STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP238-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. WASHINGTON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY, THE HONORABLE DAVID W. PAULSON, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE

The issue in this case is whether the circuit court violated Michael Washington's statutory right to be present at trial when it honored his refusals to be brought to the courtroom from his holding cell. The State focuses on the facts related to the trial and Washington's refusals to attend it in the argument section of this brief. But it also provides facts relating to Washington's behavior leading up to trial for necessary context for the trial court's findings and conclusion.

By Information, the State charged Washington with burglary of a dwelling and obstructing an officer, both as a repeater. (1; 2.) The charges were based on an April 1, 2011 incident in which Washington entered R.V.'s apartment in Racine, encountered R.V., and was immediately arrested outside R.V.'s apartment with bags containing R.V.'s belongings. (1.)

From the get-go, Washington demonstrated an unwillingness to work with his appointed attorneys. Washington's first two attorneys sought and obtained the

court's permission to withdraw, citing breakdowns in the attorney-client relationships. (53:2; 55:5.) Both counsel also noted that Washington was writing pro se letters to the court. (53:4; 55:3.) Washington's second counsel also noted that Washington was proposing unviable defenses and making unreasonable discovery demands that counsel could not comply with. (55:5.)

When it allowed the second attorney to withdraw, the court expressed that Washington was engaging in a pattern of ignoring his attorneys' advice and demanding that they withdraw if they disagreed with Washington. (55:7-8.) It reminded Washington that his right to an attorney did not require that Washington be appointed an attorney who acted as Washington's puppet. (55:16-17.) It warned Washington that it would not permit any subsequent attorneys to withdraw simply because they could not comply with Washington's unreasonable demands. (55:18.)

Washington's third attorney, Wendy Paul, likewise sought to withdraw months after her appointment, citing a deterioration in their relationship. (60:2.) The court initially granted the motion, but then reconsidered and denied it, given that Washington (through Paul) had filed a speedy trial demand, and a new attorney would not be prepared for the trial scheduled for November 16. (60:6-7.)

About a month later, the day before trial, Attorney Paul again asked to withdraw, noting that Washington had filed two motions without her knowledge and that they had a fundamental difference of opinion about viable defenses. (61:3.) The court reminded Washington that his counsel was not his puppet, and that it believed that the problems Washington was having with Paul and his previous two attorneys were "act[s] of manipulation" by Washington. (61:6-9.) It denied the motion to withdraw in light of Washington's refusal to withdraw his speedy trial demand. (61:9.)

The next day, on November 16, Attorney Paul notified the court that the day before, she "learned of some new information for the very first time" from Washington that she believed could assist Washington's defense, but that Washington refused her recommendation that he withdraw the speedy trial demand to give her time to investigate. (63:3.) After further discussion, Washington withdrew the speedy trial demand. (63:6-7.) The court rescheduled the trial. (63:7-8.)

By the next hearing on January 31, 2012, Paul asked the court a third time to permit her to withdraw, stating that the attorney-client relationship was irreparably broken. (64:2.) When asked, Washington stated that he did not know if "there [was] an attorney in the world who [he] would get along with" and who would not want to withdraw. (64:2-3.) The court

discussed Washington's continued failure to work with his attorneys and the trial delays that have resulted. (64:4.) When the court stated that Washington did not "seem[] to . . . get along with any attorneys," Washington shot back, "[M]aybe they don't get along with me, have you ever considered that?" (64:4.)

The court reiterated that Washington was engaging in a manipulative pattern of seeking new attorneys and making speedy trial demands to prevent the case from being resolved. (64:6.) The court found that under the circumstances, Washington would likely engage in the same pattern with any subsequent attorneys, so it denied the motion. (64:6-7.)

On the morning of trial on February 14, 2012, before jury selection began, Attorney Paul informed the court that the week before, she attempted to speak with Washington about the results of her investigation of the new information he provided her the day before the November trial. (65:2.) But Washington wanted to speak about other matters, and when she tried to redirect him to the trial and theory of defense, he "stated that [Paul] was not his attorney. And refused to speak to [Paul] about that." (65:2.) Paul said that since then, she wrote Washington inviting him to call her collect when he wanted to talk, but she had not heard from him. (65:3.)

