STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I
Case No. 2013AP1424-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES ELVIN LAGRONE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Richard Sankovitz Presiding, and from an Order Denying the Postconviction Motion, the Honorable Jeffrey A. Wagner Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Is an on-the-record colloquy regarding the waiver of the right to testify required at the mental responsibility phase of a bifurcated criminal proceeding?

In ***State v. Weed***, 2003 WI 85, ¶ 40, 263 Wis. 2d 434, 666 N.W.2d 485, the Wisconsin Supreme Court mandated that circuit courts conduct a personal, on-the-record colloquy when a criminal defendant waives his or her fundamental constitutional right to testify.

Here, the circuit court found that no colloquy was required at the mental responsibility phase of a bifurcated criminal proceeding. The circuit court ruled that a defendant does not have a Fifth Amendment right to testify at the mental responsibility phase.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted as this case involves an issue of substantial and continuing public interest. Counsel is unaware of any published Wisconsin case law directly addressing whether a defendant has a fundamental constitutional right to testify in the mental responsibility phase of a bifurcated criminal proceeding, and if so, whether this right can be waived in the absence of a personal, on-the-record colloquy.

While undersigned counsel anticipates the parties' briefs will sufficiently address the issue raised, the opportunity to present oral argument is welcomed if this court would find it helpful.

STATEMENT OF THE CASE AND FACTS

According to the criminal complaint, James Elvin Lagrone forced his way into his ex-girlfriend B.M.J.'s home and prevented her from leaving, choked her until she lost consciousness, grabbed and pulled on her breasts, inserted his finger into her vagina, and stuck an unknown object into her anus. When an individual came to the home to visit B.M.J., Mr. Lagrone fled the residence in B.M.J.'s car. (2).

Mr. Lagrone was charged with five counts: strangulation and suffocation, domestic abuse, contrary to Wis. Stat. § 940.235(1); false imprisonment, domestic abuse, contrary to Wis. Stat. § 940.30; second degree sexual assault, domestic abuse, contrary to Wis. Stat. § 940.225(2)(a); first degree recklessly endangering safety, domestic abuse, contrary to Wis. Stat. § 941.30(1); and operating a vehicle without the owner's consent, domestic abuse, contrary to Wis. Stat. § 943.23(3). (2).

Mr. Lagrone entered a plea of not guilty by reason of mental disease or defect. (41:11). A bifurcated criminal proceeding took place. For the first phase (the guilt phase), Mr. Lagrone pled guilty to all five counts. (48:6). The plea questionnaire noted that Mr. Lagrone was giving up his right to testify in "phase I, not for II". (21:1). However, the circuit court never personally confirmed during the plea colloquy that Mr. Lagrone understood that he had a right to testify in the mental responsibility phase.

For the second phase (the mental responsibility phase), a court trial took place, the Honorable Richard Sankovitz presiding. (49; 50; 51). The defense presented testimony from arresting officer Jeffrey Stumpf, Mr. Lagrone's social worker Alan Balcerak, and Dr. Anthony Jurek, who opined that at the time of the offense Mr.

Lagrone suffered from paranoid schizophrenia, which caused him to lack capacity to understand the wrongfulness of his behavior and rendered him unable to conform his behavior to the requirements of law. (49; 12). Mr. Lagrone did not testify on his behalf. Dr. John Pankiewicz testified for the State and opined that he could not find that at the time of the offense Mr. Lagrone lacked substantial capacity to understand the wrongfulness of his actions or conform his behavior to the requirements of the law. (51; 8). Additionally, the State provided the court with a recording of Mr. Lagrone's statements to the police. (51:19-26). The court found that Mr. Lagrone did not lack substantial capacity to understand the wrongfulness of his actions or conform his behavior to the requirements of law. (51:41-42).

At no point during the mental responsibility phase did the circuit court conduct an on-the-record colloquy regarding whether Mr. Lagrone understood his right to testify and his waiver of that right. (49; 50; 51).

On May 25, 2012, Mr. Lagrone was sentenced to 12 years (six years of initial confinement and six years of extended supervision). (52:40, 45-46; 27).

