STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2013 AP 000467 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDDIE LEE ANTHONY,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A COURT OF APPEALS DECISION AFFIRMING JUDGMENT OF CONVICTION IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE RICHARD J. SANKOVITZ PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

Alderman Law Firm
Kimberly Alderman
State Bar #1081138
Post Office Box 2001
Madison, WI 53701
(608) 620-3529
kimberly@aldermanlawfirm.com

Attorney for Eddie Lee Anthony

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INTRODUCTION

Defendant Eddie Lee Anthony, by Attorney Kimberly Alderman, filed a brief in the Wisconsin Supreme Court ("Anthony's Brief") asking the court to overturn the court of appeals decision affirming his conviction because (1) the Circuit Court erred when it stripped Anthony of his right to testify to material facts and in his own defense because his behavior was never so disruptive, obscene, or violent as to interfere with his trial, and (2) the Circuit Court's error in denying Anthony his constitutional right to testify was not subject to harmless error review, because the excluded testimony pertained to legal elements of the charges and defense, and the error was therefore structural. The State filed a brief in opposition. Anthony herein replies.

REPLY ARGUMENT

The State argues that a criminal defendant may waive his right to testify through conduct in the same way that a defendant can implicitly waive his right to be present for his trial under ***Illinois v. Allen***. 397 U.S. 337, 90 S. Ct. 1057 (1970); (St.'s Br. at 3.) However, the State never overcomes its own admission that "there does not appear to be a[nother] case where a defendant was prevented from testifying but never removed from the courtroom." (St.'s Br. at 12.) That is because no other court has held a defendant can waive his right to testify to material facts and in his own defense when his conduct never rises to a level necessitating his removal from the courtroom.

In the many cases where a defendant is removed from a courtroom for disruptive conduct, the court attempts to allow the ejected defendant to testify in his own defense. *See, e.g.* ***Douglas v. State***, 214 P.3d

312, 315-16, (Alaska, 2009) (allowing defendant ejected from trial to testify via telephone); ***State v. Chapple***, 145 Wash.2d 310, 36 P.3d 1025, 1028 (Wash. 2001) (allowing trial counsel of an ejected defendant to present defendant's testimony from his first trial for the same crime); ***State v. Carey***, No. 12-0230 (Iowa Ct. App., filed Aug. 13, 2014) (granting defendant a new trial where, although he was properly ejected from his trial, he was not permitted the opportunity to return and indicate whether he wished to testify in his own defense.) The case law is clear that a criminal defendant's right to testify in his own defense is a separate and more protected right than his right to be present during trial.

In support of its novel argument that criminal defendants can implicitly waive their right to testimony by displaying agitation, the State relies on cases involving the forfeiture of the right to counsel. In these cases, however, the defendants were afforded the constitutional right before waiving it via conduct. ***State v. Cummings***, 546 N.W.2d 406, 199 Wis. 2nd 721 (1996); ***United States v. Goldberg***, 67 F.3d 1092, 1100 (3rd Cir. 1995); ***State v. Carruthers***, 35 S.W.3d 516, 548-49 (Tenn. 2000). It is also critical to note that all of the State's right to counsel cases involve *appointed* counsel, not the right to be represented generally.

The right to appointed counsel is a relatively new right, born of the Sixth amendment right to representation in combination with the due process clause as to funding for indigent defendants. ***Powell v. Alabama***, 287 U.S. 45, 53 S. Ct. 55 (1932); ***Gideon v. Wainwright***, 372 U.S. 335, 83 S. Ct. 792 (1963). In none of the State's cases did the court say the defendant could not be represented by *any* counsel. Rather, each defendant waived his right to have representation paid for on the taxpayer's dime because he manipulated the right to counsel to create

a delay in the proceedings. *See* ***Cummings***, 546 N.W.2d at 417; ***Goldberg***, 67 F.3d at 1100; ***Carruthers***, 35 S.W.3d at 548-49.

Unlike in the right to appointed counsel cases cited by the State, Anthony was never afforded the constitutional right which was stripped from him, nor did his behavior ever rise to the reprehensibility demonstrated by the defendants in those cases. In the State's right to appointed counsel cases, the criminal defendants never sincerely begged the court to allow them to exercise a constitutional right, as did Anthony. None of the courts denied the defendants the right entirely; rather, after warning, courts simply took away the instrument of the defendants' delay tactics – *appointed* counsel. Further, it makes no sense to use right to appointed counsel cases when there are many right to testify cases that give tailored guidance, as explored thoroughly in the opening brief.

