STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP467-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDDIE LEE ANTHONY,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, AFFIRMING A JUDGMENT AND ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD J. SANKOVITZ PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

MARGUERITE M. MOELLER
Assistant Attorney General
State Bar #1017389

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 266-9594 (Fax)
moellermm@doj.state.wi.us

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ISSUES PRESENTED FOR REVIEW

1. Despite being fundamental, some constitutional rights may be forfeited by a defendant's conduct. Here, after the trial court ruled that evidence of Anthony's wrongful conviction for a 1966 armed robbery conviction was irrelevant and that Anthony could not mention it while testifying, Anthony repeatedly said he would not comply with the trial court's ruling. Although the trial court painstakingly explained that the evidence Anthony wanted to present was inadmissible and would prejudice him, Anthony threatened that he would have to be carried from the courtroom if he were not allowed to

testify as he wanted. Did Anthony forfeit his right to testify?

The trial court said yes and barred Anthony from testifying.

The court of appeals did not decide the issue.

2. Alternatively, is the violation of the right to testify a structural error that is not subject to harmless-error review?

The trial court did not address this question.

In finding that any error was harmless, the court of appeals implicitly decided that violation of the right to testify is not a structural error.

3. Assuming that violation of the right to testify is not a structural error, was any error in barring Anthony from testifying harmless?

The trial court did not address this question.

The court of appeals said yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, both oral argument and publication of the court's opinion are warranted.

SUPPLEMENTAL STATEMENT OF FACTS

Facts additional to those presented in Anthony's brief will be set forth where necessary in the Argument.

ARGUMENT

I. ANTHONY FORFEITED THE RIGHT TO TESTIFY BY REPEATEDLY INSISTING THAT HE WOULD VIOLATE THE TRIAL COURT'S RULING BARRING EVIDENCE OF HIS WRONGFUL CONVICTION AND THREATENING THAT HE WOULD HAVE TO BE CARRIED FROM THE COURTROOM IF HE COULD NOT TESTIFY AS HE WISHED.

A. General principles regarding forfeiture of constitutional rights.

The United States Supreme Court has never addressed the issue whether a criminal defendant through misconduct may forfeit the right to testify. The Court has, however, held that a defendant's constitutional right to be present during all material stages of his trial may be forfeited if the defendant conducts himself "in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Given that forfeiture of the right to testify inheres in forfeiture of the right to be present, logically the Court would apply forfeiture doctrine to a criminal defendant's right to testify as well.

Likewise, this court and the court of appeals have held that a defendant through his manipulative or disruptive conduct may forfeit constitutional rights, including the right to counsel, *State v. Cummings*, 199 Wis. 2d 721, 752-57, 546 N.W.2d 406 (1996), and the right to confront the witnesses against him. *State v. Rodriguez*, 2007 WI App 252, ¶ 20, 306 Wis. 2d 129, 743 N.W.2d 460. As the court of appeals recently observed, "a defendant in a criminal case may lose fundamental rights

(such as the right to appear at the trial and confront the accusers) when the defendant forfeits those rights by interfering with the ability of the trial court to protect those rights." *State v. Vaughn*, 2012 WI App 129, ¶ 26, 344 Wis. 2d 764, 823 N.W.2d 543 (citations omitted).

Whether a defendant forfeited a constitutional right through his misconduct presents a question of constitutional fact that this court reviews de novo.[1] *See Cummings*, 199 Wis. 2d at 758-59.

As the State will show below, Anthony forfeited his right to testify by repeatedly insisting that he would not comply with the trial court's evidentiary rulings and by threatening that he would have to be physically removed from the courtroom if he did not get his way.

B. Anthony's behavior and body language caused the trial court to reasonably fear that Anthony might become violent were the court to enforce its evidentiary ruling during his testimony.

In accusing the trial court of violating his right to testify, Anthony downplays the seriousness of his misconduct, describing his behavior as "exhibiting mere agitation and stating his intention to mention something irrelevant in the context of presenting otherwise relevant defense testimony." Anthony's brief at 19.

Contrary to Anthony's characterization of his behavior as fairly innocuous, the trial transcript and the lower court's post-trial findings of fact tell another story.

[1] Because the court of appeals declined to decide whether Anthony forfeited the right to testify (*see* A-Ap. A:¶ 16), it is the trial court's forfeiture ruling that is subject to review.

After the court advised Anthony that he should answer "two" when asked how many convictions he had (66:27), Anthony indicated that he planned to tell the jury about an allegedly wrongful conviction for a 1966 crime that netted him twelve years in prison:

> [I]n 1966 I was convicted of an armed robbery of a white man. I was only 19 and I was innocent. I stayed like 12 mother-fucking years for something I didn't do. I'm going to tell it to the jury.

(*id.*:27-28).