Mr. Lagrone filed a postconviction motion seeking an evidentiary hearing and an order granting a new trial on the mental responsibility phase of the bifurcated criminal proceeding. (34:1, 5). As grounds, Mr. Lagrone asserted that the circuit court erred in failing to conduct an on-the-record colloquy regarding the waiver of his right to testify at the mental responsibility phase, and that he did not understand that he had the right to testify at the mental responsibility phase. (34:1, 4).

The Honorable Jeffery A. Wagner issued an order and decision denying Mr. Lagrone's postconviction motion. (35;

App. 104-106). The circuit court's order held that Mr. Lagrone did not have a "fundamental constitutional right to testify during the mental responsibility phase..." The court then stated that "[i]n the absence of either a fundamental right or a statutory duty on the part of the court to conduct a colloquy concerning the right to testify in a Phase II proceeding, the court declines to hold an evidentiary hearing, particularly where the defendant has not set forth anything in his motion of what his testimony would have been." (35:3; App. 106).

ARGUMENT

I. An On-The-Record Colloquy Regarding the Waiver of the Right to Testify Is Required at the Mental Responsibility Phase of a Bifurcated Criminal Proceeding, and Mr. Lagrone Is Entitled to an Evidentiary Hearing.

A. Introduction and summary of argument.

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." ***Harris v. New York***, 401 U.S. 222, 225 (1971).

In ***Rock v. Arkansas***, the United States Supreme Court found that a criminal defendant's right to testify on his or her own behalf is a fundamental constitutional right. 483 U.S. 44, 52 (1987). The right is rooted in several provisions of the federal constitution, including the Fourteenth Amendment's guarantee of due process of law, and the Sixth Amendment's right to compulsory process for obtaining witnesses in the defendant's favor. ***Id***. at 51-52.

Likewise, Article I, Section 7 of the Wisconsin Constitution guarantees criminal defendants "the right to be

heard by himself" and the right "to have compulsory process to compel the attendance of witnesses in his behalf." Consistent with ***Rock***, the Wisconsin Supreme Court has "affirm[ed] that a criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶ 39, 263 Wis. 2d 434, 666 N.W.2d 485.

In ***Weed,*** the Wisconsin Supreme Court mandated that the circuit court conduct an on-the-record colloquy with the defendant in order to ensure that his or her waiver of the right to testify is knowing and voluntary. ***Id***., ¶ 40. This simple but personal colloquy was designed to ensure that (a) the defendant is aware of his or her right to testify and (b) the defendant has discussed this right with counsel. ***Id***., ¶ 43.[1] When a court fails to conduct an on-the-record colloquy, an evidentiary hearing is necessary, at which the State carries the burden to show by clear and convincing evidence that the defendant's waiver of the right to testify at trial was knowing and voluntary. ***State v. Garcia,*** 2010 WI App 26, ¶¶ 9, 14, 323 Wis. 2d 531, 779 N.W.2d 718. If the State fails to meet its burden, a new trial is required. ***Id***.

Here, Mr. Lagrone asserts that he had a constitutional right to testify at the mental responsibility phase of his criminal trial and the circuit court erred by failing to conduct an on-the-record colloquy regarding his waiver of the right to testify at the mental responsibility phase.

Whether Mr. Lagrone's constitutional right to testify at the mental responsibility phase is a fundamental right that can be waived in the absence of a personal colloquy, requires an

[1] Note: in ***State v. Denson***, 2011 WI 70, ¶ 63, 335 Wis. 2d 681, 799 N.W.2d 831, the Wisconsin Supreme Court declined to extend ***Weed*** to require a personal, on-the-record colloquy for the waiver of the right *not* to testify.

application of constitutional principals, and is thus reviewed independently. ***State v. Denson***, 2011 WI 70, ¶ 47, 335 Wis. 2d 681, 799 N.W.2d 831.

B. The fundamental right to testify attaches at the mental responsibility phase in a bifurcated trial, and an on-the-record colloquy is required.

Contrary to the circuit court's decision, the right to testify must apply to the mental responsibility phase of a bifurcated criminal proceeding.

