STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1424-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES ELVIN LAGRONE,

Defendant-Appellant-Petitioner.

ON REVIEW FROM A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND A DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD J. SANKOWITZ AND THE HONORABLE JEFFREY A. WAGNER PRESIDING, RESPECTIVELY

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

CASES CITED

Page

Page

Page

Page

STATUTES CITED

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case this court has accepted for review, oral argument and publication are appropriate.

STATEMENT OF THE ISSUES

1. Whether a defendant has a constitutional right to testify at the responsibility phase of a bifurcated trial and, if so, whether a circuit court must engage the defendant in a

personal colloquy to ensure the defendant is knowingly, intelligently and voluntarily waiving his right to testify.

2. Whether the failure to conduct such a colloquy is subject to harmless error analysis and, if so, whether the failure to conduct a colloquy here was harmless.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant-Petitioner James Elvin Lagrone's statement of the case and facts sufficiently frame the issues 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.

SUMMARY OF ARGUMENT

This Court has held that a defendant has a fundamental constitutional right to testify, or not to testify, at his criminal trial. *See State v. Denson*, 2011 WI 70, ¶55, 335 Wis. 2d 681, 799 N.W. 2d 831; *State v. Weed*, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W. 2d 485. This Court has held that when a defendant elects *not to* testify on his own behalf at the guilt stage of a criminal trial, the circuit court must engage the defendant in a colloquy in order to discern whether the defendant is knowingly waiving his right to testify. *See Weed*, 263 Wis. 2d 434, ¶40. Conversely, this Court has held that while a colloquy is encouraged, a circuit court is not required to inquire whether the defendant knowingly waives his right to remain silent at the guilt phase. *See Denson*, 335 Wis. 2d 681, ¶8.

Against this background comes this case. Although the responsibility phase of a not guilty by reason of mental disease or defect (NGI) trial is tied in some ways to a criminal trial, it is different in its nature and its purpose. Whether a defendant has a fundamental constitutional right to testify at this phase appears to be a matter of first impression. The State submits that because the

NGI phase is not constitutional in nature, and because of the many manners in which it is different from the criminal trial, there is no fundamental constitutional right to testify at the second phase of the trial. And because personal colloquies serve to protect fundamental constitutional rights, the State argues that there is no right to a personal colloquy regarding a defendant's decision to remain silent at this phase. Further, even if there were a constitutional right to testify at this phase, this Court should decline to extend the colloquy requirement in *Weed* to a defendant's decision not to testify at the responsibility phase.

Finally, in *State v. Nelson*, 2014 WI 70, ¶¶27, 51-52, 355 Wis. 2d 722, 849 N.W. 2d 317, this Court held that the denial of the right to testify is subject to harmless error review. If this Court should decide that the circuit court was required to engage Lagrone in a colloquy on his decision to remain silent, or if this Court declines to address the constitutional question, it should examine whether the court's error was harmless. Although it is the State's burden to show that the error was harmless, it was Lagrone's burden below to show that he was not responsible for the crime. Because Lagrone has failed at any point in the proceedings to aver what he would have testified about that would have helped him carry his burden, the State has shown that any error in failing to engage in a colloquy was harmless.

ARGUMENT

I. There is no requirement that a circuit court engage in a colloquy with a defendant at the responsibility phase of a criminal trial in order to determine that he is knowingly waiving his right to testify.[1]

As a preliminary matter, the State notes that its brief tracks Lagrone's arguments, which set forth the constitutional issues first. The State recognizes, though, that this Court will normally not "address a constitutional issue if the case can be disposed of on other grounds." *State v. Hale*, 2005 WI 7, ¶42, 277 Wis. 2d 593, 691 N.W. 2d 637. To avoid the constitutional questions that Lagrone raises, this case can instead be decided on harmless error grounds, as set forth in the court of appeals' decision[2] and outlined in section II of the State's argument.

A. Standard of review

Whether a circuit court is 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. *State v. Francis*, 2005 WI App 161, ¶14, 285 Wis. 2d 451, 701 N.W. 2d 632.

B. Relevant law

1. The right to testify at a criminal trial

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[1] The State refers to the defendant's "right to testify" at the responsibility phase of the NGI proceeding, but this should not be confused with a defendant's constitutional right to testify. *See* Wis. Stat. § 906.01 (stating that generally every person may be a witness).

[2] *State v. Lagrone*, 2013AP1424-CR (Dist. I, Apr. 7, 2015) (A-Ap. 101-113).