The court told Anthony that the conviction was irrelevant, but Anthony insisted he had a right to bring it up (*id.*:28). After expressing sympathy for what had happened to Anthony, the court explained that "whether you were wrongfully accused and convicted or not doesn't make any difference" (*id.*). Anthony continued to insist that he could tell the jury whatever he wanted:

> I think to my benefit for them to know the truth, the whole truth. . . I talk to the jury. I know how to get to them without Anpu Aungk[2] so I don't care. I want to bring everything out. I'm serious. . . I'm telling them that, too. I want to bring everything out.

(66:28-29) (footnote omitted).

Anthony then went off on a rambling tangent (*see* 66:29), causing the court to twice implore him to "stop for a second" (*id.*:30). The court encouraged Anthony to "take a deep breath and calm down" (*id.*). The court started to explain that if Anthony were to "go into detail about the armed robbery" he claimed to be wrongly convicted of, the court would cut him off (*id.*). Anthony retorted:

> Cut me off. They judge of the facts. That's a fact that happened that's true. I'm going to keep

[2] Anthony explained that "Anpu Aungk" is "my Egyptian protector, the high priest" (66:29).

> saying it. *You got to carry me out of here.* I'm going to say it, Your Honor. . . I have a right to say that the police come up there and close my mouth up. . . .

(66:30) (emphasis added).

The court warned Anthony that if he went into detail about the armed robbery, "I'm directing you to stop talking and if you don't stop talking I will take you off the stand" (66:31). Anthony replied, "Okay, all right"; the court reiterated that "[i]f you go into that[,] that's the end of your testimony. I'll find you've blatantly violated my rule . . . and they will take you off the stand. That will be the end of it" (*id.*).

After an additional colloquy between the court and Anthony (66:31-33), the court again advised him that if he started talking about the armed robbery while on the stand, the court would remove him and that would end his chance to tell his side of the story (*id.*:33). There was then a four-to-five-minute break during which Anthony conferred with trial counsel (*id.*). After this break, the following colloquy occurred:

> THE COURT: . . . If you take the stand you're going to avoid the armed robbery issue from the sixties?
>
> THE DEFENDANT: I can't avoid it.
>
> THE COURT: Then I'm going to order you right now you can't take the stand.
>
> THE DEFENDANT: Okay.
>
> THE COURT: I could put you on the stand but if you went into that, I try to cut off that line of questioning I'd have a difficult situation for two reasons.
>
> THE DEFENDANT: I understand.

(66:33-34.)

The court painstakingly explained the ways in which Anthony would hurt his cause by flouting the court's order (66:34). Defense counsel then provided an offer of proof regarding the testimony Anthony would have given had he been permitted to testify (*id.*:35-37). The court interrupted counsel's recitation:

> I just want to find out what he's going to say on the stand. I want to be clear from Mr. Anthony what he's giving up if he decides he's going to tell the jury about the armed robbery, his wrongful conviction.

(66:37.)

Shortly thereafter, the court asked if Anthony planned to "take the stand and tell the jury about this matter which I said you can't talk about" (66:38). Anthony replied that he wanted the jury "to know everything I can remember all the way back to when I was five years old" (*id.*). The court again explained that he could not do so and that it was excluding testimony regarding Anthony "being convicted of armed robbery, wrongfully serving time in prison" (*id.*). The court unambiguously cautioned him that "[i]f you're telling me right now you're going to break my rule I'm not even going to let you take the stand" and asked if Anthony understood (*id.*). Anthony said he did, at which point the court inquired "What's your decision? Are you going to talk about that or not?" (*id.*). Anthony replied "I got to do it," prompting the court to order that he could not testify because he said he was going to break the court's rules (*id.*).

Anthony then launched into what can only be described as a stream-of-consciousness narrative (66:39-40). Speaking of his life experiences since the age of five, Anthony told the court, "I want the jury to know that. I want them to know everything" (*id.*:40).

Exhibiting tremendous patience, the court told Anthony that its ruling was not based on respect for the court but rather on its concern that the jury's decision would be made more difficult by injecting irrelevant matters into the trial (66:41). The court told Anthony that if it were required to enforce its ruling during his testimony, "it is going to put you in a very, very, very poor light in front of this jury" (*id.*). Giving Anthony yet another chance, the court inquired if he had changed his mind (*id.*:42). He replied, "I can't, Your Honor" (*id.*). The court then thoroughly explained the ramifications of Anthony's decision (*id.*:43) and engaged him in a colloquy to make sure nobody had pressured him into insisting on telling the jury about his Illinois conviction (*id.*:44).

The court concluded by making sure Anthony understood the consequences of his decision:

> So you understand what you've now decided is because you want to break my rule I'm not going to let you do that, you're giving up your chance to tell your side of the story to the jury. Do you understand that?

(66:45.) Anthony confirmed that he did understand (*id.*).

The court expressed its concern that allowing Anthony to testify about what happened to him in the sixties would interfere with the jury's ability to get at the truth (66:46). The court remarked that if Anthony tried to get the evidence in, "he's forfeited his right to testify" (*id.*).