This Court has previously held that the right against self-incrimination applies to the mental responsibility phase of a bifurcated criminal proceeding. In ***State v. Langenbach,*** the court considered whether the Fifth Amendment privilege against self-incrimination applied at the mental responsibility phase of a bifurcated criminal trial. 2001 WI App 222, ¶ 1, 247 Wis. 2d 933, 634 N.W.2d 916 (Ct. App. 2001). ***Langenbach*** found that the mental responsibility phase is a "part" of a criminal case and the right against self-incrimination applied. ***Id.,*** ¶¶ 19-20.

Given that the Fifth Amendment right against self-incrimination applies at the mental responsibility phase and the right to testify is a "necessary corollary" to the Fifth Amendment's guarantee against self-incrimination, *see* ***Rock v. Arkansas***, 483 U.S. 44, 52 (1987), it is only logical that the right to testify and accompanying law regarding an on-the-record colloquy is applicable to the mental responsibility phase. While the circuit court's decision in this case notes that ***Langenbach*** does not provide that *all* Fifth Amendment rights apply to the mental responsibility phase (35:3; App. 106), the decision is devoid of any case law or policy reason as to why the right to testify should not apply to the mental responsibility phase.

Moreover, because the right to testify is a fundamental right, it can only be waived personally by the defendant with an on-the-record colloquy. As the Wisconsin Supreme Court recognized in ***Weed***, the decision to testify is so fundamental that it is necessary to have an "intentional relinquishment or abandonment of the right." 2003 WI 85, ¶ 40, 263 Wis. 2d 434, 666 N.W.2d 485 (citation omitted). Further, conducting an on-the-record colloquy "is the clearest and most efficient means" of ensuring that a defendant has validly waived his or her constitutional rights and "preserving and documenting that valid waiver for purposes of appeal and postconviction motions." *See* ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716; *see also*, ***State v. Anderson***, 249 Wis. 2d 586, ¶ 23, 638 N.W.2d 301.

Thus, because the right to testify is a fundamental right that must be applied to the mental responsibility phase, and here the circuit court failed to conduct a personal, on-the-record colloquy, Mr. Lagrone is entitled to an evidentiary hearing. ***State v. Garcia***, 2010 WI App 26, ¶¶ 9, 14, 323 Wis. 2d 531, 779 N.W.2d 718.

C. Mr. Lagrone was not required to make an offer of proof regarding the content of his testimony to obtain an evidentiary hearing.

The facts of this case are in contrast to ***State v. Winters***, 2009 WI App 48, 317 Wis. 2d 401, 766 N.W.2d 754, in which the defendant was denied relief due to his failure to provide an offer of proof regarding the content of his testimony. In ***Winters***, the defendant elected to waive his right to testify at trial. The court conducted a colloquy to ensure that he was waiving his right to testify knowingly, voluntarily, and intelligently. ***Id***., ¶ 7. However, the following day, after the State had released its rebuttal witnesses, the

defendant changed his mind and requested to testify. ***Id***., ¶¶ 8-11. The circuit court denied the defendant's request. ***Id***., ¶ 12. On appeal, the defendant argued that the circuit erred in refusing to allow the defendant to revoke his waiver of the right to testify. ***Id***., ¶ 13. The Court of Appeals denied the defendant relief on the basis that he did not provide an offer of proof at the time of trial or in his postconviction motion as to his testimony, but explicitly noted that the defendant was *not* "challenging the colloquy wherein he knowingly, voluntarily, and intelligently waived his right to testify." ***Id***., ¶¶ 14-16.

Unlike ***Winters***, here, Mr. Lagrone *is* challenging the circuit court's failure to conduct a colloquy. Mr. Lagrone is not alleging that he "changed his mind," or that for reasons outside the record, that his waiver of the right to testify was not knowing, voluntarily, or intelligent.

This case is analogous to ***State v. Garcia***, which does not require the defendant to provide an offer of proof regarding the content of his testimony. 2010 WI App 26, 323 Wis. 2d 531, 779 N.W.2d 718.