When asked by the court, Washington denied that Paul was providing adequate representation and stated that he wanted her to withdraw. (65:3.) The court reminded Washington of his pattern:

> THE COURT: Well, sir, we've been down this road so many times over and over and over.
> DEFENDANT: And we can keep going over and over it again.
> THE COURT: No, we're—
> DEFENDANT: She's not representing me, man.
> THE COURT: Sir, the matter is set for trial.
> DEFENDANT: I don't know what it's set for, she ain't representing me.
> THE COURT: All right, Mr. Washington?
> DEFENDANT: I'm telling you[,] she's not representing me, man.
> THE COURT: Sir, will you let me speak. The matter is scheduled for a jury trial this afternoon. And it is going to be going forward as a jury trial. We have addressed this issue of who is your—
> DEFENDANT: I said she's not representing me and we ain't going no trial now, I mean that.
> THE COURT: Sir, we will go forward with the trial[,] and if necessary you may have to be removed from the courtroom.
> DEFENDANT: I'm gone. She's not representing me.

(65:3-4.)

The court then made a record of Washington's outburst and removal from the courtroom:

> Mr. Washington semi was removed and semi left on his own after the last outburst. So we are out of his presence right now. And the real issue that has come up here is one of manipulation. I think Mr. Washington has been trying to

> manipulate this case in my opinion for a very long period of time. We had selected a jury and prior to that jury being sworn not too long ago some new information was disclosed. The adjournment was granted so that that could be investigated. Since then I believe he has on two or three additional occasions attempted to discharge counsel and I've denied that motion saying we could be going forward. So we're going to have to decide how to proceed here and as I say the concern that I have is that there's no end in sight if we allow this to continue and allow him to continue with this type of manipulation.

(65:4-5.)

The circuit court then discussed Washington's constitutional right to be present. It noted that it lacked audiovisual equipment to allow Washington to participate in the trial remotely. (65:5.) It stated that if necessary, staff would escort Washington involuntarily to the courtroom, the court would warn him on the record if he continued to not cooperate, and staff would remove him if the warning failed (with the trial proceeding without him). (65:6.) The court stated that Washington would have time to cool off before trial was to begin that afternoon. If at that point Washington refused to cooperate, the court would permit the trial to go on but would allow counsel to regularly consult with Washington and see if he wanted to return. (65:7.)

As addressed in more detail in the argument section below, Washington refused numerous entreaties to return to court, and the trial went on without him. Attorney Paul continued to

represent Washington through jury selection and the half-day trial, during which the jury was instructed to not allow Washington's absence to affect its verdict. The jury returned verdicts of guilt on both charges. (66:130.) The court later sentenced Washington in a proceeding at which Washington was present. (67:2.)

By postconviction motion, Washington sought a new trial, alleging that the circuit court violated his statutory right to be present under Wis. Stat. § 971.04. (47.) The postconviction court denied the motion after finding that Washington waived his right to be present when he "chose to be excluded." (48; 69:19.) Washington appeals.

ARGUMENT

Washington is not entitled to a new trial when he chose, despite being given numerous opportunities to change his mind, to waive his right to be present at trial.

A defendant's right to be present at trial is protected both in the federal and Wisconsin constitutions[1] and by statute.[2] On appeal, Washington does not dispute that he waived his constitutional right to be present at his trial. Rather, he argues

[1] U.S. Const. Amend. XIV; Wis. Const. Art. 1, § 8; *State v. Divanovic*, 200 Wis. 2d 210, 219-20, 546 N.W.2d 501 (1996).

[2] Wis. Stat. § 971.04.

that his absence from the courtroom before the trial commenced violated his statutory right to be present at trial. Thus, in effect, he argues that a defendant's statutory right to be present in criminal proceedings, as set forth under Wis. Stat. § 971.04 and as interpreted by this court in *State v. Dwyer*, 181 Wis. 2d 826, 512 N.W.2d 233 (Ct. App. 1994), is more robust than the constitutional protections.

The State disagrees. As a threshold matter, because Washington's counsel never objected on statutory grounds to the court's handling of Washington's refusals to attend his trial, Washington forfeited his direct claim and is limited to an ineffective assistance of counsel claim.

To that end, counsel was not deficient for not raising an objection based on statutory grounds because Washington waived his statutory right to be present. Under the circumstances, the trial court provided Washington with numerous opportunities to attend his trial; Washington knowingly refused every invitation. Given that, Washington waived his statutory right to be present. Further, Wis. Stat. § 971.04(3) and *Dwyer* address the situation where a defendant was absent from trial, without more, not the clear waiver Washington made here.