In its written decision denying Anthony's postconviction motion, the trial court recalled the tense atmosphere surrounding Anthony's insistence that he be allowed to tell the jury about his 1966 conviction:

> Mr. Anthony became quite agitated about the matter, so agitated in fact that the courtroom bailiffs called for additional deputies. In short order,

> six additional deputies arrived, they handcuffed Mr. Anthony and their sergeant suggested to me that he be ordered to wear a stun belt. . . I described Mr. Anthony's demeanor for the record. I said "he was speaking very forcefully" and that "there was a good deal of anger in his voice" and that "[h]is voice was at a high pitch," and that, to me, these were signs of a disturbance about to erupt. I recall how enraged he was, how tensely coiled he became the more he insisted on telling the jury about the 1966 conviction, and how close he seemed to a breaking point. (I did not state these additional observations in so many words at the time. I was hoping not to produce another outburst.)

(46:4.) The record supports the court's recollection of its description of Anthony's demeanor (*see* 66:52).[3]

The State will show below that under the factual backdrop recounted above, the trial court correctly found that Anthony had forfeited his right to testify.

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[3] This court should dismiss out of hand Anthony's suggestion that the trial court's post-trial expressions of concern about jury security due to Anthony's behavior (46:6, 14) was a post hoc rationalization. *See* Anthony's brief at 24. The trial court explained that it purposely omitted describing the extent of Anthony's threatening behavior to avoid further provoking him (46:4).

That the court was truly concerned about Anthony's potential for violence is also reflected in its comments at sentencing:

> You're sitting there in a wheelchair with 1, 2, 3, 4, 5 extra deputies because of that once [sic] incident in my court where you couldn't contain your rage, and that's what I'm concerned about.

(68:38.)

C. The cases Anthony invokes are inapposite, while cases finding forfeiture of the right to counsel by virtue of a defendant's conduct support the trial court's decision here.

To support his claim that the trial court erred in barring him from testifying, Anthony relies on a host of cases from other jurisdictions, none of which involved a situation in which the defendant was prevented from testifying although not removed from the courtroom.

For example, in *United States v. Ward*, 598 F.3d 1054 (8th Cir. 2010), Ward was removed from the courtroom for his entire trial after refusing to heed the judge's command to stop talking to his attorney. Unlike Judge Sankovitz here, the judge in *Ward* did not personally address the defendant to see whether he wanted to testify and to explain that he could lose that right via his conduct. *Id.* at 1059. Under these circumstances, the court found a violation of Ward's constitutional right to be present at trial. *Id.* at 1060.

Likewise, in *United States v. Ives*, 504 F.2d 935 (9th Cir. 1974), *vacated on other grounds*, 421 U.S. 944 (1975), *opinion reinstated in relevant part*, 547 F.2d 1100 (9th Cir. 1976), Ives was repeatedly removed from the courtroom for behavior that admittedly was more violent and disruptive than Anthony's behavior here, e.g., he struck defense counsel in the face during a recess and attacked federal prosecutors while in the jury's presence. 504 F.2d at 943-44. Not surprisingly, the court upheld the trial court's decision to bar Ives from testifying. *Id.* at 946.[4]

[4] While Anthony applauds the *Ives* judge for making "multiple attempts to reintegrate Ives into the trial and maintain his right to testify," *see* Anthony's brief at 14, the Ninth Circuit suggested that the judge may have been overly solicitous toward Ives. *See United States v. Ives*, 504 F.2d 504, 944 n.20 ("At some point there is *(Continued on next page)*

The four state cases Anthony discusses are equally inapposite. In *Douglas v. State*, 214 P.3d 312, 321 (Alaska 2009), the defendant was removed from the courtroom on the first day of trial but allowed to testify via speaker phone. In *State v. Chapple*, 36 P.3d 1025, 1034 (Wash. 2001), the appellate court found the defendant had waived both his right to be present and his right to testify by virtue of his disruptive conduct. And in *State v. Wylie*, No. A12-0107, 2013 WL 599146, *3-4 (Minn. Ct. App. Feb. 19, 2013),[5] the defendant was in the midst of testifying when the trial court ordered him off the stand due to his repeated references to previously excluded evidence. As for *State v. Carey*, No. 12-0230, 2014 WL 3928873 (Iowa Ct. App. Aug. 13, 2014),[6] there the appellate court found that the trial court had properly removed Carey from the courtroom on the first day of trial but abused its discretion by continuing his exclusion without conducting an on-the-record colloquy to determine whether he could be returned. *Id.* at *13.

Anthony correctly observes that the conduct of the defendants in the above cases was more disruptive than his conduct during trial. But that does not mean – as Anthony contends – that a trial court can only bar a defendant from testifying when his conduct justifies his removal from the courtroom.

