years initial confinement. A-Ap.130. As consideration, the State expected Myrick's debriefing and testimony. While the letter does not specifically state that Myrick would have to enter a plea of guilty or no contest, this was implicit with the agreement. After all, how would the "offer of resolution" be effected if Myrick did not enter a plea? How would Myrick end up at the sentencing hearing pursuant to the agreement if he did not enter a plea? How would Myrick receive the benefit of the

recommendation if he did not enter a plea? The agreement between the parties clearly contemplated and involved Myrick's offer to enter a plea.

The State argues that there "is no evidence in the appellate record that Myrick accepted the prosecutor's offer." See State's brief at p.4. As previously argued, the prosecutor acknowledged that the parties had a "plea agreement." There was an offer and acceptance. Myrick maintains that he and trial counsel signed the letter agreement and returned it to the prosecutor. That the trial court record contains only an unsigned copy of the agreement (12:2) is insignificant. The record reflects that the prosecutor simply gave the trial court an unsigned copy of the letter agreement. 62:4. In extensive discussion regarding the letter, 62:4-12, the prosecutor never once disavowed the letter agreement. In fact, in speaking about the copy provided to the trial court, the prosecutor told the court that it contained the "terms of the contract" between Myrick and the State. 62:5. Moreover to the extent the State now seeks to disavow the written agreement, which the parties and trial court recognized below, the parties' conduct, as noted in the record, demonstrates the existence of an agreement whether written or not. Based on the State's offer to amend the charge to felony murder and recommend 12-13 years confinement, Myrick and his

counsel met with and gave a debriefing to the detectives. 62:5-9. This debriefing occurred on July 2, 2010, the date of the letter agreement. 4:1. In addition to Myrick, trial counsel, and the two detectives, Assistant District Attorney Williams was also present at the debriefing. 4:1. Subsequent to the debriefing and consistent with the terms of the letter agreement, Myrick then testified at Winston's preliminary hearing. 62:5-9. Such facts plainly belie the State's argument that there was no agreement or offer to plead. Similarly, it makes no sense that Myrick, in the middle of a first degree intentional murder case and with counsel, would make a full confession of his involvement absent the existence of some plea agreement. It makes no sense that Myrick would repeat such incriminatory statements under oath and in court by testifying at a co-defendant's preliminary hearing absent the existence of some plea agreement. In this regard, the situation here is vastly different from that in **State v. Nicholson**, 187 Wis.2d 688, 523 N.W.2d 573 (Ct. App. 1994) which the State cites in its brief for the proposition that the were no plea negotiations between Myrick and the State. See State's brief at p.3. In **Nicholson**, the Court dealt with the difference between statements made in plea negotiations, which it noted were inadmissible under Sec. 904.10, and statements made during

confession negotiations by an *unrepresented* defendant. **Id**. at p.697. Italics added. The State's reliance on Nicholson is flatly misplaced as **Nicholson** applies to statements made by an unrepresented defendant. Such is not the case here. Moreover, **Nicholson** provides that if an accused 1)exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and 2)the expectation was reasonable given the totality of the objective circumstances, then the discussion should be characterized as a plea negotiation. **Id**. at p.698. Such is the case here. The State filed the criminal complaint on July 30, 2009. A-Ap.101-102. At the time of the letter agreement, July 2, 2010, Myrick was therefore almost one year into his case with the entirety of such time spent in custody awaiting trial. The agreement also came after multiple (eight) pre-trial court appearances and two days of jury selection for the first trial in the case. 53:0 and 54:0. Indeed, on July 6, 2010, the parties appeared in court and advised that a resolution had been reached. 58:3. The July 2, 2010 letter memorialized the terms of the resolution. It represented a subjective expectation by Myrick to enter a plea of guilty or no contest to the specific charge of felony murder and to cooperate with the State in offering information against Winston. Given the totality of the circumstances, such an

expectation was imminently reasonable. The agreement greatly reduced Myrick's exposure to penalty. Because of the agreement reached by the parties, the trial court then discharged the jury and set the matter for a status hearing 60 days later. 58:2. Given the severity of the charge involved and the procedural posture of the case at such juncture, it is hard to imagine how the July 2, 2010 letter cannot be deemed to represent a plea agreement or manifestation of plea negotiations between the parties.

Finally, the State's arguments that Myrick did not make an offer to plead guilty or no contest, and that the July 2, 2010 letter did not constitute a plea negotiation, have been waived. If the State wanted to make an argument that there was no plea agreement, that there was no plea negotiation, or that the July 2, 2010 letter in particular did not amount to an agreement or negotiation, it should have done so before the trial court. Instead, as noted above, the State took a vastly different position; it expressly admitted the existence of a plea agreement and recognized the July 2, 2010 letter as such. Therefore, not only is the State judicially estopped from advancing the contrary positions that it now asserts on appeal, it is precluded from doing so by the waiver doctrine. Arguments raised by for the first time on appeal are generally deemed forfeited or waived. See **Tatera v. FMC**

Corp., 2010 WI 90,¶19, note 16, 328 Wis.2d 320, 786 N.W.2d 810 (2010); **Portage Daily Register v. Columbia County Sheriff's Dept.,** 2008 WI App 30,¶27, 308 Wis.2d 357, 746 N.W.2d 525.