Historically, under common law, criminal defendants were deemed incompetent witnesses and therefore prohibited from testifying on their own behalf. *See Ferguson v. Georgia*, 365 U.S. 570, 573-75 (1961). This practice continued in this country until the mid-nineteenth century, when states began enacting statutes allowing criminal defendants to testify. *Id*. at 577. In 1869, Wisconsin deemed criminal defendants competent to testify in their trials. *Id*. at 577 n.6. States recognized "that permitting a defendant to testify advances both the detection of guilt and the protection of innocence." *Rock v. Arkansas*, 483 U.S. 44, 49-50 (1987) (internal quotations omitted).

Eventually, courts recognized that a defendant's right to testify is rooted in several constitutional provisions. *Id.* at 51. It arises from the Fourteenth Amendment's guarantee of due process and the Sixth Amendment's right to compulsory process. *State v. Denson*, 2011 WI 70, ¶ 50, 335 Wis. 2d 681, 779 N.W. 2d 831. The right is logically included in the defendant's right to be heard and to call witnesses. *Id*. It is also a corollary of the defendant's Fifth Amendment guarantee against compelled testimony. *Id.* ¶52. The privilege against self-incrimination is fulfilled only when a defendant is "guaranteed the right to remain silent unless [she] chooses to speak in the unfettered exercise of [her] own will. The choice of whether to testify in one's own defense is an exercise of the constitutional privilege." *Id.* (citing *Rock*, 483 U.S. at 53).

"At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Id.* at 49. This right is a "fundamental constitutional right." *Weed*, 263 Wis. 2d 434, ¶39.

2. The responsibility phase of a NGI trial

Under Wis. Stat. § 971.15, otherwise known as the NGI statute, "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law." If a defendant enters a plea of NGI, the criminal trial is bifurcated. *See* Wis. Stat. § 971.165(a). The first phase of the trial considers the defendant's guilt. *Id.* If the defendant is found guilty, the jury, acting as a moral decision-maker as opposed to a factfinder, then determines in the second phase whether the defendant is mentally responsible for the crime.[3] *See State v. Magett*, 2014 WI 67, ¶33, 355 Wis. 2d 617, 850 N.W. 2d 42; *State v. Murdock*, 2000 WI App 170, ¶26, 238 Wis. 2d 301, 617 N.W. 2d 175. In this phase, the jury is tasked with applying "the 'ethics and standards of our society' to determine whether a defendant should be held responsible for criminal activity." *Murdock*, 238 Wis. 2d 301, ¶26 (quotation without citation in original).

"The responsibility phase described above has evolved over time and has now become close to a civil trial." *Magett*, 355 Wis. 2d 617, ¶34. It is the defendant's burden to show by the greater weight of credible evidence that he suffers from the mental disease or defect that renders him not responsible for the crime. *Id.* ¶¶38-39. A judge may also dismiss the NGI defense or direct a verdict in favor of the State, neither of which is allowed in a criminal trial. *Id.* ¶ 39. "Also, because the responsibility phase is not a criminal proceeding, the defendant need obtain only a five-sixths verdict on the issue of mental disease or defect to carry his

[3] With the consent of the State, the defendant may waive his right to a jury at the second phase. *See State v. Murdock*, 2000 WI App 170, ¶¶26-29, 238 Wis. 2d 301, 617 N.W. 2d 175.

burden." *Id.* Thus, "the responsibility phase is not a part of a 'criminal' trial." *State v. Koput*, 142 Wis. 2d 370, 395, 418 N.W. 2d 804 (1988).

Not surprisingly then, a "criminal defendant's right to an NGI defense is a statutory right that is not guaranteed by either the United States or Wisconsin Constitutions." *Magett*, 355 Wis. 2d 617, ¶32; *State v. Burton*, 2013 WI 61, ¶9, 349 Wis. 2d 1, 832 N.W. 2d 611. There is also no constitutional right to a bifurcated trial. *Spencer v. Texas*, 385 U.S. 554, 568 (1967); *Magett*, 355 Wis. 2d 617, ¶32. In other words, there is no fundamental constitutional right to an NGI plea. *See Francis*, 285 Wis. 2d 451, ¶19.

"The civil hues of the responsibility phase, coupled with the fact that bifurcation and the NGI plea are statutory in nature, not constitutional, remove the proceedings from the exacting demands of criminal proceedings and leave it in a category of its own." *Magett*, 355 Wis. 2d 617, ¶40.