Anthony argues that only behavior justifying a defendant's removal from trial will justify barring a

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always the one extra straw that breaks the camel's back. After reviewing the record, we think that point may have been reached sooner than the judge decided it was reached in this case").

[5] Because Anthony has included a Fastcase version of *Wylie* as Appendix D to his brief, the State will not append a copy of Westlaw's version of *Wylie* to its brief.

[6] Because Anthony cites *Carey* but does not provide a copy in his brief appendix, the State has included a copy of the *Carey* decision at R-Ap. 101-12.

defendant from testifying. That argument ignores the fact that complete removal from trial is a more serious interference with a defendant's constitutional rights than barring a defendant from testifying.

As the Eighth Circuit observed in *Ward*, 598 F.3d at 1057-58, "The right to be present, which has a recognized due process component, is an essential part of the defendant's right to confront his accusers, to assist in selecting the jury and conducting the defense, and to appear before the jurors who will decide his guilt or innocence." Removing the defendant from the courtroom therefore infringes all of those other rights. In contrast, stripping a defendant of the right to testify does not infringe his right to confrontation, his right to assist in jury selection and conducting the defense (other than presenting his own testimony), or his right to appear before the jury. This is a significant difference between the two sanctions.

Also significant is the jury's awareness that the defendant has been barred from attending his own trial as opposed to its ignorance of a decision to prevent him from testifying. Whereas a jury cannot help but notice a defendant's absence from a criminal trial, a jury will not know that the defendant's failure to testify was due to a trial court ruling rather than a strategic decision. Importantly, here the jury was instructed that the fact Anthony did not testify "must not be considered by you in any way and must not influence your verdict in any matter" (67:18).

In short, there are important differences between removing a defendant from trial and preventing him from testifying. Anthony's contention that only conduct justifying the former will justify the latter ignores these differences, and this court should reject it.

While the State agrees with Anthony that there does not appear to be a case where a defendant was prevented from testifying but never removed from the

courtroom at any point in the proceedings, cases finding that a defendant relinquished his constitutional right to counsel based on conduct rather than an explicit waiver indirectly support the trial court's finding that Anthony forfeited his right to testify.

Chief among these cases is *State v. Cummings*, 199 Wis. 2d 721. There this court held that Newton[7] had forfeited his Sixth Amendment right to counsel where he continuously refused to cooperate with a succession of court-appointed attorneys, constantly complained about their performance, and never tried to contact the State Public Defender to request new counsel after his last court-appointed attorney withdrew. *Id.* at 756-59.

Similar to *Cummings*, the court in *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995), recognized that a defendant can forfeit his right to counsel under the doctrine of "'waiver by conduct,'" a concept that "combines elements of waiver and forfeiture." The *Goldberg* court explained that "[o]nce a defendant is warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel." *Id.*

Along the same lines as *Cummings* and *Goldberg* is *State v. Carruthers*, 35 S.W.3d 516, 548-49 (Tenn. 2000), where the court found that "an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings[,] . . . [and] the distinction between these two concepts is slight[.]"

If a defendant can be found to have forfeited or "waived by conduct" the right to counsel without an explicit waiver and absent any violent behavior, it logically follows that a defendant can also be found to

[7] Newton's appeal was consolidated with that of Cummings.

have forfeited his right to testify without engaging in behavior that merits removal from the courtroom. After all, the right to counsel pervades every aspect of trial and is so important that its violation amounts to structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006). In contrast, the right to testify is not as all-encompassing, and this court has held that its violation is trial error subject to harmless-error review. *State v. Nelson*, 2014 WI 70, ¶ 46, 355 Wis. 2d 722, 849 N.W.2d 317.

Although indirectly supporting the State's argument, the above cases admittedly deal with a far different scenario than the one confronting the court in Anthony's trial. More factually analogous to our case – although certainly not on all fours – is *Smith v. Green*, No. 05 Civ. 7849 (DC), 2006 WL 1997476 (S.D.N.Y. July 18, 2006).[8]

There, after receiving multiple warnings from the judge, Smith would not agree to limit his trial testimony to the charged conduct. Rather, Smith's attorney told the court that Smith wanted to testify "'for the sole purpose of discussing the verdict of the previous trial and the fact that it was unconstitutionally obtained.'" *Smith*, 2006 WL 1997476 at *11; R-Ap. 122. Finding that the state trial-court judge "had every reason to believe that Smith meant what he said and that he would not limit the scope of his testimony as instructed," the federal habeas court found that the judge had properly prevented Smith from testifying:

> The judge's decision was not "arbitrary or disproportionate" relative to the court's purpose of protecting the sanctity of the trial. *Rock* [*v. Arkansas*], 483 U.S. [44,] 56 [(1987)]. Smith's proffered testimony was irrelevant to the charges. In fact, evidence that he had already been convicted and sentenced for substantially similar conduct

[8] The State has included a copy of the decision in the appendix to its brief (R-Ap. 113-25).

