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.

REPLY BRIEF OF DEFENDANT-APPELLANT

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026
E-mail: lambk@opd.wi.gov

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
Telephone: (414) 227-4805

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS

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

The State argues that because an individual does not have a fundamental constitutional right to a not guilty by reason of mental disease or defect ("NGI") trial, there is not a fundamental constitutional right to testify at the mental responsibility phase. (State's Br. at 6). However, just because an individual does not have a fundamental constitutional right to a NGI proceeding, this does not preclude a finding that the right to testify at the mental responsibility phase is a fundamental constitutional right.

The State does not cite or discuss ***State v. Langenbach,*** in which this Court held that the corollary Fifth Amendment right against self-incrimination applies to the mental responsibility phase of a bifurcated criminal proceeding. 2001 WI App 222, ¶¶ 1, 9, 247 Wis. 2d 933, 634 N.W.2d 916 (Ct. App. 2001) ("Contrary to the State's assertions, a defendant does not lose his or her Fifth amendment rights after pleading guilty to criminal charges.").

The State also argues that "if a personal colloquy is not required at a criminal proceeding when a defendant elects to waive his right *not* to testify, it should not be required at [the mental responsibility phase] of an NGI proceeding." (State's

Br. at 6 (citation omitted) (emphasis added)). However, this case involves the "right to testify," not the "right *not* to testify." Thus, this case is more analogous to a criminal proceeding when a defendant elects to waive his "right to testify," which requires a personal colloquy. (*See* Mr. Lagrone's Br. at 5, 7).

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

As in this case, in ***State v. Garcia***, the circuit court failed to conduct an on-the-record colloquy regarding the defendant's waiver of the right to testify. 2010 WI App 26, ¶ 2, 323 Wis. 2d 531, 779 N.W.2d 718. As the State acknowledges, ***Garcia*** "approved of an evidentiary hearing to address a defendant's claim that the circuit court failed to conduct the required colloquy concerning a defendant's right to testify at a criminal trial." (State's Br. at 10).

Nonetheless, the State argues that ***State v. Winters***, 2009 WI App 48, 317 Wis. 2d 401, 766 N.W.2d 754, in which a colloquy was held, is "more instructive" for the purposes of this case. (State's Br. at 11-12). The State argues that whether or not a colloquy was held has no bearing on whether a defendant is required to provide an offer of proof. However, the presence or absence of a colloquy is significant. If a valid colloquy has been conducted on the right to testify, the defendant has stated on the record that he is aware of his right to testify and that he has discussed this right with counsel. *See* ***State v. Weed***, 2003 WI 85, ¶ 43, 263 Wis. 2d 434, 666 N.W.2d 485. In contrast, when a colloquy is not conducted, as is the case here, there is no indication on the record that the defendant is aware of the right to testify. *Compare with* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389

N.W.2d 12 (1986) (to obtain an evidentiary hearing on a claim that defendant did not knowingly, intelligently, and voluntarily enter a plea, defendant must allege that the circuit court conducted a defective plea colloquy and that he or she did not know or understand the information that should have been provided); ***State v. Hampton***, 2004 WI 107, ¶ 61, 274 Wis. 2d 379, 683 N.W.2d 14 (to obtain an evidentiary hearing on a claim that defendant did not knowingly, intelligently, and voluntarily enter a plea for reasons outside the record requires a particularized motion with sufficient supporting facts).

Moreover, ***Winters*** 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. (*See* Lagrone's Br. at 8-9). The State fails to address this distinction. Therefore, Mr. Lagrone was not required to provide an offer of proof.

The State also argues that Mr. Lagrone, like the defendant in ***Winters***, waived his right to testify. However, Mr. Lagrone waived his right to testify in the guilt phase (phase I), *not* the mental responsibility phase (phase II). The circuit court never personally confirmed at any point that Mr. Lagrone understood that he had a right to testify in the mental responsibility phase. (*See* State's Br. at 12 n.5; Lagrone's Br. at 2). Thus, based on the absence of a colloquy at the mental responsibility phase and Mr. Lagrone's assertion that he did not understand that he had the right to testify at the mental responsibility phase (34:1, 4), his right to testify at the mental responsibility was not knowingly and intelligently waived.

C. Harmless error cannot be applied to this case.

As discussed in Mr. Lagrone's brief (at 9-10), in ***State v. Nelson***, 2014 WI 70, ¶¶ 5, 52, 355 Wis. 2d 722, 849 N.W.2d 317, the Wisconsin Supreme Court concluded that the denial of the defendant's right to testify in a criminal case was subject to harmless error review "because its effect on the outcome of the trial is capable of assessment." [1,2]

In contrast to ***Nelson***, in this case, harmless error cannot be applied because it is not "capable of assessment." There was no on-the-record colloquy nor did the circuit court inquire into the substance of Mr. Lagrone's testimony.

Moreover, assuming for the sake of argument, but not conceding, that harmless error were to be applied, in this case the State would not be able to meet its burden given that the substance of Mr. Lagrone's testimony is not on the record as in ***Nelson***. 355 Wis. 2d 722 at ¶ 44 (In order for an error to be harmless, the State, as the party benefiting from the error, must prove that is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.). As discussed above in Part B, contrary to the State's

---

[1] On November 13, 2014, the defendant filed a petition for certiorari in the United States Supreme Court. On December 15, 2014, the Court requested a response from the State. *See* ***Nelson v. Wisconsin***, No. 14-555.

[2] While many courts have held that the denial of a criminal defendant's right to testify is subject to harmless error analysis, other courts have refused to follow this principal and instead hold that the denial of the right to testify is not subject to harmless error analysis. *See* ***State v. Nelson***, 2014 WI 70, ¶ 65, 52, 355 Wis. 2d 722, 849 N.W.2d 317 (Abrahamson, C.J., dissenting).

suggestion (at 14), Mr. Lagrone was not required to provide an offer of proof.

Therefore, as discussed in Mr. Lagrone's brief (at 8) and above, this case is more akin to ***State v. Garcia***, in which the circuit court failed to conduct an on-record-colloquy, and consequently held an evidentiary hearing postconviction to determine whether the defendant knowingly, voluntarily, and intelligently waived the right to testify. 2010 WI App 26, ¶ 3, 323 Wis. 2d 531, 779 N.W.2d 718. Thus, as in ***Garcia***, a postconviction evidentiary hearing should be held in this case. ***Id.*****,** ¶ 9.

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 9th day of January, 2015.

Respectfully submitted,

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
Telephone:(414) 227-4805
E-mail: lambk@opd.wi.gov

Attorney for Defendant-Appellant

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 1,300 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 9th day of January, 2015.

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
Telephone: (414) 227-4805
E-mail: lambk@opd.wi.gov
Attorney for Defendant-Appellant