In ***Garcia***, as in this case, the circuit court failed to conduct an on-the-record colloquy regarding the defendant's waiver of the right to testify. ***Id***., ¶ 2. The defendant argued that the failure to conduct a colloquy should warrant a new trial in all cases. ***Id***., ¶ 8. The Court of Appeals disagreed and adopted the State's position that the remedy was the same as when a court failed to engage in a colloquy with a defendant about the right to a jury trial, the right to counsel, or a plea colloquy deficiency. ***Id***., ¶ 9 (citing ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) (right to counsel); ***State v. Anderson***, 2002 WI 7, ¶ 23, 249 Wis. 2d 586, 638 N.W.2d 301 (right to trial by jury); ***State v. Bangert***, 131 Wis. 2d 246,

270-72, 389 N.W.2d 12 (1986) (waiver of multiple constitutional rights by entry of guilty or no contest plea)). The Court stated that "[w]hen the circuit court neglects its duty to hold the appropriate colloquy; the State carries the burden to show that the defendant's waiver was knowingly and voluntary and must do so by clear and convincing evidence." ***Id***., ¶ 9.

Thus, because the circuit court here failed to conduct a colloquy, this case is properly analyzed under ***Garcia***, which does not require an offer of proof, and Mr. Lagrone is entitled to an evidentiary hearing.

D. Harmless error cannot be applied to this case.

In ***State v. Nelson***, the Wisconsin Supreme Court considered whether a circuit court's denial of defendant Angelica Nelson's right to testify was amendable to harmless error review. 2014 WI 70, ___ Wis. 2d ___, 849 N.W.2d 317. During her trial on sexual assault of a child, Nelson informed the circuit court that she wanted to testify. The circuit court engaged her in a colloquy about waiving her right against self-incrimination, which Nelson stated that she understood. ***Id***., ¶ 14.

The circuit court also asked Nelson about the substance of her testimony. Nelson stated that she "'want[ed] to tell what actually happened.'" She stated that she wanted to testify that she did not unbuckle the child's pants and that the assaults did not happen three days in a row. The court responded that the testimony had no bearing on the elements of the offense, and "made sure that Nelson's attorney had expressed to Nelson that 'it wouldn't be a good idea' for Nelson to testify." ***Id***., ¶ 15. The circuit court found that Nelson was not "'intelligently and knowingly waiving her right against self-incrimination because she wants to testify to

things that are completely irrelevant…'" ***Id***., ¶¶ 15-16. Nelson appealed and asserted that the court violated her constitutional right to testify on her behalf and therefore, a new trial was required. ***Id***., ¶ 17.

The Wisconsin Supreme Court assumed, without deciding, that the circuit court erred because, having engaged in the colloquy required by ***Weed***, it had no basis to find that Nelson was not validly waiving her right against self-incrimination. ***Id***., ¶¶ 21, 27. However, the Court concluded that the denial of Nelson's right to testify was subject to harmless error review "because its effect on the outcome of the trial is capable of assessment." ***Id***., ¶¶ 5, 52 (emphasis added); *see also*, ***State v. Magett***, 2014 WI 67, ¶¶ 47-52, 61, 66, ___ Wis. 2d ___, 850 N.W.2d 42 (applying harmless error analysis to a circuit court's refusal to hold the mental responsibility phase of a trial when defendant's proposed evidence was discussed on-the-record). The Court further concluded that the alleged error was harmless beyond a reasonable doubt. ***Nelson***, 2014 WI 70, ¶¶ 5, 52.

In contrast to ***Nelson***, in this case, there was no on-the-record colloquy nor did the circuit court inquire into the substance of Mr. Lagrone's testimony. Thus, the failure of the court to conduct the necessary colloquy is not subject to harmless error because its effect on the outcome of the trial is not capable of assessment.

CONCLUSION

For the reasons stated, Mr. Lagrone respectfully requests that this Court reverse the circuit court's decision and remand the case to the circuit court with directions to hold an evidentiary hearing.

Dated this 1st day of October, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,806 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 1st day of October, 2014.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 1st day of October, 2014.

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