STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP1424-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES ELVIN LAGRONE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND A POSTCONVICTION MOTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD J. SANKOVITZ AND THE HONORABLE JEFFREY A. WAGNER PRESIDING, RESPECTIVELY

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be resolved on the briefs by applying well-established legal principles to the

facts; accordingly, the State requests neither oral argument nor publication.

STATEMENT OF THE ISSUES

1. Wisconsin requires a circuit court to engage a defendant in a personal colloquy regarding the defendant's waiver of his fundamental right to testify at trial. A defendant does not have a fundamental constitutional right to a not guilty by reason of mental disease or defect (NGI) trial. Here, the circuit court did not engage James Lagrone in a personal colloquy at the second phase of his NGI trial when Lagrone declined to testify. Did the circuit court err?

2. The denial of a defendant's right to testify is subject to harmless error review. Here, Lagrone has offered no evidence as to what his testimony would have revealed. Was any error harmless?

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

Defendant-Appellant James Elvin Lagrone's statement of the case is sufficient to frame the appellate issue for review. As respondent, the State exercises its option not to present a full statement of the case but will supply facts as necessary in its argument. *See* Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

I. The circuit court properly denied Lagrone's motion for a new trial or an evidentiary hearing because Lagrone was not entitled to a colloquy on his decision not to testify at the second phase of his NGI trial.

A. Standard of review.

Whether a circuit court was required to engage a defendant in a personal colloquy regarding his decision not to testify at the second phase of a not guilty by reason of mental disease or defect (NGI) trial is a question of law reviewed de novo. *See State v. Francis*, 2005 WI App 161, ¶14, 285 Wis. 2d 451, 701 N.W.2d 632.

B. Relevant law.

As far as the State can discern, whether a defendant has a constitutional right to testify at the mental responsibility phase of a bifurcated trial and whether the court must engage the defendant in a personal colloquy regarding that right are matters of first impression in Wisconsin. Nonetheless, there are numerous cases that can shed light on how this question should be answered.

A criminal defendant's right to testify on his own behalf is a fundamental right. *State v. Weed*, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. Because it is a fundamental right, "a circuit court should conduct a colloquy with the defendant in order to ensure that the defendant is knowingly and voluntarily waiving his or her right

to testify." *Id.* ¶40. Similarly, a criminal defendant's right *not* to testify is also a fundamental right. *State v. Denson*, 2011 WI 70, ¶55, 335 Wis. 2d 681, 799 N.W.2d 831 (emphasis added). However, "circuit courts are not required to conduct an on-the-record colloquy to determine whether a defendant is knowingly, voluntarily, and intelligently waiving his or her right *not* to testify." *Id.* ¶8 (emphasis added). Further, "[c]ourts engage in personal colloquies in order to protect defendants against violations of their fundamental constitutional rights." *Francis*, 285 Wis. 2d 451, ¶1.

These principles, however, apply to a criminal trial. "[T]he responsibility phase of the bifurcated trial is not an integral part of the criminal trial, but is rather a special proceeding in the criminal process in which the defendant has the burden of proof to establish his lack of responsibility[.]" *State v. Koput*, 142 Wis. 2d 370, 374, 418 N.W.2d 804 (1988).

> Phase two is dispositional in nature – is this person who has been found guilty beyond a reasonable doubt of criminal conduct to be punished or is there to be a different disposition because, in good conscience and public morality, the defendant is a person, because of mental disease or defect, who ought not to be held criminally liable for his or her conduct.

Id. at 389. "[T]he responsibility phase of the bifurcated trial has an entirely different purpose, and is indeed a different type of trial, from the guilt phase, where the burden is on the state to prove each and every element of the crime beyond a reasonable doubt." *Id.* at 390.

In other words, phase two of the bifurcated trial contemplated by Wis. Stat. § 971.165, is simply different in nature than phase one. The jury need not be unanimous in its verdict, the burden is on the defendant, and the court may even enter a directed verdict. *See id.* at 390-92. The responsibility phase is simply not treated the same way as the guilt phase. *Id.* at 395. While it is not "purely civil" in nature, phase two "is not criminal in its attributes or purposes." *Id.* at 397.

C. Lagrone is not entitled to a new trial or an evidentiary hearing because the circuit court was not required to conduct a colloquy when Lagrone decided not to testify.

This case presents a question akin to the one the court faced in *Francis*. In *Francis*, the defendant argued that the trial court erred in failing to engage her in a personal colloquy when she opted to abandon her NGI plea in favor of a plea agreement with the State. 285 Wis. 2d 451, ¶¶1, 6, 10-11. In reviewing the claim, the court examined three lines of cases from Wisconsin, as well as other jurisdictions. *Id.* ¶¶14-27.