Yet, the State offers no meaningful response to Anthony's exploration of cases where the right to testify was at issue. (Pl.'s Br. at 11); ***Douglas v. State***, 214 P.3d 312 (Alaska, 2009); ***State v. Chapple*** 145 Wash.2d 310, 36 P.3d 1025 (Wash. 2001); ***State v. Wylie***, No. A12-0107, unpublished slip opinion (Minn. App. Feb. 19, 2013; ***State v. Carey***, No. 12-0230 (Iowa Ct. App., filed Aug. 13, 2014.) The State does discuss one right to testify case, ***Smith v. Green***. No. 05 Civ. 7849 (DC), 2006 WL 1997476 (S.D.N.Y. July 18, 2006). In ***Smith***, the defendant had two outbursts in front of the jury. ***Id.*** In one such outburst, he called the judge a "dirty, lying racists [sic] fool." ***Id***. He was removed from the courtroom, but in an effort to allow him to participate in his trial, he was brought back three separate times. ***Id***. After the defendant was expelled from the trial for good, the court still brought him back to determine whether he wanted to exercise his right to

testify. ***Id.*** However, because the defendant indicated that he only wanted to testify concerning irrelevant matters – not to material facts in his own defense – the court determined that he would not be permitted to testify. ***Id***.

Smith is dissimilar to Anthony's because (1) the right to be present was never implicated in Anthony's case as it was in ***Smith***, (2) Anthony did not display anything close to the disruptive conduct of the defendant in ***Smith***, (3) the trial court in Anthony's case did not make meaningful efforts to protect the right to testify as did the court in ***Smith***, and (4) critically, the ***Smith*** defendant wished to testify to irrelevant evidence, whereas Anthony went so far as to make an offer of proof as to the relevance of his desired testimony. Additionally, by not arguing otherwise, the State concedes that Anthony's testimony was relevant to the elements at issue in the case.

To the extent that ***Smith*** informs the decision in this case, it should support a ruling in favor of Anthony, who did not act as disruptively yet was afforded a lower level of protection. Notably, in ***Smith,*** as in ***Douglas***, ***Chapple***, ***Wylie***, and ***Carey***, the right to testify to material facts remained in tact even after the right to be present was implicitly waived.

Even if a defendant could implicitly waive his right to testify to material facts without having waived his right to be present, Anthony did not display conduct egregious enough to merit a complete denial of the right to testify in his own defense. Throughout the legal proceedings for this case, Anthony never threatened physical violence, shouted abusive language, made obscene gestures, assaulted anyone, or suggested he was considering doing any of these things. (*See generally*, Trial Tr.) The State's brief, therefore, necessarily focused on Anthony's

"agitation" over the denial of his right to testify, and unjustified conjecture that the then-63-year-old, interminably respectful Anthony could hypothetically erupt. (St.'s Br. at 4-9.)

Moreover, the circuit court's rationale of Anthony's potential to be dangerous appears to have arisen *post-hoc*. (R. 66 at 34, 42.) At the time of the ruling, the circuit court focused exclusively on the protective aspect, explaining that Anthony should not be allowed to testify because it might bias the jury against him for three reasons: (1) without hearing more, the jury may think he was criminally involved in the 1966 robbery, (2) the jury may be biased against Anthony if he caused a "ruckus," and (3) the jury may be biased against Anthony if they saw behavior suggesting that Anthony is a person who "easily loses his temper or can't follow the rules other people follow." (*Id*.) The rationale as to protecting those in the courtroom was not professed until the Circuit Court issued its order denying Anthony's post-conviction motion. (R. 46 at 12-14.)

The record in this case speaks for itself, however. Anthony was adamant he wanted to testify in his own defense, but ultimately compliant and cooperative with the judge's order prohibiting him from doing so.

The State next argues that the circuit court's error is subject to harmless-error review based on this court's holding in ***State v. Nelson***. (Pl.'s Br. at 16); No. 2012AP2140-CR (Wis. Sup. Ct., July 16, 2014.) In making this argument, however, the State fails to acknowledge the vital distinction that makes ***Nelson*** inapplicable to the facts at hand. In ***Nelson***, the defendant wanted to testify as to matters wholly irrelevant to the elements of the charged crimes or any valid defense. (Pl.'s Br. at 17.) The right to testify to irrelevant evidence is not constitutionally

protected, so any error in ***Nelson*** was necessarily subject to harmless error review. In contrast, Anthony wanted to testify to relevant facts that would have presented a defense to the elements of the crimes charged.