To the extent that this Court believes that the trial court violated Washington's statutory right under *Dwyer* and that

counsel was deficient for failing to so object, any error was harmless (and similarly not prejudicial under the ineffective assistance rubric) under the circumstances. Finally, if this Court still disagrees, the State submits that *Dwyer* was wrongly decided and asks this Court to consider certifying the issue to the supreme court.

A. Washington forfeited his claim that the court violated his statutory right to be present when he failed to contemporaneously raise the claim to the circuit court.

A defendant can waive or forfeit a statutory or constitutional right if he or she does not contemporaneously invoke it in the circuit court. *State v. Weidner*, 47 Wis. 2d 321, 325, 177 N.W.2d 69 (1970). This includes a right to due process. *See Kenosha Cty. Dept. of Human Serv. v. Jodie W.*, 2006 WI 93, ¶¶ 21, 24, 293 Wis. 2d 530, 716 N.W.2d 845.

> A contemporaneous objection enables the litigants, the lawyers and the trial court to make a record regarding the issue when the recollections of everyone are still fresh. Enforcement of the contemporaneous objection rule encourages the parties to view the trial as an event of significance that should be kept as error-free as possible. The rule promotes both efficiency and fairness. A contemporaneous objection puts both the parties and the court on notice of the disputed issue, thereby providing a fair opportunity to prepare and address the issue in a way that most efficiently uses judicial resources. If this rule of waiver did not exist, a party could lie in the weeds by not objecting and then belatedly raise the issue when it was advantageous to do so.

State v. English-Lancaster, 2002 WI App 74, ¶ 15, 252 Wis. 2d 388, 642 N.W.2d 627 (citations omitted).

Here, Attorney Paul never objected to the court's propsed process to encourage Washington to attend his trial, nor did she allege that the court was violating Washington's statutory right under Wis. Stat. § 971.04. Had Paul done so, the trial court could have addressed the statutory standard; if the court concluded that it needed to change course, it could have done so then. *See, e.g.*, *State v. Guzman*, 2001 WI App 54, ¶ 25, 241 Wis. 2d 310, 624 N.W.2d 717 ("The purpose of the contemporaneous objection is to allow the trial court to correct any alleged error with minimal disruption. A timely objection would have afforded the trial court the opportunity to correct any potential error.") (Citations omitted.)

And for those same reasons, Washington's postconviction motion seeking a new trial based on the statutory violation did not preserve his right to raise this challenge on direct appeal because it did not timely alert the court to the potential error when it had a chance to correct it.

Although a defendant's failure to object contemporaneously to an alleged error waives any right to complain about this error on appeal, *State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511, a claim of ineffective assistance of counsel provides a means of circumventing a waiver. *State ex*

rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 680 n.5, 556 N.W.2d 136 (Ct. App. 1996). Thus, this Court may review a waived error under the standards for determining whether counsel was ineffective. *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31. To prove ineffective assistance of counsel, a defendant must prove that counsel was deficient and that that deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Accordingly, this Court should assess Washington's claim under the *Strickland* standard.

B. Washington knowingly and voluntarily waived his right to be present at his trial.

Because Washington waived his right to be present by refusing to allow jail staff to bring him to trial, counsel was not deficient for failing to raise an objection on statutory grounds.

1. As with his constitutional right to be present at trial, a defendant may waive his statutory right.

Although Washington's appeal focuses on his statutory right to be present at trial, a brief discussion of the corresponding constitutional right is helpful.

A defendant has a constitutional right to be present in the courtroom at all stages of his trial. *State v. Divanovic*, 200 Wis. 2d 210, 219-20, 546 N.W.2d 501 (Ct. App. 1996). A defendant may waive that right by misconduct or consent. *Id.* at 220.

"Although the law requires waiver of the right to be present, when a defendant is voluntarily absent from the trial proceedings, a defendant's failure to assert the right to be present can constitute an adequate waiver and an express waiver on the record is not essential." *Id.* (citations omitted). Appellate courts assess whether a defendant's absence from trial violated his constitutional rights in light of the entire record. *Id.* at 221.

Likewise, Wis. Stat. § 971.04 provides that a defendant charged with a felony must be present at various stages in criminal proceedings, including during voir dire of the jury, Wis. Stat. § 971.04(1)(c), and during trial, Wis. Stat. § 971.04(b). But the statute further provides that a court may continue a trial when the defendant voluntarily absents himself from the court's presence without the court's permission:

> If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court, the trial or the return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times.