"The first line of cases addresses the rationale behind personal colloquies; these cases recognize the important role such colloquies play in protecting fundamental constitutional rights." *Id.* ¶15. "The second line of cases makes abundantly clear that the right to an NGI plea simply does not qualify as a fundamental constitutional right." *Id.* ¶19.

> Taken together, these first two sets of cases suffice to dispose of Francis' contention that the court was required to conduct an on-the-record colloquy with respect to her desire to abandon her NGI plea. They make clear that only fundamental constitutional rights warrant this special protection and that an NGI plea falls outside the realm of fundamental rights.

Id. ¶22. The third line of cases approved of counsel's withdrawal of the defendant's NGI plea on his behalf, or even a defendant's implicit withdrawal of an NGI plea. *Id.* ¶¶22-25.

Applying *Francis* to this case, the State submits Lagrone had no right to a personal colloquy on his decision not to testify at phase two of his proceeding. A right to an NGI proceeding is not a fundamental constitutional right. *Id.* ¶19. Thus, while Lagrone had the right to testify at the second proceeding, his right was not one of the few rights considered fundamental under the constitution because the proceeding itself is not constitutionally required. Further, if a personal colloquy is not required at a criminal proceeding when a defendant elects to waive his right *not* to testify, *see Denson*, 335 Wis. 2d 681, ¶¶ 8, 55, it is not required at phase two of an NGI proceeding.

II. Even if the circuit court's failure to engage Lagrone in a personal colloquy was error, the error was harmless.

In the event this court is inclined to adopt Lagrone's suggestion that a court must engage in a personal colloquy when a defendant elects not to testify at phase two of an NGI proceeding because it is a fundamental constitutional right to testify

at the proceeding, Lagrone is still not entitled to relief because his claim is subject to harmless error review and the error was clearly harmless. For the error to have had an effect on the proceeding, Lagrone would have had to establish (1) that he did not knowingly, intelligently and voluntarily waive his right to testify, and (2) the exclusion of his testimony was not harmless.

A. **A violation of a defendant's right to testify is subject to harmless error review.**

While "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," not all constitutional violations automatically require reversal. *Chapman v. California*, 386 U.S. 18, 23 (1967) (footnote omitted). "Constitutional errors at trial fall into two categories: trial errors, which are subject to harmless error analysis, and structural errors, which 'defy analysis by "harmless error" standards.'" *State v. Hansbrough*, 2011 WI App 79, ¶10, 334 Wis. 2d 237, 799 N.W.2d 887 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)).

"A structural error is a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Hansbrough*, 334 Wis. 2d 237, ¶10 (citation omitted which quoted *Fulminante*, 499 U.S. at 310). "Such errors 'infect the entire trial process and necessarily render a trial fundamentally unfair.'" *Hansbrough*, 334 Wis. 2d 237, ¶10 (citation omitted). "Structural errors 'seriously affect the fairness, integrity or public reputation of judicial proceedings and are so fundamental that

they are considered per se prejudicial.'" *Id*. (citation omitted).

The United States Supreme Court has found structural error in a "very limited class of cases." *See State v. Ford*, 2007 WI 138, ¶43, 306 Wis. 2d 1, 742 N.W.2d 61. These include the complete denial of counsel, a biased trial judge, racial discrimination in grand jury selection, the denial of the right to self-representation at trial, the denial of a public trial and a defect in the reasonable doubt jury instruction. *Id*. ¶43 n.4.

On the other hand, "[c]onstitutional violations are generally subject to a harmless-error analysis." *State v. Flynn*, 190 Wis. 2d 31, 54, 527 N.W.2d 343 (Ct. App. 1994). Indeed, there is a "'strong presumption that any other [constitutional] errors . . . are subject to a harmless-error analysis.'" *Hansbrough* 334 Wis. 2d 237, ¶11 (citation omitted) (brackets in original). Such errors are considered "trial error" and "may be 'quantitatively assessed' in the context of the other evidence presented in order to determine whether it was harmless beyond a reasonable doubt." *Id*. ¶10 (quoting *Fulminante*, 499 U.S. at 307-08).

"[T]he right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right." *Rock v. Arkansas*, 483 U.S. 44, 53 n.10 (1987). This right is rooted in several constitutional provisions, including the Fourteenth Amendment's guarantee of due process and the Sixth Amendment's right to compulsory process. *Denson*, 335 Wis. 2d 681, ¶50

(citing *Rock*, 483 U.S. at 51-52). It is expressly guaranteed by art. I, § 7 of the Wisconsin Constitution. *Denson*, 335 Wis. 2d 681, ¶51.