It is worth nothing that the right to testify in one's own defense has been found more important than the right of self-representation, the denial of which the United States Supreme Court has determined is a structural error. ***Rock v. Arkansas***, 483 U.S. 44, 52, 107 S. Ct. 2704 (1987) (noting the right to testify in one's own defense is "more fundamental to a personal defense" than the right of self-representation); ***State v. Imani***, 326 Wis.2d 179, 786 N.W.2d 40 (Wis. 2010) ("an improper denial of a defendant's constitutional right to self-representation is a structural error subject to automatic reversal.") Given the facts at hand, a finding that the instant error was structural remains consistent with the ***Nelson*** holding.

Finally, as a factual matter, the circuit court's error in denying Anthony his constitutional right to testify was not harmless. The State argues that the error was harmless because Anthony chose to pursue an "all-or-nothing strategy" by not asking for an instruction on second-degree intentional homicide. (Pl.'s Br. at 21.) This argument is akin to the Arkansas Supreme Court rationale rejected by the Supreme Court in ***Rock***. ***Rock***, at 49 (*internal citations omitted*) ("any prejudice or deprivation [defendant] suffered was minimal and resulted from her own actions and not by any erroneous ruling of the court.") Anthony's strategy was to present a defense of self-defense, and this was ripped from him at the last possible moment – when the State rested. His trial counsel's attempt to cobble together what remained of the trial does not somehow justify the court's denial of Anthony's right to testify. The court's last-minute order preventing Anthony from

presenting his intended defense to first-degree intentional homicide does not somehow obligate Anthony to take a lesser-included offense instruction.

To prove that the court's error was harmless, the State is required to prove that it is "clear beyond a reasonable doubt that a rational jury would have found [Anthony] guilty absent the error." ***State v. Harvey***, 254 Wis.2d 442, ¶ 46 647 N.W.2d 189 (2002). Where Anthony was prevented from presenting *any* defense to the charges against him, it is disingenuous for the State to suggest that it has proven beyond a reasonable doubt that a rational jury would have found Anthony guilty had he been permitted to present his defense.

The State asks this Court to extend ***Allen*** to an impermissible degree, allowing trial courts to question criminal defendants individually rather than through counsel, then deprive them of any defense when their answers are difficult to understand or express frustration with the prosecutorial process. Extending the law in this manner would serve no legitimate purpose and would pervert the already eroded constitutional guarantee of the right to testify. What the trial court in this case should have done was (1) interacted with Anthony's counsel, rather than relying on Anthony's ability to meaningfully debate legal relevancy, (2) not engaged in a protective inquiry, where it was deciding for Anthony and his counsel whether it would be in Anthony's best interest to testify, (3) allowed Anthony to testify to material facts or at least explored alternatives to depriving him of his entire defense, and (4) not adapted its stated justification for the deprivation after the fact and in light of a post-conviction challenge.

As the United States Supreme Court explained in ***Rock***:

> [The right to testify] is one of the rights that are essential to due process of law in a fair adversary process… The most important witness for the defense in many criminal cases is the defendant himself… Restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve.

Rock at 51, 52, 56 (*internal citations omitted*). In the instant case, Anthony was denied this essential right, the denial was arbitrary and disproportionate to both the contemporaneous and *post hoc* rationales, and the error was structural due to the conceded relevancy of the intended testimony. The error can be neither cured nor justified now that the conviction is in place and Anthony is serving what amounts to a lifetime sentence.

CONCLUSION

Anthony respectfully requests the Court decline to extend ***Allen*** to permit "waiver by agitation" of the right to testify to material facts, overturn his conviction, and grant him a fair trial where he is afforded the opportunity to meaningfully defend himself.

Dated October __, 2014.

Respectfully submitted,

ALDERMAN LAW FIRM

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Kimberly Alderman
WI State Bar #1081138
Post Office Box 2001
Madison, WI 53701
(608) 620-3529
kimberly@aldermanlawfirm.com
Attorney for Eddie Lee Anthony

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,273 words.

_____
Kimberly L. Alderman
State Bar No. 1081138

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 __ day of October, 2014.

_____
Kimberly L. Alderman
State Bar No. 1081138