Wis. Stat. § 971.04(3).

Moreover, as with a defendant's constitutional right, a defendant can waive either expressly or by conduct his

statutory right to be present as enumerated in Wis. Stat. § 971.04. *See State v. Dickson*, 53 Wis. 2d 532, 546, 193 N.W.2d 17 (1972) (applying predecessor of Wis. Stat. § 971.04); *see also State v. Soto*, 2012 WI 93, ¶ 44, 343 Wis. 2d 43, 817 N.W.2d 848 (holding that a defendant may waive his right to be present at the pronouncement of judgment under Wis. Stat. § 971.04(1)(g)).

2. Washington's consistent refusals to allow staff to escort him to the trial served as valid waivers of his statutory right to be present at his trial.

After Washington's outburst on the morning of trial, the court afforded Washington many opportunities to return.

When the afternoon session began, the court asked a deputy to "see what [Washington's] demeanor is and if he is willing to return to the courtroom[.]" (65:9.) The deputy reported that "the officer upstairs asked Mr. Washington if he would like to come down and participate in his jury trial. Mr. Washington said no. No further comment." (65:10.)

The court then found that Washington had history of manipulative behavior and acted with intent to delay the proceedings. (65:11-15.) It found that Washington waived his constitutional right to be present. (65:15.)

The court observed that *Divanovic* recommended that Washington be brought involuntarily to trial, warned if he

continued to not cooperate, and removed if that warning was ineffective, but did not believe that that procedure was appropriate for safety reasons. It found:

> I believe at this point . . . recognizing the way in which he . . . behave[d] and act[ed] when he was brought into court earlier and his expressed unwillingness to come down now or participate that attempting to involuntarily bring Mr. Washington back into court would unduly jeopardize the safety of officers and perhaps even Mr. Washington since his aggressiveness and his attitude suggest that he may be physically resistant to being brought back in and that it could result in an altercation.

(65:15.)

The court made clear that Washington could return to the courtroom at any point if he was "willing to cooperate and behave," that Attorney Paul would continue to represent Washington, and that Paul would get reasonable opportunities to confer with Washington throughout the trial. (65:16.) The court further noted that Washington would be "periodically advised" of his right to return to the courtroom. (65:16.)

Shortly after that ruling, the court allowed a break for Attorney Paul to confer with Washington. (65:20.) When she returned, Paul said that she explained the court's ruling to Washington, and that Washington refused to participate in the trial. (65:21.) The court and counsel proceeded with jury selection, which took the remainder of that day. (65:22.)

The next morning, both a corrections officer and Attorney Paul made contact with Washington that morning, and Paul confirmed that Washington refused to come to the courtroom. (66:2.) The court found that Washington was "still by his conduct refusing to come down, waiving his right to be present, so we will continue without him." (66:2.) The court indicated that it would give Paul opportunities throughout the trial to talk to Washington, and asked Paul to inform Washington that he should inform jail staff if, at any time, he changed his mind about coming to the trial. (66:2-3.)

Before trial, Attorney Paul also preserved an objection to the State's using a booking photo of Washington for identification purposes, but acknowledged that the alternative—forcing Washington to appear at trial—was less desirable. (66:10.) The court stated that "it may well be far more prejudicial to [Washington] to force him to be brought in by officers when he's physically apparently resistive to that as he demonstrated yesterday that he was likely to be in." (66:10.)

Trial began with testimony from R.V. and one of the police officers dispatched to R.V.'s 911 call. (66:32-71.) During a recess, Attorney Paul again made contact with Washington and reported that he did "not want to participate in trial." (66:73.) She also told the court that she explained Washington's right to testify, that he told her he understood his right, and that he did

not want to testify. (66:73.) The court found that Washington continued to waive his right to be present. (66:73-74.)

A second officer testified, the State rested, and Attorney Paul rested at the close of the State's case, ending the evidence portion of the trial at 11:15 that morning. The court excused the jury until 1 p.m. (66:84, 97.) After the jury returned, counsel presented closing arguments and the court gave the jury its instructions. (66:98-128.)