Recently, the Wisconsin Supreme Court held that "the denial of the right to testify is subject to harmless error review." *State v. Nelson*, 2014 WI 70, ¶31, 355 Wis. 2d 722, 849 N.W.2d 317.[1]

Most courts that have considered this issue have reached the same conclusion. *See Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir. 1988); *Ward v. Sternes*, 334 F.3d 696, 708 (7th Cir. 2003) (citing *Ortega*, 843 F.2d at 262); *Arredondo v. Pollard*, 498 F. Supp. 2d 1113, 1128 (E.D. Wis. 2007) (citing *Ortega*, 843 F.2d at 262); *Palmer v. Hendricks*, 592 F.3d 386, 398-99 (3d Cir. 2010); *Arthur v. United States*, 986 A.2d 398, 415 n.20 (D.C. 2009) (citing cases, and noting that trend in United States Circuit Courts of Appeals is to find violation subject to harmless error); *Woolfolk v. Commonwealth*, 339 S.W.3d 411, 418-19 (Ky. 2011); and *People v. Solomon*, 560 N.W.2d 651, 656 (Mich. Ct. App. 1996).

B. Any error in failing to conduct a colloquy was harmless.

The State argues that any error in failing to conduct a colloquy was harmless for two reasons. One, Lagrone has not averred that his decision not to testify was unknowing, unintelligent or involuntary. Two, there is no record from which to

[1] The defendant has filed a petition for certiorari in the United States Supreme Court. *Nelson v. Wisconsin*, No. 14-555 (Nov. 13, 2014).

conclude that any erroneous exclusion of the testimony was anything but harmless.

Lagrone argues that he was not required to make an offer of proof on these two points.[2] In support of this position, Lagrone cites *State v. Garcia*, 2010 WI App 26, ¶14, 323 Wis. 2d 531, 779 N.W.2d 718, and attempts to distinguish *Nelson*, 355 Wis. 2d 722, and *State v. Winters*, 2009 WI App 48, ¶14, 317 Wis. 2d 401, 766 N.W.2d 754. The State argues Lagrone's reasoning is incorrect for the reasons that follow.

Lagrone argues that *Garcia* supports his position that he is entitled to an evidentiary hearing and that he was not required to make an offer of proof.[3] In *Garcia*, this court addressed Garcia's claim that he was entitled to a new trial because the circuit court failed to conduct a colloquy on whether he was knowingly waiving his right to testify. 323 Wis. 2d 531, ¶1. The court rejected Garcia's argument, concluding that the circuit court's postconviction hearing adequately established that Garcia knowingly waived his right. *See id.*

The State acknowledges that *Garcia* approved of a postconviction hearing to address a defendant's claim that the circuit court failed to conduct a required colloquy concerning a defendant's right to testify at a criminal trial. But even if this court concludes that a similar colloquy is required in the second phase of an NGI trial, it does not mean that the path charted by *Garcia* is the only one available. In addition, *Garcia*

[2] Lagrone's Br. at 7.

[3] Lagrone's Br. at 8.

predates *Nelson*, which unequivocally held that a violation of the right to testify is subject to harmless error review. *See Nelson*, 355 Wis. 2d 722, ¶31.

The State believes that *Winters* is more instructive for purposes of this case. In *Winters*, the defendant "complain[ed] that the trial court should have permitted him to revoke his waiver of his right to testify after he changed his mind overnight." 317 Wis. 2d 401, ¶14. Winters failed to make "an offer of proof at the time of trial or in the postconviction motion." *Id.* ¶16. The court emphasized that the trial was not the only opportunity for the defendant to make the requisite offer of proof. *Id.* ¶22. "[Winters] could have done so via an affidavit when he filed his postconviction motion. He did not." *Id.* The court held that this failure "operate[d] as a waiver of his right to have this issue decided." *Id.* ¶16.

> Based on the only information submitted, we would have to speculate about the substance of the testimony Winters claims he would have given at trial, which we are not permitted to do. Accordingly, Winters's failure to provide an offer of proof either at trial or in the form of an affidavit in his postconviction motion prevents this court from considering whether the trial court erred in denying his request to withdraw his waiver of his right to testify.

Id. ¶24; *cf. State v. Brown*, 2003 WI App 34, ¶¶16-20, 260 Wis. 2d 125, 659 N.W.2d 110 (postconviction alibi claim forfeited where defendant made no offer of proof as to what his purported alibi testimony would have been).