> would likely have prejudiced the jury against him. Under these circumstances, including petitioner's clearly articulated purpose of continuing to disrupt the proceedings and ignore the court's instructions, it was well within the judge's discretion to prevent him from testifying. Accordingly, the court's decision did not violate Smith's Fifth Amendment rights.

(*Id.* at *11; R-Ap. 123.)

As in *Smith*, here Anthony failed to heed the trial court's numerous warnings and repeatedly insisted that he would violate the trial court's evidentiary ruling, going so far as to threaten that he would have to be carried out of the courtroom if he were not allowed to tell the jury what he wanted them to hear (66:30). While the fifth and sixth amendments guarantee a criminal defendant the right to testify at his trial, the right is not absolute. *See Rock v. Arkansas*, 483 U.S. 44, 49, 55 (1987). Rather, *Rock* teaches that limitations on a defendant's right to testify are permissible as long as they are not "arbitrary or disproportionate to the purposes which they are designed to serve." *Id.* at 55-56.

Preventing Anthony from telling the jury about his allegedly wrongful conviction in Illinois four decades earlier, even if it meant he could not give testimony to support a self-defense theory, was not arbitrary or disproportionate to the trial court's goals. Those goals were to exclude irrelevant evidence that would have worked to Anthony's detriment and to head off an expected outburst from Anthony when the court tried to enforce its rulings during his testimony.

For all these reasons, this court should find that Anthony through his misconduct forfeited the right to testify at trial. Faced with Anthony's defiant behavior, the trial court gave Anthony numerous chances to forsake his plan to violate the court's evidentiary ruling and repeatedly warned him that he would lose his right to tell his side of the story if he persisted in doing so. The trial

court was not required to let Anthony testify and gamble that he would carry out his threat of having to be removed from the courtroom were he prevented from saying whatever he wanted during his testimony.

II. *STATE V. NELSON*'S HOLDING THAT VIOLATION OF THE RIGHT TO TESTIFY IS SUBJECT TO HARMLESS-ERROR REVIEW IS NOT LIMITED TO SITUATIONS WHERE ALL OF THE DEFENDANT'S PROPOSED TESTIMONY IS IRRELEVANT.

Three weeks before granting Anthony's petition for review, this court in *Nelson*, 355 Wis. 2d 722,[9] held that the denial of a defendant's right to testify is subject to harmless-error review. *Id.*, ¶ 43. Undeterred by this holding, Anthony contends that *Nelson* is limited to situations in which a defendant wants to testify about irrelevant matters. *See* Anthony's brief at 30-32. Specifically, he perceives "a distinction between a defendant's right to testify generally, and his right to testify in his own defense" *Id.* at 5. Because he wanted to testify that he was acting in self-defense when he killed

[9] Nelson, through her new counsel, Stanford law professor Jeffrey L. Fisher, has signaled her intention to file a petition for writ of certiorari with the United States Supreme Court. According to the Supreme Court's website, Justice Kagan on September 22, 2014, granted Fisher's request to enlarge the time for filing Nelson's petition to November 13, 2014 (http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14a319.htm, last visited September 24, 2014). Nelson plans to raise the question "whether a denial of a defendant's constitutional right to testify is amenable to harmless-error review." Application for Extension of Time Within Which to File a Petition for Writ of Certiorari in *Nelson v. Wisconsin*, No. 14A319 (U.S. Sup. Ct.), at 1.

S.J.,[10] Anthony believes he can escape *Nelson*'s holding. *Nelson* notwithstanding, he claims that a violation of his right to testify is structural error[11] entitling him to automatic reversal.

For the following reasons, Anthony is wrong.

Nothing this court said in *Nelson* suggests the narrow holding that "harmless error review is only appropriate if the intended testimony is irrelevant as to all legal elements at issue," as Anthony claims. *See* Anthony's brief at 32. Rather, throughout its opinion, this court without using any qualifying language held that the denial of a defendant's right to testify is subject to harmless-error review. *See Nelson*, 355 Wis. 2d 722, ¶¶ 5, 43, 52. So while Anthony is correct that Nelson's putative testimony was irrelevant to the elements of sexual assault of a child, there is no indication this court intended to limit *Nelson*'s holding to that type of situation. This is one reason Anthony is wrong in advocating a narrow reading of *Nelson*.

Anthony is effectively arguing that the denial of the right to testify can be structural *or* trial error depending on the quality of the proposed testimony. But that is like saying that the denial of the right to self-representation may be structural or trial error depending on how skillful a job the defendant would have done in presenting his case. Neither the United States Supreme Court nor this court has ever taken that approach in deciding whether the

[10] Unlike Anthony, the State is following the court of appeals' lead and using initials to identify the homicide victim and her children.