When the court learned that the jury had reached a verdict, the court directed jail personnel to ask Washington if he wanted to be present to receive the jury's verdict. (66:129.) According to the court, Washington "indicated very emphatically to personnel[,] which was heard over the telephone by someone in this courtroom[,] that he . . . does not want to come down." (66:129.) The proceedings continued, the jury returned to the courtroom, and it returned verdicts of guilt on both counts. (66:130.)

In sum, either court staff or Washington's counsel or both asked Washington whether he wanted to be present at jury selection, at the start of trial, mid-trial, and for the return of verdict. Washington refused every invitation. Further, there is nothing in the record to indicate that Washington informed jail staff that he wished to return to the courtroom.

Under the circumstances, the court's procedure did not violate Washington's statutory right to be present. Washington's affirmative refusals to the court's invitations return to the courtroom served as valid waivers of his statutory right to be present for jury selection, for trial, and for the return of verdict. *See, e.g.*, *Soto*, 343 Wis. 2d 43, ¶ 49 (holding that Soto affirmatively waived his right to be present at his plea hearing when he and his counsel deemed videoconferencing to be acceptable). Moreover, the court was not obligated to jeopardize the safety of court staff and Washington by ordering staff to forcibly escort Washington to the courtroom. *See State v. Vaughn*, 2012 WI App 129, ¶ 26, 344 Wis. 2d 764, 823 N.W.2d 543 (refusing, based on safety concerns for court staff and the defendant, to impose rule on circuit courts that they must drag "an obstreperous defendant . . . into court" to comply with palliative requirements). Accordingly, counsel was not deficient for objecting on statutory grounds.

3. *Dwyer* and *Koopmans* are "absence without more" cases and, accordingly, are not controlling.

Washington primarily relies on *Dwyer*, 181 Wis. 2d 826, and *State v. Koopmans*, 210 Wis. 2d 670, 563 N.W.2d 528 (1997), to the extent that the courts in those cases understood Wis. Stat. § 971.04(1) and (3) to preclude circuit courts from finding that a defendant forfeited, by his absence alone, his right to be present

at trial or sentencing. (Washington Br. 5-10.) But that argument fails to recognize the distinction between forfeiture, i.e., absence without more, and waiver, i.e., a clear expression of a desire to not be present.

The supreme court discussed that distinction in *Soto.* In *Soto*, the defendant elected to attend his plea hearing by teleconference. 343 Wis. 2d 43, ¶ 33. On appeal, he claimed that, based on Wis. Stat. § 971.04(1)(g), he could not waive his right to be in the same courtroom as the judge during his plea hearing. *Id.* ¶ 41, n.8.

The supreme court disagreed, and in doing so, it emphasized the difference between forfeiture and waiver: "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Id.* ¶ 35 (quoting *State v. Ndina*, 2009 WI 21, ¶¶28-31, 315 Wis. 2d 653, 761 N.W.2d 612) (internal quotation marks omitted). It held that a defendant could expressly waive his or her right to be present under § 971.04(1)(g), and it concluded that Soto indeed waived his right to be present when he agreed to participate in the hearing by teleconference.

It distinguished that express waiver from the forfeiture-by-mere-absence situation in *Koopmans*. In *Koopmans*, the supreme court held that the circuit court could not infer waiver of

Koopmans' statutory right to be present at her sentencing based on her absence alone, where Koopmans had absconded to Belize months earlier. 210 Wis. 2d at 679. Further, the supreme court limited *Koopmans* to the narrow holding "that a defendant who absents herself from sentencing, without more, has not sufficiently demonstrated waiver of her right to be physically present." *Soto*, 343 Wis. 2d 43, ¶ 41 n.8. Thus, *Koopmans* does not control here, where Washington waived his right to be present by clearly expressing his desire to not attend trial.

Nor does *Dwyer*, another absence-without-more case, support Washington. In *Dwyer*, Dwyer informed the trial court during jury selection that she wanted to hire a new attorney. 181 Wis. 2d at 832. The court denied that request, and after a brief recess, Dwyer did not return to court. *Id.* The court tried Dwyer in absentia over her attorney's objection. *Id.*

The court of appeals reversed. The court explained that a trial court could try a defendant in absentia when he or she, by his or her conduct, waived his or her right to be present. *Id.* at 837. But it further understood Wis. Stat. § 971.04(3) to provide that the court could infer that waiver by absence alone only if the defendant was present at the beginning of trial. *Id.* Because Dwyer was not present at the beginning of the trial, i.e., when her jury was sworn, *see State v. Miller*, 197 Wis. 2d 518, 521, 541

N.W.2d 153 (Ct. App. 1995), the court of appeals held that Dwyer was entitled to a new trial. *Dwyer*, 181 Wis. 2d at 837.