> 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.

Koput, 142 Wis. 2d 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.

C. Because there is no fundamental constitutional right to an NGI proceeding, there is no fundamental constitutional right to testify at its responsibility phase. Without a fundamental constitutional right to protect, there is no requirement for the circuit court to engage the defendant in a personal colloquy regarding his silence.

Lagrone argues that he had a fundamental constitutional right to testify at the responsibility phase of his NGI trial.[4] Lagrone contends that because "the second phase is part of a criminal case and the right to testify is a fundamental component of the criminal justice system, the right to testify must apply at the second phase."[5] He also argues that because a defendant may not be compelled to incriminate himself at the responsibility phase, he must also have a constitutional right to testify at that same phase.[6] Lagrone is mistaken.

As outlined above, the second phase of an NGI trial "has an entirely different purpose" than the guilt phase of a criminal trial so it seems odd to suggest, as Lagrone does, that a constitutional right to testify "must" apply at the second phase simply because it applies at the first phase. *See Koput*, 142 Wis. 2d at 390. This position ignores all of the vast differences between the two phases, including, of course, that one phase is rooted in both the United States and Wisconsin Constitutions and one is not. *See* U.S. CONST. amends. V, VI; Wis. Const. art. I, § 7. Because the responsibility phase is not constitutional in nature, but statutory, it is the State's position that the defendant's right to testify at this portion of the trial also stems from the statutes, not any constitutional provision.

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[4] Lagrone's Br. at 12-17.

[5] Lagrone's Br. at 15.

[6] Lagrone's Br. at 16.

Lagrone also argues that a defendant's retention of his Fifth Amendment right against self-incrimination at the responsibility phase suggests that his right to testify at this same phase is constitutional.[7] While this argument has some appeal, the State submits that it is ultimately misguided.

In *State v. Langenbach*, the State sought to compel the defendant to testify at the responsibility phase of his NGI trial. 2001 WI App 222, ¶7, 247 Wis. 2d 933, 634 N.W. 2d 916. The State had argued that the defendant had lost his Fifth Amendment rights to be free from self-incrimination after he had entered his no contest plea at the first phase of the criminal trial. *Id.* ¶¶7-9. The court disagreed, stating that this Court "has recognized that the Fifth Amendment privilege extends beyond a guilty plea and conviction." *Id.* ¶9. The court stated that the privilege "continues at least until sentencing." *Id.*

The court of appeals set forth three reasons for concluding that a defendant retains his Fifth Amendment rights against self-incrimination at the responsibility phase of an NGI trial. *Id.* ¶¶9-11. One, the defendant has yet to be sentenced; a defendant could fear that anything he would say at the responsibility phase could lead to a harsher sentence if the factfinder were to reject his NGI evidence and determine he is criminally responsible for the crime. *Id.* ¶9. Two, a defendant may withdraw his plea for any fair and just reason before sentencing; thus, he should not be compelled to incriminate himself because "[i]ncriminating statements may affect the trial court's discretionary determination as to the existence of a fair and just reason to withdraw that plea." *Id.* ¶10. And three, the court stated that the privilege against self-incrimination remains with a defendant through his potential appeal. *Id.* ¶11.

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[7] Lagrone's Br. at 16.

Lagrone asserts that the constitutional right to testify is a corollary to the Fifth Amendment privilege against self-incrimination.[8] Thus, because a defendant retains his privilege against self-incrimination at the responsibility phase, Lagrone reasons that he must also retain his constitutional right to testify.[9] But this reasoning is too simplistic and ignores both the nature and purpose of the phase and the rights at issue.

As stated repeatedly, the responsibility phase is simply different from the guilt phase. Its nature and purpose are to ascertain whether a defendant who has been found guilty beyond a reasonable doubt of committing a crime should nonetheless be found not criminally responsible for that crime because of a mental disease or defect that prevented him from appreciating his conduct or conforming his conduct to the law. *See* Wis. Stat. §§ 971.15, 971.165. At this second phase, the burden is on the defendant to prove his case. In essence, most of what we consider the normal rules of a criminal courtroom –the State's significant burden, the requirement of a unanimous verdict, as well as the prohibition against a directed verdict – are out the window. This new phase is not constitutional in nature, or even criminal, but is "a category of its own." *Magett*, 355 Wis. 2d 617, ¶39.

