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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

No. 2014AP2370-CR

AARON SCHAFFHAUSEN,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE ST. CROIX COUNTY CIRCUIT COURT
HONORABLE HOWARD W. CAMERON, PRESIDING

APPELLANT'S REPLY BRIEF

TIM PROVIS
Appellate Counsel
Bar No. 1020123

123 East Beutel Road
Port Washington, WI 53074
(414) 339-4458

Attorney for Appellant
SCHAFFHAUSEN

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Discussion

1. Jury Error

a. Responding to counsel's first argument, see Appellant's Brief at 6, hereinafter AB, the State first claims it was not error for the court below to tell the jury it would decide whether the doctors were experts because the court "implicitly determined that [the doctors] were qualified to give expert testimony." Respondent's Brief at 8, hereinafter RB. But the court below explicitly told the jury otherwise, so this claim is belied by the record.

The State then provides an excerpt from Professor Blinka's evidence treatise expressing the professor's opinion court qualification of experts is "inappropriate and unnecessary," RB 8-9. But this opinion is beside the point because Wisconsin law requires the court to make the qualification decision, see AB 6 citing cases, and here the court told the jury it would make the decision. (523:1240

[lines 14-15])(524:1397 [lines 9-11]). (Counsel notes that with the advent of *Daubert* rules in Wisconsin the judge's duties in this regard are more important than ever.)

A court must exercise its discretion to “fully and fairly inform the jury of the rules applicable to the case and to assist the jury in making a reasonable analysis of the evidence.” *State v. Coleman*, 206 Wis.2d 199, 212, 556 N.W.2d 701, 706 (1996)(citations and quotation marks omitted). Since the court below told the jury it would decide whether a doctor was an expert, contrary to the applicable rule of law, it cannot be disputed this was clear error and any argument otherwise is meritless.

b. Responding to the second part of counsel's first argument, *i.e.*, that the failure to give the jurors the promised instruction left them on their own, AB 7, the State claims the standard instruction on expert testimony, given by the court below, eliminates any possibility any juror could have refused to consider any expert's testimony. RB 10-11. But Wis-JI Criminal 200, while discussing how expert testimony should be used, nowhere states anything about how to determine if a witness is an expert. Thus, the jurors were still left to their own devices on that issue.

(The State notes *Morgan v. Krenke*, 72 F.Supp.2d 980 (E.D.Wis.1999), was overruled. RB 11-12. Counsel apologizes to the Court for his deficient research and notes the State cites no case finding exclusion of defense psychiatric testimony from the sanity phase of a bifurcated trial is constitutional.)

c. Preservation of the Issue

The State first claims waiver because trial counsel did not object. RB 5. But the waiver rule “is one of judicial administration and does not limit the power of an appellate court in a proper case to address issues not raised in circuit court.” *State v. Caban*, 210 Wis.2d 597, 609, 563 N.W.2d 501, 506-07 (1997) following *Wirth v. Ely*, 93 Wis.2d 433, 444, 287 N.W.2d 140 (1980). *Wirth, supra*, defines a proper case as one in which “all new issues raised are legal questions, the parties have thoroughly briefed the issues and

there are no disputed issues of fact.” 93 Wis.2d 444. See, e.g., *State v. Leitner*, 2001 WI App 172, ¶42, 247 Wis.2d 195, 633 N.W.2d 207 (“we choose to ignore the waiver.”) aff’d *State v. Leitner*, 2002 WI 77, ¶11, 253 Wis.2d 449, 646 N.W.2d 341. The *Wirth* criteria, which are nearly the same for raising a constitutional issue for the first time on appeal, see *In Re Baby Girl K.*, 113 Wis.2d 429, 448, 335 N.W.2d 846, 856 (1983), are met here. Counsel submits it is in the best interests of justice to consider this issue since it involves Mr. Schaffhausen’s fundamental right to present a defense. See AB 8. The protection of this right is especially important in a sanity phase because that phase is the trial of the accused’s defense and he has the burden of proof there.

The State further claims the Court is barred from reviewing for plain error under rules applying to unobjected to jury instructions. RB 5-6. But there was no unobjected to jury instruction here because the court below never gave the promised instruction. See AB 7. Trial counsel could not object to a jury instruction never given.

2. Refusal to Provide Jury with Reports It Requested.

a. Counsel submitted the court below did not properly consider the 3 determining factors on this issue which are:

1) “whether the exhibit will aid the jury in proper consideration of the case,”

2) “whether a party will be prejudiced by submission of the exhibit, and”

3) whether the exhibit could be subjected to improper use by the jury.”