Dwyer is not on point. The *Dwyer* court understood voluntary absence under subsection (3) to mean waiver inferred by conduct, or "absence without more." Unlike Dwyer's inferred waiver by her absence alone, i.e., her disappearance during jury selection after which it did not appear that counsel or the court could communicate with her, Washington had an outburst on the morning of trial, was removed from the courtroom, and subsequently waived his right to be present by refusing the many invitations by the court and counsel to attend his trial. Hence, the delimitation in subsection (3) does not apply here because there was no ambiguity in Washington's absence. Washington was removed from court, not "voluntarily absent[] . . . without leave of the court" (*see* Wis. Stat. § 971.04(3)), and when asked numerous times, he stated that he did not want to return.

To be sure, the postconviction court concluded that Washington "waived [his] statutory right, by his conduct, to be present." (69:18-19.) But that was not a conclusion that Washington was absent without more; rather, it correctly concluded that Washington expressly *chose* to waive his right to be present.

And there is nothing in § 971.04 or case law to prevent a court from trying a defendant in absentia when that defendant expressly waives his right to be present at any portion of a criminal proceeding listed under Wis. Stat. § 971.04. Here, Washington expressly waived his right to be present during voir dire. After the jury was selected, he expressly waived his right to be present at the start of trial. The jury was sworn, trial began, and Washington again expressly waived his right to return both mid-trial and for the return of the verdicts. The court's process and procedure under the circumstances did not run afoul of Wis. Stat. § 971.04. Accordingly, counsel was not deficient for failing to object on statutory grounds.

4. If this Court deems *Dwyer* to be on point and to demand a new trial, the facts of this case demonstrate why *Dwyer* was wrongly decided.

Alternatively, if this Court accepts Washington's proposition—i.e., that under *Dwyer*, the fact that he was not present at the start of trial means that he cannot waive, as a matter of law, his presence at the remainder of trial—the State submits that *Dwyer* was wrongly decided.

The State recognizes that this Court is bound its own precedent and that it cannot overrule or withdraw language in *Dwyer*. Nevertheless, when this Court believes that a prior court of appeals case was wrongly decided, it may signal its

disfavor by certifying the appeal to the supreme court. *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

If *Dwyer* indeed stands for the notion that a court can never hold a trial in absentia for a defendant who is not present when the jury is sworn, the facts of this case demonstrate why that interpretation of Wis. Stat. § 971.04(3) is unworkable. A defendant could endlessly sandbag his trial so long as he prevents himself from being present at the start of trial, by either expressly waiving his right, or by engaging in conduct that requires his removal from the courtroom. A defendant doing the latter could especially profit if his behavior demands his removal while a jury is being selected or just before it is sworn, given the likelihood that that behavior would prejudice the jury panel or pool and result in further delays.

C. Any error was harmless and non-prejudicial.

Violations of a defendant's right to be present under Wis. Stat. § 971.04 are subject to a harmless error analysis. *State v. Peterson*, 220 Wis. 2d 474, 489, 584 N.W.2d 144 (Ct. App. 1998). Alternatively, to the extent that this Court views this case in the rubric of ineffective assistance of counsel, Washington must show that his absence from trial was prejudicial. *Strickland*, 466 U.S. at 693. Although the burden of proof for each test is different, the standard for the tests for harmless error and prejudice is largely the same, i.e., whether the error undermines

confidence in the outcome. *State v. Dyess*, 124 Wis. 2d 525, 545, 370 N.W.2d 222 (1985).

Looking at the totality of the circumstances, any error by the court in honoring Washington's refusal to be present at his trial was harmless for several reasons.

First, Attorney Paul fully participated in the jury selection and trial, which meant that Washington's interests were represented throughout. *See, e.g.*, *Peterson*, 220 Wis. 2d at 489-90 (finding harmless error in Peterson's absence where Peterson's attorney "was present and fully participated in the proceedings"). Here, Attorney Paul fully participated in voir dire (65:22-73), she convinced the court to take steps to avoid prejudice against Washington if the State used a booking photo for identification (66:11-12), she made an opening statement (66:29-32), she cross-examined the State's witnesses (66:47-53, 55-56, 69-71, 72-73, 81-82), she moved to dismiss at the close of the State's case and moved for judgment notwithstanding the verdict (66:86, 135), she convinced the court to instruct the jury on voluntary intoxication (66:88-95), and she made a closing argument (66:106-10). Paul contacted Washington before trial and mid-trial, and reminded the court to check whether Washington wanted to be present for the verdict. (66:2, 73, 129.)