Lagrone's attempt to distinguish *Winters* is unavailing.[4] Lagrone argues that *Winters* is irrelevant because Winters previously waived his right to testify following a personal colloquy, but changed his mind and later sought permission to testify on his own behalf.[5] But whether or not there was a colloquy has no bearing on *Winter*'s finding that a defendant is required to make an offer of proof concerning the substance of the allegedly excluded evidence, here: the defendant's testimony. Like any other evidence a defendant argues was improperly excluded, the defendant must demonstrate what that evidence would have shown.

In tandem with *Winter*'s instruction to defendants to make an offer of proof when they argue that their testimony was erroneously excluded is *Nelson*'s conclusion that the erroneously excluded evidence of a defendant's testimony is subject to harmless error review.

Lagrone's attempt to limit *Nelson* to its facts is unavailing.[6] While it is true, as Lagrone points out, that the court twice stated, "We conclude that harmless error review applies to the circuit court's

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[4] Lagrone's Br. at 7-8.

[5] Lagrone ignores that he, too, previously waived his right to testify. Lagrone pleaded guilty to the charges against him and waived his right to testify (21:1; 48:9-11). In fact, next to the checked box on the plea questionnaire that states, "I give up my right to testify and present evidence at trial," someone hand-wrote, "True for phase I, not for II" (21:1). There is no challenge to Lagrone's waiver of his right to testify at the first phase of the trial. *See State v. Winters*, 2009 WI App 48, ¶15, 317 Wis. 2d 401, 766 N.W.2d 754 (noting Winters did not challenge the initial waiver). Thus, Lagrone – like Winters – knowingly waived his right to testify.

[6] Lagrone's Br. at 10.

alleged denial of Nelson's right to testify because its effect on the outcome of the trial is capable of assessment[,]" *Nelson*, 355 Wis. 2d 722, ¶¶5, 52, this statement is not helpful to Lagrone for at least two reasons.

One, in reading the whole decision, it is clear that the court held "that denial of the right to testify is subject to harmless error review" without any qualification that harmless error review applies only to facts similar to those found in *Nelson*. *Id.* ¶31. This is clear because the court made its unequivocal conclusion after it set forth its analysis on the right to testify, the decision to testify and the application of harmless error review to other scenarios. *Id.* ¶¶19-31. After analyzing all of the principles, the court concluded that any "error denying the defendant of the right to testify on his or her own behalf bears the hallmark of a trial error." *Id.* ¶32. A trial error, unlike a structural error, is an error subject to harmless error review. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). The court acknowledged that a defendant's testimony could be particularly important, but that "this does not make its absence incapable of assessment." *Nelson*, 355 Wis. 2d 722, ¶33. "Stated otherwise, denying a defendant the right to testify is not the type of error, 'the effect[] of which [is] inherently elusive, intangible, and [therefore] not susceptible to harmless error review.'" *Id.* (citation omitted) (brackets in original). The court concluded, the denial of the right to testify – like numerous other constitutional rights – is subject to harmless error analysis. *Id.* ¶¶31-33. Thus, Lagrone's cherry-

picked statements mean only that because a defendant's testimony is capable of assessment, its erroneous exclusion is subject to harmless error review.

Two, Lagrone's argument that the harmless error review that applies in a case like *Nelson* – in which the defendant made a record as to what she wanted to testify to – does not apply to him because he failed to make a record is nonsensical. Whether a constitutional right is a trial error, or a structural error, does not depend on the offer of proof made. Had Lagrone made an offer of proof on his unknowing waiver of his right to testify and an offer on the substance of his testimony, this court may have found any denial of the right was prejudicial. But because Lagrone failed to inform the court how he wished to testify, his claim must fail.

Put another way, in this case, Lagrone claims that the circuit court erred when it failed to conduct a colloquy determining whether he had waived his right to testify voluntarily, intelligently and knowingly. Even if the circuit court erred, then only one of two scenarios is possible. One, Lagrone's waiver was voluntary, intelligent and knowing. If this is the case, then the failure to provide the colloquy was necessarily harmless. If this is not the case, then the waiver was not voluntary, intelligent and knowing and Lagrone wanted to testify. If Lagrone wanted to testify, he was required to tell the court what his testimony would have been in order to assess whether the exclusion of the evidence was harmless or prejudicial. But Lagrone has refused to tell the courts what his testimony would have been. An offer of proof is necessary to determine prejudice. *See State v. Moffett*, 46 Wis. 2d 164, 168-69,

174 N.W.2d 263 (1970). Without any explanation as to how Lagrone's testimony would have altered the outcome of the responsibility phase, this court must find the exclusion of the evidence harmless.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the judgment of conviction and the order denying postconviction relief.

Dated this 3rd day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,252 words.

Dated this 3rd day of December, 2014.

_____
Katherine D. Lloyd
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

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

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 3rd day of December, 2014.

_____
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