[11] In his petition for review, Anthony raised one issue: "May a criminal defendant be stripped of his right to testify pursuant to ***Illinois v. Allen*** when his behavior is never so disruptive, obscene, or violent that he must be removed from his trial?" Petition for Review in *State v. Anthony*, 2013AP467-CR (Wis. Sup. Ct.), at iv. Although Anthony did not raise the separate issue of whether the violation of his right to testify was structural error, the State believes that issue is subsumed in the question of whether any error was harmless.

violation of a specific constitutional right is amenable to harmless-error review. Nor has Anthony cited a single case that supports his proposed dichotomy. This is a second reason Anthony is wrong in reading *Nelson* narrowly.

In arguing that *Nelson* should be confined to situations in which a defendant's proposed testimony is wholly irrelevant, Anthony confuses the initial determination of whether harmless-error analysis applies with the separate question of whether the exclusion of particular testimony is harmless or prejudicial. The relevance or irrelevance of a defendant's proposed testimony should not affect the threshold determination of whether a particular constitutional violation amounts to structural error; logically, it only factors into the harmless-error analysis. This is because the wrongful exclusion of irrelevant testimony is almost certainly harmless error, whereas the wrongful exclusion of relevant testimony is more likely prejudicial. Asserting, as Anthony does, that violation of the same constitutional right may be structural *or* trial error depending on the quality of the excluded testimony is an unwitting concession that the violation is amenable to harmless-error review. This is a third reason this court should reject his proposed narrowing of *Nelson*'s holding.

Finally, insofar as Anthony relies on language in *Luce v. United States*, 469 U.S. 38 (1984), to support his view that wrongful exclusion of a defendant's relevant testimony may be structural error, that reliance is misplaced. As Anthony acknowledges, the question in *Luce* was whether a defendant must testify to preserve the claim that the trial court erred in allowing the government to impeach him with a prior conviction. In answering yes, the Supreme Court remarked that "the appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." *Id.* at 42. Anthony takes this language as a sign that the Supreme Court would eschew harmless-error review for a violation of the right to testify. *See* Anthony's brief at 27.

But all the *Luce* Court meant was that without knowing the content of the defendant's testimony, a trial court could not logically conclude that error in allowing impeachment via a prior conviction was harmless where the erroneous ruling caused the defendant to forego testifying. In contrast to the situation in *Luce*, here Anthony's proposed testimony was made known to the trial court and court of appeals via an offer of proof.

For all of the above reasons, *Nelson*'s holding that violation of the right to testify is trial error amenable to harmless-error review applies across the board and not just to situations in which the defendant's proposed testimony is irrelevant to the elements of the charged crime. The State therefore will not address Anthony's arguments for why any error in preventing him from testifying was structural error because *Nelson* forecloses that argument. Instead, the State will show below why any error in preventing Anthony from testifying was harmless beyond a reasonable doubt.[12]

III. ANY ERROR IN PREVENTING ANTHONY FROM TESTIFYING WAS HARMLESS BEYOND A REASONABLE DOUBT.

A. General principles governing harmless-error analysis and standard of review.

For an error to be harmless, the State, as beneficiary of the error, must prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Nelson*, 355 Wis. 2d 722, ¶ 44.

[12] Needless to say, if the Supreme Court were to grant Anthony's certiorari petition in *Nelson* (*see* fn.9, *supra*) and hold that violation of the right to testify is structural error, the State's harmless-error argument would be moot.

In *State v. Norman*, 2003 WI 72, ¶ 48, 262 Wis. 2d 506, 664 N.W.2d 97, this court instructed reviewing courts to consider the following non-exhaustive factors in assessing whether an error is harmless:

> the frequency of the error, the nature of the State's case, the nature of the defense, the importance of the erroneously included or excluded evidence to the prosecution's or defense's case, the presence or absence of evidence corroborating or contradicting the erroneously included or excluded evidence, whether erroneously admitted evidence merely duplicates untainted evidence, and the overall strength of the prosecution's case.

(footnote omitted.)

More recently, this court in *Nelson*, 355 Wis. 2d 722, ¶ 46, identified the following factors as meriting consideration when deciding whether the denial of the right to testify was harmless error: 1) the importance of the defendant's testimony to the defense case; 2) the cumulative nature of the testimony; 3) the presence or absence of evidence corroborating or contradicting the defendant on material points; and 4) the overall strength of the prosecution's case (citations omitted).

Whether an error was harmless presents a question of law subject to this court's independent review. *Nelson*, 355 Wis. 2d 722, ¶ 18.

B. Given the strength of the State's case and the evidence undermining his self-defense claim, there is no reasonable probability the jury would have acquitted Anthony had he testified to killing S.J. in self-defense.

1. Because Anthony decided to forego the submission of second-degree intentional homicide, the State must show only that his testimony would not have created a reasonable probability of a not-guilty verdict.

