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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

Appeal No. 2015-AP-1845-CR

MORGAN E. GEYSER,
Defendant-Appellant.

Waukesha County Circuit Court
Case No. 2014-CF-596

ON APPEAL FROM A NONFINAL ORDER OF THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL O. BOHREN PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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Contrary to the State's arguments, this Court should find that the Defendant met her burden, reverse the circuit court, and order that the Defendant be waived into the juvenile court system.

I. THE CIRCUIT COURT MISAPPLIED THE THREE FACTORS TO THE EVIDENCE.

As the Defendant has argued, the circuit court did not reach a reasonable conclusion, having failed to use a demonstrated rational process to examine the relevant facts and apply a proper standard of law.

A. The Defendant's Significant Mental Health Issues Would not be Treated, but Made Worse in the Criminal Justice System.

The State makes the same legal error that the circuit court made when it focuses its discussion of the first element on the circuit court's "nearly overarching concern" with the Defendant's status "after she turned eighteen years old were she to be in the juvenile system." (State's Br. at 9). The first element that a defendant seeking reverse waiver must prove is, "That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system." Wis. Stat. § 970.032(2)(a). This statutory language unambiguously identifies the subject of examination for this element: the adequacy of treatment in the criminal justice system. Under the plain language of the statute, the circuit court's "nearly overarching concern" *vis-à-vis* this element, *i.e*. the adequacy of treatment in the juvenile justice system, is entirely irrelevant.

In *State v. Dominic E.W.*, 218 Wis. 2d 52, 579 N.W.2d 282 (Ct. App. 1998), the State argued regarding this element "that the juvenile must prove a total absence of treatment in the adult system – establishing the comparable adequacy of the juvenile system does not satisfy the first criterion." *Id*. at 56, 579 N.W.2d at 284. This Court disagreed with the State, however, *id*. ("We disagree."), holding instead that "[t]he reverse waiver statute permits the trial court to balance the treatment available in the juvenile system with the treatment available in the adult system and requires it to decide under the specific facts and circumstances of the case which treatment will better benefit the juvenile," *id*. (citing *State v. Verhagen*, 198 Wis. 2d 177, 193-94, 542 N.W.2d 189, 194 (Ct. App. 1995)).

In *Verhagen*, cited above by this Court, "The trial court acknowledged that [the defendant]'s treatment in the adult system might not be as adequate as that in the juvenile system, but the court concluded, on balance, that the other statutory factors in favor of retaining adult court jurisdiction overrode this consideration." *Id*. at 193, 542 N.W.2d at 194. This Court affirmed the circuit court's ruling and approved of the circuit court's having "balanced the relevant legal criteria," i.e. the three statutory elements. *Id*. at 193-94, 542 N.W.2d at 194.

The State correctly summarizes the purpose of the Defendant's discussion of *State v. Kleser*, 2010 WI 88, 328 Wis. 2d 42, 786 N.W.2d 144, to support the proposition that there are no balancing tests involved in the analysis required under Wis. Stat. § 970.032(2). (State's Br. at 11-12). The Wisconsin Supreme Court clarified in *Kleser* that "the reverse waiver statute requires the juvenile to

prove *each* of the three elements by preponderance of the evidence. . . . If the juvenile fails to prove one of these elements, the court cannot grant the reverse waiver, no matter how compelling the other two elements may be." *Id*. at ¶ 97, 328 Wis. 2d at 84, 786 N.W.2d at 164-65 (emphasis in original). The Defendant agrees with the State's characterization of this statement as "nothing more than a plain reading of Wis. Stat. § 970.032(2)." (State's Br. at 12). And yet, as discussed above, the circuit court in *Verhagen* "concluded, on balance, that the [second and third] statutory factors in favor of retaining adult court jurisdiction overrode" the first factor. *Verhagen*, 198 Wis. 2d at 193-94, 542 N.W.2d at 194. The above-quoted language in *Kleser* makes clear that a circuit court does not "balance" the three "factors," nor can any one or two factors be said to "override" the remainder. *Verhagen* says otherwise; *Verhagen*, therefore, is wrong.