II. Myrick did not waive his right to an evidentiary hearing under Section 971.31(3).

The State argues that Myrick may have "expressly waived" his right to challenge the voluntariness of his statements. See State's brief at p.10. The record does not support this argument. The record does not reflect any colloquy between the trial court and Myrick concerning his right to challenge the admissibility of his statements on constitutional grounds and his relinquishment of such right. The record does not reflect any express statement by Myrick that constituted a waiver or could be construed as constituting a waiver. The record simply does not reveal any "express" waiver by Myrick. Further, to the extent that the State's argument could be interpreted to urge a finding of waiver by omission or non-action, the case law do not support such a finding. A defendant can waive an objection to the admissibility of an allegedly inculpatory statement or admission by

failing to object to its admissibility but such inaction must be a deliberate trial strategy on the part of the defendant. See **Upchurch v. State**, 64 Wis.2d 553, 219 N.W.3d 363,560 (1974). The record does not reflect any inaction by Myrick that could be viewed as part of a deliberate strategy to concede the admissibility of his statements. In fact, the record shows just the opposite, that Myrick was concerned with the admissibility of the statements:

ATTORNEY KOVAC: I am concerned that under 971.31(3) which is—deals with the admissibility of statements of the defendant, it provides that the admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury unless the defendant by motion challenges the admissibility of such statement before trial. 63:11.

Finally, Myrick would note that under Section 971.31(3) he was entitled to an evidentiary hearing concerning the admissibility of his statements on any grounds not just **Miranda/Goodchild**. Section 971.31(3) provides as follows:

The admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion challenges the admissibility of such statement before trial. Wis. Stat. Sec. 971.1(3).

The statute does not provide that it is limited to only challenges related to **Miranda/Goodchild**. As such, Myrick was entitled to an evidentiary hearing outside the presence of the jury on any grounds. In this case, the most prominent basis for the challenge to the admissibility of the statements was under Section 904.10. The **Goodchild** issue was related and secondary to the challenge under Section 904.10. The voluntariness issue came about only in the context of the inducements made by the State to Myrick as part of plea negotiations. Just as there are factual issues to be determined in a pure **Miranda/Goodchild** challenge, there are factual issues to be determined in a challenge under Section 904.10. Such issues relate to what statements may have been made by a defendant, to whom, and in what context. More particularly, there are fact issues that pertain to whether the statements made by a defendant were made "in connection with" a plea or plea offer. The State's opening arguments in its brief are 1)that Myrick did not make any offer to plead guilty or no contest and 2)that Myrick's statements were not in connection with an offer to plead. See State's brief at pp.2 and 5. Myrick of course disputes these arguments. The point remains however that these are factual issues to be resolved by way of evidentiary hearing. As noted previously in this brief, **Nicholson**

provides that if an accused 1)exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and 2)the expectation was reasonable given the totality of the objective circumstances, then the discussion should be characterized as a plea negotiation. **Id**. at p.698. Whether a defendant had a subjective expectation and whether such expectation was reasonable given the totality of the circumstances, are fact-intensive inquiries. Such inquires require an evidentiary hearing. The trial court erred in making the admissibility determination under Sec. 904.10 without holding such a hearing.

III. Error in the admission of Myrick's testimony was not harmless.

To determine whether an error is harmless, this Court inquires whether the State can prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. **State v. Jorgenson**, 2008 WI 60,¶23, 310 Wis.2d 138, 754 N.W.2d 77. The State argues that any error in admitting Myrick's testimony was harmless "because that testimony was consistent with Myrick's defense, as articulated in his attorney's opening statement." State's brief at p.11. This argument ignores the reality that it

was the trial court's ruling that forced Myrick to address such evidence in his opening statement. Trial counsel specifically noted below that he restructured his opening statement to account for the trial court's decision and the inevitable admission of Myrick's testimony. 64:84. But for the trial court's decision to admit such testimony, Myrick would not have had to address such evidence in his opening statement. Indeed, the trial court's decision to admit Myrick's testimony vastly changed the evidentiary posture of the parties as well as the strength of the State's case. Without Myrick's preliminary hearing testimony, the State had a weak case. There was no eyewitness testimony. There was no statement by a co-defendant. There was no physical or biological evidence that placed Myrick at the crime scene. Without Myrick's bargained for confession, the primary evidence the State had was that Myrick was a passenger in the black Tahoe some time shortly after shooting, that ballistic tests matched the 9 mm casings found at the crime scene with the handgun that Myrick had tossed in a yard upon exiting the Tahoe, 68:42-43, and that police found a keychain in Myrick's pocket which contained the keys to the car driven by Harris. 67:40-45. Such evidence was starkly less incriminating than the statements ultimately given by Myrick as a result of his plea agreement.

Such evidence did not establish beyond a reasonable doubt that Myrick was at the crime scene, that Myrick shot or participated in the shooting of Harris, or that Myrick abducted or participated in the abduction of Harris. To the extent that such evidence did minimally link Myrick to the crime scene and to Harris, it did not link Myrick to the actual shooting of Harris. Such evidence likewise did not establish the requisite intent to kill. At the most, such evidence was probative of the fact that at some point in time, Myrick came into possession of the handgun and the keys. Such evidence was silent as to how that happened or when. The evidence allowed for the inference that Myrick came into possession of those items only after Harris was killed and that Myrick played no role in the killing. In contrast, the statements that Myrick made pursuant to the plea agreement were significantly incriminating. For the above-reasons, the State has not shown and cannot show that a rational jury would have found Myrick guilty even if the error had not occurred.

CONCLUSION

For all of the above reasons and those given in Myrick's brief-in-chief, Myrick respectfully contends that the trial court erred and requests that this

Court vacate the judgment of conviction and sentence and/or remand the case to the trial court for a new trial.

Dated this _____day of May 2013.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 2840 words.

Dated this _____day of May 2013.

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CERTIFICATION 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 s. 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 upon all opposing parties.

Dated this ____day of May 2013

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