In deciding whether any error in barring Anthony from testifying was harmless, this court must not lose sight of Anthony's decision to pursue an all-or-nothing strategy at the close of the case. This strategy was confirmed during the instructions conference, when the trial court informed counsel that out of an abundance of caution, it had included an instruction on self-defense, second-degree intentional homicide, in the packet of instructions it had prepared (67:4). The court recalled that defense counsel earlier had said Anthony's preference was to forego the submission of any lesser-included offense and inquired if that was still Anthony's position (*id.*:5). Counsel and Anthony confirmed that it was (*id.*). The court then explained to Anthony what was meant by a lesser-included crime and asked if he understood (*id.*:5-6). Anthony replied "Yes, I do" (*id.*:6). The court gave Anthony time to consult with defense counsel (*id.*:6-7), after which the court asked Anthony:

> What you want is just to have the jury choose between first-degree intentional homicide or not guilty; that would be their choice?

(67:7.) Anthony said "Yes, sir. Thank you" (*id.*).

The court then made a record on whether anyone had threatened Anthony to force him to give up his right to request a lesser-included instruction; whether defense counsel had discussed the choices available; and whether counsel thought Anthony understood them (67:7-8).

In light of Anthony's decision to adopt an all-or-nothing strategy at the close of the case, the test for harmless error is whether there is a reasonable probability Anthony would have been acquitted had he been permitted to testify. Because counsel – and Anthony personally – declined the submission of any lesser-included crime, the test for harmless error is not whether there is a reasonable probability he would have been convicted of second-degree intentional homicide, unnecessary defensive force, under Wis. Stat. §§ 940.01(2)(b) and 940.05(1)(a) had he testified. Even without Anthony's testimony, the trial court was willing to instruct the jury on this lesser offense based on testimony "about the fighting that had gone on between Mr. Anthony and [the victim] before the ultimate struggle and based on the comment that [Janet] Mayfield made about how Mr. Anthony told her that he had snapped" (67:4).

Despite the trial court's offer, Anthony made an informed decision to limit the jury's options to first-degree intentional homicide and not guilty. It was that informed decision to forego submission of any lesser-includedcrimes, rather than the court's ruling barring him from testifying, that limited the jury's options to first-degree intentional homicide and not guilty. Under these circumstances, Anthony would be judicially estopped from now arguing that the trial court's ruling prejudiced him by preventing the jury from convicting him of a less serious type of homicide. *See State v. Michels*, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987) (defendant judicially estopped from arguing evidence was insufficient to convict him of manslaughter, heat of

passion, where he requested an instruction on that offense).

Implicitly recognizing this, Anthony argues only that the exclusion of his testimony prevented him from requesting and obtaining an instruction on perfect self-defense. *See* Anthony's brief at 34-35.[13] While the State disputes Anthony's suggestion that his testimony would have merited such an instruction (*see* section III.B.2., *supra*), the State will assume for purposes of its harmless-error discussion that the trial court would have been willing to instruct the jury on perfect self-defense without also instructing on second-degree intentional homicide, unnecessary defensive force.[14] Indulging this assumption, the State will show below why there is no reasonable probability the jury would have found Anthony not guilty had he been permitted to testify.

[13] To support this argument, Anthony improperly relies on an unpublished per curiam opinion of the court of appeals, *State v. Powell*, No. 02-2918-CR (Dist. II), 2003 WL 21524810 (Wis. Ct. App. July 8, 2003). *See* Anthony's brief at 34-35. Anthony's citation to *Powell* violates Wis. Stat. § (Rule) 809.23(3)(a).

[14] This is a fanciful assumption. Had the trial court planned to give a perfect self-defense instruction, the prosecutor certainly would have sought an instruction on second-degree intentional homicide. And such a request would have been granted, given that the reasonableness of Anthony's belief that he needed to stab S.J. forty-five times was in doubt. Submission of a lesser-included offense at the prosecutor's request – even over Anthony's objection – would have been proper. *See State v. Moua*, 215 Wis. 2d 511, 519, 573 N.W.2d 202 (Ct. App. 1997); *State v. Fleming*, 181 Wis. 2d 546, 555, 559-62, 510 N.W.2d 837 (Ct. App. 1993).

2. Given the choice of convicting Anthony of first-degree intentional homicide or acquitting him, there is no reasonable probability the jury would have found him not guilty had he testified.

According to counsel's offer of proof, had Anthony been allowed to testify, he would have said that he "became fearful and afraid" in the victim's bedroom because of the physical altercation between the two of them; that he believed she had picked up a knife; and that he then used the ice pick he had brought into the room to defend himself (66:35). When the trial court asked how Anthony intended to explain "why he had to plunge the ice pick into [S.J.'s] body so many times," counsel said Anthony would testify that "he did not realize or understand that the threat had previously been terminated" (*id.*:36).

Defense counsel also represented that Anthony would testify that the reason he fled after killing S.J. was his fear of police based on his prior experiences (66:36-37).