If *Verhagen* is wrong, then so is *State v. Dominic E.W.*, 218 Wis. 2d 52, 579 N.W.2d 282 (Ct. App. 1998). *Verhagen* is the only case cited in *Dominic E.W.* in support of the holding that "[t]he reverse waiver statute permits the trial court to balance the treatment available in the juvenile system with the treatment available in the adult system and requires it to decide under the specific facts and circumstances of the case which treatment will better benefit the juvenile." *Id*. at 56, 579 N.W.2d at 284 (citing *Verhagen*, 198 Wis. 2d at 193-94, 542 N.W.2d at 194). The State implicitly acknowledges in its brief that *Dominic E.W.* was wrong in this regard, noting that "the statute requires that [the Defendant] demonstrate that she could not receive *adequate* treatment in the criminal justice system, not

that she could not receive better treatment or the best available treatment." (State's Br. at 9 (emphasis in original)). Phrased differently, the State acknowledges that Wis. Stat. § 970.032(2) does not "permit[] the trial court to balance the treatment available in the juvenile system with the treatment available in the adult system." *See id*.

And yet, as the State puts it, "the circuit court's nearly overarching concern" was "with what would happen to Geyser after she turned eighteen years old were she to be held in the juvenile system." (State's Br. at 9). This has nothing to do with whether she can receive adequate treatment in the criminal justice system. As the State puts it, the circuit court "concluded that the juvenile system could not provide Geyser the long-term treatment that she needs." (State's Br. at 10). This, too, has nothing to do with whether she can receive adequate treatment in the criminal justice system. The State argues that the Defendant "ignores that if convicted of attempted first-degree homicide, she will spend her first years at Copper Lake, which is where she would be if she were to be adjudicated delinquent in the juvenile system." (State's Br. at 9). Of course she does; this fact has nothing to do with whether she can receive adequate treatment in the criminal justice system.

Not all of the circuit court's observations are irrelevant, however. The State acknowledges that "the court acknowledged that Taycheedah, the facility at which Geyser would eventually end up were she convicted, was overcrowded and there currently exists a waiting list for programming . . . ." (State's Br. at 11 (citing

129:16-17)). The State also acknowledges that "the circuit court acknowledged that Geyser presented '[t]estimony [] that meaningful services for [her] would not be available in the adult system.'" (State's Br. at 9 (citing 129:13)). The record clearly reflects that the Defendant cannot receive adequate treatment in the criminal justice system.

B. Transferring Jurisdiction to Juvenile Court Does not Depreciate the Seriousness of the Offense.

The State asserts in its brief, "The circuit court amply explained just how serious Geyser's crime was and how transferring her case would depreciate that seriousness." (State's Br. at 15). Tellingly, the State does not identify this ample explanation in the record. The most "ample" discussion of this element by the circuit court is its conclusion that "[t]he nature of this offense, the youthfulness of the defendants, their mental development, the mental continued development of each of the defendants satisfies this Court, with the nature of the offense, that to place the defendants in the juvenile setting unduly depreciates the nature of the offense, the seriousness of the offense." (129:24).

But this conclusion is hardly an explanation. Even the passage quoted by the State in support of its argument, instead of explaining how reverse waiver would unduly depreciate the seriousness of the offense, merely emphasizes that the Defendant is charged with attempted first-degree homicide. The circuit court's reminder that the alleged acts were "an effort to kill someone, not a mistake by hitting them too hard" (129:20), is no more than a reminder that "the defendant

had the mental purpose to take the life of another human being or was aware that [her] conduct was practically certain to cause the death of another human being." WIS-JI CRIMINAL 1070. The State argues that "it is incredible to suggest . . . that the circuit court refused to transfer jurisdiction solely because the crime was one enumerated in Wis. Stat. § 938.183" (State's Br. at 14), but then cites later in the same paragraph the circuit court's statement in support of its refusal to transfer jurisdiction that "[t]his was premeditated murder and an attempt to do so," (State's Br. at 14 (citing 129:20)).