It is true that the defendant retains some constitutional rights at this phase, like the right against self-incrimination. But as explained in *Langenbach*, this right attaches to the defendant because of what it can mean for the defendant in *other* proceedings. 247 Wis. 2d 938, ¶¶9-11. In *Lagenbach*, the court expressed no concern over how compelling the defendant to testify against himself at the responsibility phase would affect the jury's determination of the defendant's responsibility. The *Langenbach* court was concerned only with how compelling the

[8] Lagrone's Br. at 16.

[9] Lagrone's Br. at 16.

defendant to incriminate himself at the responsibility phase could harm him in *other* areas of the criminal case because the case was not yet final. *Id.* Here, there is no parallel concern regarding the constitutional right to testify. Lagrone has not shown how failing to find a defendant's constitutional right to testify will not cause irreparable harm elsewhere. Further, the State emphasizes that a defendant is permitted to testify during the responsibility phase should he wish to do so and should he have relevant testimony. *See* Wis. Stats. §§ 906.01 and 904.02; *Magett*, 355 Wis. 2d 617, ¶¶54-56. But a defendant's ability to testify at the responsibility phase is not rooted in the United States or Wisconsin Constitutions; instead, the right to testify at this phase is statutory.

Colloquies play an important role in protecting a defendant's fundamental constitutional rights. *Weed*, ¶39, 263 Wis. 2d 434, ¶39; *Francis*, 285 Wis. 2d 451, ¶15. A circuit court should conduct a colloquy with a defendant to ensure that the defendant is knowingly, intelligently and voluntarily waiving a fundamental constitutional right. *Weed*, 263 Wis. 2d 434, ¶40; *but see Denson*, 335 Wis. 2d 681, ¶8 (concluding that although the right *to* testify is a fundamental constitutional right, there is no requirement that a circuit court engage the defendant in a personal colloquy regarding his waiver of the right to remain silent). Because the right to testify at the responsibility phase of an NGI trial is not a fundamental constitutional right, it is not necessary for the circuit court to engage the defendant in a colloquy regarding his decision not to testify on his own behalf.

D. Even if there is a fundamental constitutional right to testify, or not to testify, at the responsibility phase, there is no need to extend *Weed* to this phase because its nature and its purpose are different than the guilt phase.

Should this Court accept Lagrone's position that there is a fundamental constitutional right to testify at the responsibility

phase of the NGI trial, the State submits that it is not necessary for a circuit court to conduct a personal colloquy with the defendant to ensure that he understands that right. In arguing the contrary point, Lagrone points to this Court's decision in *Weed*, which instructed circuit courts to engage defendants in an on-the-record colloquy when a defendant elects not to testify.[10] 263 Wis. 2d 434, ¶40. Lagrone again ignores the difference between the responsibility phase of an NGI proceeding and the guilt phase of a criminal trial.

In *Weed*, this Court concluded that because a criminal defendant's right to testify on his own behalf is a fundamental constitutional 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.* ¶¶39-40. But a criminal defendant's right *not* to testify is also a fundamental right and its waiver does *not* require a circuit court "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." *Denson*, 335 Wis. 2d 681, ¶¶8, 55.

In *Denson*, this Court recognized that Wisconsin is "in the small minority of jurisdictions that impose an affirmative duty upon circuit courts to conduct an on-the-record colloquy to ensure that a criminal defendant is knowingly, intelligently, and voluntarily waiving his or her right to testify." *Id.* ¶64. The Court noted that many jurisdictions even advise against such colloquies with some reasoning that a colloquy "might inadvertently influence the defendant to waive his or her right *not* to testify, might improperly intrude upon the attorney-client relationship or interfere with defense strategy, or might lead the defendant into believing that his or her defense counsel is somehow deficient." *Id.* In other words, other jurisdictions have concerns that courts

[10] Lagrone's Br. at 17-19.

should tread carefully in mandating personal colloquies with a defendant when the right to testify or remain silent is at issue.

These concerns are present, if not amplified, at the responsibility phase of an NGI trial. Although Lagrone argues that a colloquy is *more* necessary at this phase given the possibility that a defendant in an NGI proceeding is suffering from a mental illness,[11] the State submits that this same possibility may caution against further intrusion from the circuit court into the attorney-client relationship. For example, a defendant who suffers from a mental illness may become more confused – not less – by a circuit court inserting itself by way of a personal colloquy into the defendant's decision to remain silent.