State v. Jensen, 147 Wis.2d 240, 260, 432 N.W.2d 913, 922 (1988). See AB 10.

As to the first factor, the State argues because the jury took “extensive notes” it did not need the reports as the court below found. RB 16. The two problems with this argument are: first, “the jury itself considered [this] evidence important enough to request it during its deliberations.” *State v.*

Jaworski, 135 Wis 2d 235, 244, 400 N.W.2d 29 (Ct.App.1986) quoted with approval 2006 WI 77, ¶106. Secondly, since the court’s earlier comments allowed jurors to refuse to consider the testimony, see AB 6-7, the reports could have been the only source of information on Mr. Schaffhausen’s defense one or more jurors considered at all and in that event notes of testimony were irrelevant.

As to the second factor, the State supports the ruling below that sending the reports back would unduly emphasize the reports over the doctor’s testimony. RB 16. But again, if one or more jurors decided the doctors weren’t experts and so did not consider their testimony, the reports would have been their sole source of information on Mr. Schaffhausen’s defense.

Considering the third factor, the State supports the ruling below the reports could not be redacted so as to eliminate prejudicial evidence. RB 17. However, counsel has already pointed out trial counsel felt the reports were so important to the defense he waived his earlier objection. AB 10-11. Even were it correct the reports had to be redacted, does not the goal of a fair trial demand the court take the extra time to complete a necessary redaction? In our system, “justice is supposed to be swift but *deliberate*.” *Barker v. Wingo*, 407 U.S. 514, 521, 92 S.Ct. 2182 (1972), emphasis added & see n. 15.

b. Preservation of the Constitutional Error

Since trial counsel did not explicitly phrase his argument for honoring the jury’s request in constitutional terms, the State argues this Court may not consider whether refusal to send the requested reports violated Mr. Schaffhausen’s right to present a defense. RB 18-21.

But since the purpose of the sanity phase is the presentation and evaluation of the accused’s sanity defense with the burden on the accused, does not every evidentiary ruling in that phase affect the right to present a defense to a greater or lesser degree? In any case, Wisconsin courts “have never required an objection to be as specific as possible to be effective.” All that is “required of a party is to object in such

a way that the objection's words or context alert the court to its basis." *State v. Agnello*, 222 Wis.2d 164, 173-174, ¶12, 593 N.W.2d 427 (1999). *Cf. Pacific Gas & Electric v. G.W. Thomas Drayage*, 69 Cal.2d 33, 38, 442 P.2d 641 (1968)(legal issue not determined by use of "magic words")(opn. per Traynor, J.). Counsel submits trial counsel's argument for honoring the jury's request sufficiently preserves a right to present a defense claim.

3. Discretionary Reversal

The State complains counsel did not identify the evidence erroneously admitted. RB 22. This evidence is explicitly identified at AB 11 under the heading "Additional Facts." It then complains no ground for exclusion is argued. RB 22-23. But trial counsel's objection was on relevancy to the sanity issue and present counsel complains at AB 12 of "Allowing unrestricted presentation" of guilt evidence at the sanity phase.

Then, the State repeats its claim the jury instructions could not be interpreted as allowing jurors to ignore any expert's testimony. RB 23. Counsel repeats that the standard jury instruction given here nowhere tells the jurors how to determine when a witness is an expert. See page 2 herein at ¶ b.

Next, the State argues its closing argument was not directed to telling jurors they did not need to consider the defense doctor's testimony but that they did not need to consider the State's doctor's testimony. RB 24-26. It is appropriate for the State to include the context of counsel's quotes but this is a matter of interpretation and when the State said the guilt evidence was enough "before we even hear from *the* doctors" and was sufficient "no matter what *any* doctor said" (529:2666), emphasis added, quoted at RB 25, it seems clear a reasonable juror could interpret this as arguing the testimony of "any" doctor could be ignored.

Finally, the State claims counsel has implied it misstated the law in closing argument. RB 26. This is a red herring as counsel made no such argument. Counsel's argument simply points out the State did its best to take advantage of the court

below's error in telling the jurors they would decide whether a doctor was an expert without giving them any instruction on the issue. AB 12, AB 6-7.

Conclusion

Counsel respectfully submits the foregoing demonstrates the State's arguments are without merit and the Court should reverse and remand for a new sanity trial.

Dated: April 23, 2015

Respectfully submitted,

Tim Provis
Appellate Counsel
Bar No. 1020123

Attorney for Appellant
SCHAFFHAUSEN

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C O U R T O F A P P E A L S

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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 1,639 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated: April 25, 2015

So Certified,

Signature: _____

Timothy A. Provis

Bar No. 1020123