Second, the record demonstrates that there was nothing more Attorney Paul could have done in defending Washington.

The State's case left little to dispute. R.V. saw Washington trying to enter his kitchen, confronted Washington, watched Washington leave, saw Washington cross the street with a bag and backpack, and saw police confront and arrest Washington. Moreover, the two police officers testified that Washington ignored one of the officer's warnings to stop, instead walked toward the officer, and had to be tased. Finally, the officers and R.V. testified that items found in Washington's possession belonged to R.V.

Attorney Paul argued the only possible defense available to Washington, which was that he was too intoxicated to form the requisite intent to commit the crimes. To support that defense, Paul emphasized evidence that Washington's blood tested at .241 BAC and that Washington was behaving bizarrely when he encountered R.V. and the police (66:52-53, 55-56, 84, 106-09). As noted above, Paul also successfully persuaded the court to instruct the jury on voluntary intoxication. In all, given that Washington had no viable challenge to identity, Attorney Paul ably presented the only defense available to Washington.

Third, the court took steps to ensure that the jurors would not allow Washington's waiver to affect their verdict. The court instructed the panel that Washington was not present, that he had a right to be present, and that in this case, Washington waived that right. (65:22-23.) It told the panel,

> That fact must not influence you or your eventual verdict in any manner whatsoever. Mr. Washington will be represented by an attorney during this trial just as if he were present. Mr. Washington may invoke his right to be present at any time if he wishes to do so, therefore it is possible that he may be present at some later point during this trial despite his absence at this time.

(65:23.) The court reiterated that the jurors must not draw any inferences from Washington's absence or allow it to affect their verdict. (65:23.)

During voir dire, when asked, two members of the jury pool—Hoffman and Nelson—indicated that they had a problem with Washington not being present. (65:63-65.) Neither Hoffman nor Nelson served on the jury. (65:73.) When asked, no one else in the jury pool indicated that they had a problem with Washington not being present and not testifying. (65:66.) Further, before the jury deliberated, the court instructed the jury that Washington had a right to be present, that he waived that right, and that that fact could not influence the jury's verdict. (66:124-25.) There is nothing in the record to indicate that the jury ignored those instructions. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (appellate court "presume[s] that the jury follows the instructions given to it").

Fourth, Washington does not identify anything that happened during jury selection or trial that he would have asked Paul to handle differently. *See Peterson*, 220 Wis. 2d at 489

(finding error harmless where "Peterson does not advance on appeal any specific contribution he would have made had he been present"). Indeed, the court and Attorney Paul expressed concerns that Washington was far more likely to be prejudiced if the jury saw him being escorted into court against his will, or saw him engaging in disruptive conduct.[3] *Accord Vaughn*, 344 Wis. 2d 764, ¶ 26. Those were reasonable concerns under the circumstances. In all, the record here establishes that any error was harmless.

And for those same reasons, Washington cannot demonstrate prejudice under *Strickland* resulting from any failure by Paul to object on statutory grounds to Washington's non-presence at trial. Washington is not entitled to a new trial.

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[3] In addition to the circuit court's findings on Washington's conduct and behavior, at a *Machner* hearing in this case, Attorney Paul testified that Washington was a difficult client, constantly proposing unviable defenses and declining to permit Paul to investigate other defenses. Paul also stated that Washington would get upset when she tried to redirect him to important issues, saying at one point when she visited him that he stormed out of the room, and said that she didn't represent him. (68:9-16, 21-22.)

Washington argues that the trial court could have ordered that Washington be restrained and could made an adequate record to protect the verdict from a postconviction challenge on prejudice grounds. (Washington Br. 10.) But the concern was not that the jury would see Washington in restraints, but that it would see him being physically resistive and potentially aggressive, based on Washington's previous outburst and otherwise manipulative behavior in the proceedings.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this Court affirm the decision and order of the circuit court denying Washington's motion for a new trial, and affirm the judgment of conviction.

Dated this 18th day of July, 2016.

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 6022 words.

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Sarah L. Burgundy
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 18th day of July, 2016.

_____

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