Moreover, it bears repeating that this second phase is distinct from the guilt phase in both its nature and its purpose. At the guilt phase, the focus is on whether the defendant committed the crime. *See State v. Anderson*, 2014 WI 93, ¶24, 357 Wis. 2d 337, 851 N.W. 2d 760. On the other hand, the responsibility phase asks whether "a defendant should be held responsible for" that crime. *Murdock*, 238 Wis. 2d 301, ¶26. In the former phase, a defendant's testimony is necessarily more significant and relevant. But in the latter, it is difficult to discern of a case in which a defendant's testimony is going to be particularly compelling, or even relevant. *See Magett*, 355 Wis. 2d 617, ¶¶7, 47. By the very nature of the second phase of the NGI proceeding, a defendant claiming he is not responsible for the crime will have very little of value to add to the proceeding. *Id.* ¶¶7, 46-48. Thus, the responsibility phase is not a proceeding in which a colloquy serves to protect a

[11] Lagrone's Br. at 19. Lagrone supports his position by pointing to the record in which his counsel asked for a competency hearing twice. The State understands that a defendant at an NGI hearing may necessarily be less skillful than a non-NGI defendant, but inserting the circuit court into decisions between counsel and his client does not necessarily serve to protect the defendant's interests.

defendant from giving up an extraordinarily important part of his case, and it cannot be said that performing such a colloquy would not carry great risks. In other words, the State submits that after evaluating the risks of a colloquy against its possible benefits, it is not prudent to extend *Weed* to the second phase of an NGI proceeding.

In addition, if a personal colloquy is not required at the guilt phase of a criminal trial when a defendant elects to waive his right *to silence* – to be free from self-incrimination and to subject himself to cross-examination, *see Denson*, 335 Wis. 2d 681, ¶¶ 8, 55, then it should not be required at the second phase 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.[12]

In the event that 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 the second phase of an NGI proceeding, or if this Court opts to save the constitutional questions that Lagrone has raised for another day, Lagrone is still not entitled to relief any possible error here was harmless.

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

Although "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless

[12] Lagrone requests that this Court remand his case to the circuit court for an evidentiary hearing on the issue of whether he knowingly, intelligently and voluntarily waived his right to testify. Lagrone's Br. at 20-21. As the court of appeals concluded, this is unnecessary because any error in neglecting to perform the colloquy was harmless beyond a reasonable doubt. *State v. Lagrone*, 2013AP1424-CR, slip op. ¶13 (A-Ap.106-07).

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).

Recently, this 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.[13]

B. How to assess whether an error is harmless

"An error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Hale*, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W. 2d 637 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

C. Any error in failing to conduct a colloquy, or in excluding Lagrone's testimony, was harmless

Lagrone argues that the court of appeals' conclusion that any error from the circuit court's failure to conduct a colloquy was harmless was wrong because the court of appeals "ignored *Garcia*[14] and instead erroneously applied the harmless error doctrine based on *State v. Nelson*[.]"[15] Lagrone appears to believe that so long as he refuses to reveal what his testimony would have

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[13] 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).

[14] *State v. Garcia*, 2010 WI App 26, ¶14, 323 Wis. 2d 531, 779 N.W. 2d 718.

[15] Lagrone's Br. at 25.

been, the State can never demonstrate that any error was harmless. Lagrone is mistaken.

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.[16] In *Garcia*, the court of appeals 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 to testify. *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, *Garcia* does not dictate that Lagrone's case is not capable of harmless error assessment. *Garcia* 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. In addition, it appears that the question before the court in *Garcia* was whether Garcia was entitled to a new trial or whether the evidentiary hearing sufficiently cured any error in failing to engage in a plea colloquy. *Garcia*, 323 Wis. 2d 531, ¶4. It does not appear that the question of whether the absence of Garcia's testimony was harmless error was before the court; thus, *Garcia* is of minimal value here.

The State believes that *Winters* is more instructive. In *Winters*, the defendant "complain[ed] that the trial court should have permitted him to revoke his waiver of his right to testify

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[16] Lagrone's Br. at 24, 26, 29 n.5, 30.

after he changed his mind overnight." 2009 WI App 48, ¶14, 317 Wis. 2d 401, 766 N.W. 2d 754. But *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 his 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.[17] 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.[18] But whether or not there was a

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[17] Lagrone's Br. at 23-24.