Although Anthony now asserts that he would have testified that S.J. was a heavy crack cocaine user; had exhibited "severe aggression" on the night she died; and threatened to kill him (Anthony's brief at 8, 33), those assertions were not included in his offer of proof. Rather, those assertions first surfaced in Anthony's postconviction motion (40:4). That information therefore cannot be used to determine whether the exclusion of Anthony's testimony was harmless error. Rather, such an assertion would be relevant only to a claim of ineffective counsel for not including this information in the offer of proof. Anthony is not advancing such a claim, however.

Had Anthony provided the testimony counsel summarized during trial, there is no reasonable probability the jury would have found him not guilty. The brutal nature of the crime, Anthony's statements immediately after the murder, and other evidence belie any self-defense claim.

The victim, S.J., stood five feet, seven inches tall and weighed 139 pounds (65:39). She suffered from rheumatoid arthritis in her hands, causing them to cramp up (63:41). S.J. used a walker and sometimes had a limp (*id.*:77). The autopsy revealed she had been stabbed approximately forty-three times (65:60) and had four broken ribs (*id.*:46). Her body showed evidence of blunt force trauma as well as cutting and puncturing injuries (*id.*:40). Some of the sixteen puncture wounds to her left breast penetrated three to four inches into her body (*id.*:55). Five of the wounds caused 400 milliliters of blood to pool on the left side of her chest and 250 milliliters of blood to surround her heart (*id.*:56). A piece of metal later determined to be the tip of an ice pick was recovered from S.J.'s left shoulder (*id.*:54; 66:14-15).

Immediately after the murder, Anthony went to the home of Janet Mayfield, the mother of his fourteen-year-old son (64:19, 27). Anthony confessed to Mayfield that he had stabbed S.J. forty to fifty times because she was "messing around with the dude next door and the 'B' upstairs had something to do with it and Anubis told him to do it" (*id.*:21). Mayfield testified she thought Anubis was "[s]ome ancient Egyptian voodoo god" (*id.*:22). Anthony also told Mayfield that S.J. "had fronted him off" and "called him all kinds of names," causing him to snap (*id.*:24). He announced that he was going to return and kill the man next door and the woman upstairs (*id.*:24-25). Anthony said absolutely nothing to Mayfield about self-defense or being attacked (*id.*:25).

Sandra Rasco, the upstairs tenant Anthony told Mayfield he wanted to kill (63:36), testified that on August 18 – the day before the murder – S.J. told Rasco

that Anthony said he would take her (S.J.) to the woods and kill her (*id.*:37). S.J. said he had put an ice pick to her throat at the time (*id.*).

Rasco's daughter, Tiera Patterson Hogans, testified similarly that on the same day she was killed, S.J. said Anthony told her he would take her to the woods and kill her (63:81, 83-84).

R.J., the daughter of S.J. and Anthony (*see* 66:63), testified that while hiding in a closet, she saw Anthony enter her mother's room carrying an ice pick (*id.*:66). After that, she heard her mother yelling "'stop, please stop'" and "'I'm sorry'" (*id.*).

L.J., the victim's eighteen-year-old daughter (62:3), testified that earlier that evening Anthony told her mom that if she left out the front door, he was going to kill her (*id.*:10). While uttering this threat, Anthony had an ice pick in his hand (*id.*).

While Anthony in his offer of proof said he would testify to seeing S.J. arm herself with a knife during their altercation, none of the police witnesses testified to having found a knife at the murder scene. And when he was apprehended in Illinois hours after the murder, Anthony had no visible injuries on his body (*see* 65:18-23).

Under the third and fourth factors this court identified as relevant to the harmless-error inquiry in *Nelson*, 355 Wis. 2d 722, ¶ 46, any error in excluding Anthony's testimony was harmless beyond a reasonable doubt. The third factor – the presence or absence of evidence corroborating or contradicting the defendant on material points – weighs heavily in the State's favor. This is because evidence corroborating Anthony's self-defense claim – such as the discovery of a knife at the murder scene or any injury to Anthony – is absent. At the same time, the testimony of Sandra Rasco, Janet Mayfield, and S.J.'s daughters contradict Anthony's claim that he killed S.J. in self-defense.

Likewise, the fourth *Nelson* factor, the overall strength of the State case, dictates a harmless-error finding. The evidence recounted above illustrates that the strength of the State's case was overwhelming. It showed that Anthony killed S.J. because he thought she was consorting with another man and had called him names and "fronted him off" (64:24); self-defense had nothing to do with it.

If this court finds that the trial court violated Anthony's right to testify when it prevented him taking the stand, this court should find the error harmless beyond a reasonable doubt.

CONCLUSION

This court should affirm the decision of the court of appeals.

Dated this 7th day of October, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

MARGUERITE M. MOELLER
Assistant Attorney General
State Bar #1017389

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 266-9594 (Fax)
moellermm@doj.state.wi.us

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 7103 words.

_____
Marguerite M. Moeller
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).

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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 7th day of October, 2014.

_____
Marguerite M. Moeller
Assistant Attorney General