The circuit court also cited "the youthfulness of the defendants, their mental development, the mental continued development of each of the defendants," in support of its determination that "to place the defendants in the juvenile setting unduly depreciates the nature of the offense, the seriousness of the offense." (129:24). How the defendants' youth and mental development supports this conclusion is left unexplained. Just like the underpants gnomes from *South Park*,[1]

[1] See Michael M. O'Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751 (2009):

> When I teach *Gallion* in my Sentencing class, I invoke the 'underpants gnomes' from the television series *South Park*. As they explain to the child-protagonists of *South Park*, the underpants gnomes have a three-step plan: (1) collect underpants, (2) [awkward silence], (3) profits. The plan is laughable, of course, because it is missing the most important and difficult part: the transformation of underpants into profits. The gnomes have an input (underpants) and a desired output (profits), but no idea how to connect them. *Gallion*, I think, is really criticizing Wisconsin sentencing courts for being underpants gnomes: they recite an input (case-specific facts and generic purposes of sentencing) and an output (the particular sentence imposed) without explaining how the input relates to the output. Something else besides facts and purposes must be stated before a sentence of, say, twenty-one years in prison can truly be said to have been explained.

Id. at 768 (citing *South Park*: *Gnomes* (Comedy Central television broadcast Dec. 16, 1998), available at http://www.hulu.com/watch/249856).

the circuit court's ruling on this factor contains input and output, but none of the important explanation that distinguishes a proper exercise of discretion from "merely uttering the facts, invoking . . . factors, and pronouncing a" ruling. *See State v. Gallion*, 2004 WI 42, ¶ 2, 270 Wis. 2d 535, 544, 678 N.W.2d 197, 200.

Finally, the Defendant reiterates that the State's treatment of the Defendant while the present case has been pending mitigates any concerns about depreciating the seriousness of the offense. The Defendant's long-term stay at a short-term facility is a unique punishment that is not erased by transferring the present case to juvenile court.

C. Deterrence is Impossible in Any Court.

The State cites *Graham v. Florida*, 560 U.S. 48, 71 (2010), in support of its argument. (State's Br. at 17). *Graham* does not support the State's argument. If anything, it supports the Defendant's argument regarding deterrence.

> Deterrence does not suffice to justify the sentence either. *Roper* [*v. Simmons*, 543 U.S. 551 (2009),] noted that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Ibid.* [at 571.] Because juveniles' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions," *Johnson v. Texas*, 509 U.S. 350, 367 (1993), they are less likely to take a possible punishment into consideration when making decisions.

Id. The proper analysis regarding this element focused on whether waiver into juvenile court will affect the legal system's ability to deter. But the circuit court instead focused its analysis on whether the juvenile court system can, in fact,

deter. The circuit court erred when it presumed that retaining jurisdiction in "adult" court does, in fact, effectively deter.

CONCLUSION

The circuit court erred when it held that the Defendant did not meet her burden to prove by a preponderance of the evidence that reverse waiver was appropriate. The uncontroverted evidence presented by the Defendant clearly establishes that the Defendant could not possibly receive appropriate treatment in the adult criminal justice system, that reverse waiver would not depreciate the seriousness of the offense committed by the Defendant, and that retaining jurisdiction is not necessary to deter the Defendant or any other juveniles from committing the offense. This Court should find that the Defendant met her burden, reverse the circuit court, and order that the Defendant be waived into the juvenile court system.

Dated this 11th day of March, 2016.

Respectfully submitted,

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I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,144 words.

I further certify that I have submitted an electronic copy of this brief that complies with the requirements of Wis. Stat. § 809.19 (12), and that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated this 11th day of March, 2016.

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