[18] Although it was in another context, 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 that *Winters* did not challenge

colloquy had no bearing on the *Winters* court's conclusion that a defendant must make an offer of proof concerning the substance of the allegedly excluded evidence in order for a court to assess its significance. 317 Wis. 2d 401, ¶¶18-24. Here, the evidence that Lagrone argues was improperly excluded was his own testimony. Like any other improperly excluded evidence, Lagrone must demonstrate what that evidence would have shown. *See* Wis. Stat. § 901.03(1)(b); *Winters*, 317 Wis. 2d 401, ¶¶18-24. Lagrone could have done this in his postconviction motion, but he chose not to do so. *See Winters*, 317 Wis. 2d 401, ¶¶19-24. Like *Winters*, "[t]he obligation to make an offer of proof was on [Lagrone.]" *Id.* ¶19.

In tandem with the *Winter* court's instruction to defendants to make an offer of proof when they argue that their testimony was erroneously excluded is this Court's conclusion in *Nelson* that the erroneously excluded evidence of a defendant's testimony is subject to harmless error review. *Nelson*, 355 Wis. 2d 722, ¶31.

Lagrone's attempt to limit *Nelson* to its facts is unavailing.[19] 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 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. Lagrone appears to believe that this statement somehow means that this Court intended its holding to apply to Nelson only because it could assess the error *in her case* because of the statements Nelson made. But Lagrone misreads *Nelson* for at least two reasons.

One, in reading the whole decision, it is clear that this Court held "that denial of the right to testify is subject to harmless error review" without any qualification that harmless error review

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the initial waiver). Thus, Lagrone – like *Winters* – knowingly waived his right to testify.

[19] Lagrone's Br. at 25-26.

applies only to facts similar to those found in *Nelson*. *Id.* ¶31. This is clear because this 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 these principles, this 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). This 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). This Court concluded that the denial of the right to testify – like the abridgment of 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 and therefore its erroneous exclusion is subject to harmless error review.

Two, Lagrone's argument that harmless error review applies in a case like *Nelson* – in which the defendant made a record as to what she wanted to testify to – but 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 allegedly unknowing waiver of his right to testify and an offer on the substance of his testimony, this Court may have found any denial of his right was not harmless. But because Lagrone failed to inform any court on 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 to determine 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.

Finally, the State notes that Lagrone's central proposition – that the harmless error doctrine does not apply when a circuit court fails to conduct a colloquy at the responsibility phase of an NGI proceeding – ignores that the responsibility phase is fundamentally different than the guilt phase of the trial. In *Magett*, the trial court refused to conduct the responsibility phase of the trial because it concluded that the defendant had not proffered sufficient evidence from which a jury could find that he was not responsible for the crime. 355 Wis. 2d 617, ¶¶1, 24. In other words, the circuit court directed the verdict "for the State." *Id.* ¶62. This Court held that while "it is preferable, fairer, and more judicious to allow a defendant to put on his evidence in the responsibility phase before dismissing the NGI defense" it was still possible to assess the circuit court's decision dismissing the case for harmless error and find that the "dismissal did not affect the outcome of the case." *Id.* ¶¶65-66. Thus, if a trial court's refusal to *conduct* the responsibility phase of an NGI proceeding

may be subject to harmless error review than surely the exclusion of the defendant's testimony at the responsibility phase – a phase that is not even constitutionally necessary – is also subject to harmless error review.

Lagrone points out that harmless error harmless error review is different from the test for the sufficiency of the evidence[20] and the State agrees. And although the burden is on the State in the harmless error context, Lagrone ignores that the burden was on him to show that he was not responsible for the crime. *See Magett*, 355 Wis. 2d 617, ¶39; *Hale*, 277 Wis. 2d 593, ¶60. Even in viewing the evidence in the light most favorable to Lagrone, there is no reasonable probability of a different result at the responsibility phase of the trial.[21]

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[20] Lagrone's Br. at 27-28.

[21]Again, there is no support for Lagrone's position that an evidentiary hearing is required here. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (a defendant must allege sufficient facts in order to obtain an evidentiary hearing). This Court has now held that the denial of the right to testify is subject to harmless error review. *See Nelson*, 355 Wis. 2d 722, ¶31. As stated, in order to preserve his alleged claim of error, Lagrone was required to set forth an offer of proof detailing the evidence that he believes was erroneously excluded. *See* Wis. Stat. § 901.03(1)(b); *Winters*, 317 Wis. 2d 401, ¶¶16, 22.

CONCLUSION

For the aforementioned reasons, the State respectfully requests that this Court affirm the decision of the court of appeals.

Dated this 11th day of November, 2015.

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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 6,651 words.

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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 11th day of November, 2015.

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