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State of Wisconsin
Court of Appeals
District 1
Appeal No. 2017AP1021-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Delano Maurice Wade,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Thomas J. McAdams, presiding

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Defendant-Appellant's Reply Brief

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Argument

I. Wade's hearsay objection to Officer Reyes' testimony concerning AC's "description of what happened to her" was specific, and, regardless of the sidebar, the court overruled the objection on the record by directing the prosecutor to have the question read back.

The prosecutor asked Officer Reyes, "Did she [meaning AC] describe what happened to her?" (R:43-83) Officer Reyes began answer, but then the prosecutor interrupted in order to redirect the witness to, "[T]hat day. The 25th, the day you interviewed her." *Id.*

Officer Reyes then began to recite AC's description of what happened to her, and, at that point, defense counsel said, "Judge, I'm going to object to hearsay." (R:43-84).

In response to the objection, the prosecutor claimed that the testimony was not hearsay because AC's credibility had been called into question. *Id.*

The judge then ask to speak to the lawyers off the record. Thereafter, the judge said, "Attorney Williams [the prosecutor], *repeat the question, or have it read back please.*" *Id.*

Based on this exchange, the state makes the astonishing claim that Wade *forfeited* his hearsay objection. According to the state, "The court did not rule on the hearsay objection on the record. (R:44-84) Wade forfeited this objection by not

asking the court to rule on it on the record." (Resp. brief p. 9)

But the judge plainly did rule on the objection on the record. To be sure, the judge did not utter the talismanic words "sustained" or "overruled"; but what the judge did say clearly communicated the fact that the hearsay objection was overruled. The judge said, "repeat the question, or have it read back please." The question, immediately before the prosecutor's clarification as to time, was, "Did she describe what happened to her?"

Undeterred, the state also argues that even if Wade properly objected on hearsay grounds to the testimony concerning when she arrived home, "Wade did not object at trial to the officer's testimony about A.C.'s statements concerning her injuries." (Resp. brief p. 8) According to this remarkable argument, Wade's hearsay objection went only to Officer's Reyes' testimony concerning AC's description of when she arrived home.

Again, in overruling Wade's hearsay objection, the judge instructed the prosecutor to "repeat the question", which was, "Did she describe what happened to her?"

Wade's objection to this question had already been overruled. The court had ruled that Officer Reyes could testify as to AC's description of what happened to her. Wade is not required to restate a hearsay objection for each individual hearsay statement contained in the "description of what

happened to her."

For these reasons, the court should reject that state's claim that Wade forfeited the hearsay objection as to Officer Reyes' testimony about statements AC made concerning her injuries.

II. Defense counsel's objection to the domestic violence report was sufficiently clear.

Employing a very similar argument, the state also argues that Wade forfeited his hearsay objection to the domestic violence report. According to the state, Wade objected to the admission of the DV report itself, but not to the hearsay statement of AC contained in the report.

While it must be conceded that defense counsel's objections were not the model of clarity, reading the objections in context reveals that counsel adequately articulated the hearsay objection to the statements of AC contained in the report.

The prosecutor asked, "*Does it [the DV report] reflect the victim's demeanor when it's filled out?"* Officer Reyes indicated that it does.

At that point, defense counsel said, "I'm going to object to the next question as hearsay." (R:43-89) Since no question had yet been asked, defense counsel said, "I can wait." *Id.*

Then, moments later, when the state offered the exhibit, defense counsel said, "I'm going to object on foundation grounds, Judge."

The judge asked defense counsel to be more specific, so defense counsel said, "Well, it's not clear who put together which parts and *who was the source for the different parts.*" (R:43-90-91)

A fair understanding of defense counsel's explanation of the foundation objection is that the state had failed to establish that all assertions of fact on the document were made by the officer who created the report. Plainly, if AC was the source of some of the information contained in the report, that is not admissible under the business records exception. It is hearsay.

Though this is a closer call, a fair reading of defense counsel's objections do not permit a finding that he forfeited the hearsay objection.

III. Wade objected to not being brought into the courtroom for the jury question as soon as he learned of it; a postconviction motion is not necessary because there are no additional historical facts that must be developed.

The state argues that, "Wade forfeited his claim that he had a right to be present when the circuit court sent exhibits to the jury room. He did not raise that claim during the trial or in a postconviction motion." (Resp. brief p. 12)

The state's argument should be more precise. There are actually two separate concepts in play here: appellate waiver and forfeiture or waiver of the constitutional right to be present for the jury question. The state's argument blurs the distinction between these two concepts.

First, there is the appellate waiver rule, which provides, generally, that the court of appeals will not consider an issue for the first time on appeal. However, "[W]aiver is a rule of judicial administration, not one of an appellate court's authority to address an issue." *State v. Ortiz*, 2001 WI App 215, ¶ 11, 247 Wis. 2d 836, 842, 634 N.W.2d 860, 863. The appellant may waive an issue on appeal by not adequately raising the issue before the trial court. Since this is a rule a judicial administration, though, there is nothing preventing the appellate court from considering an issue even though is was not adequately raised in the trial court.

Secondly, and completely independent of the appellate waiver rule, there is the question of of whether Wade waived or forfeited his constitutional right to be personally present during the jury question.

Concerning the distinction between "waiver" and "forfeiture", the court of appeals has explained:

> There are thus two forks in the road of a defendant's non-appearance at his or her criminal trial: (1) waiver and (2) forfeiture. As *Divanovic* tells us, "waiver" is the " 'intentional relinquishment or abandonment of a known right or

> privilege.' " *Divanovic,* 200 Wis.2d at 220, 546 N.W.2d at 505 (quoted source omitted), *see also State v. Ndina,* 2009 WI 21, ¶ 29, 315 Wis.2d 653, 670, 761 N.W.2d 612, 620 (" '[W]aiver is the intentional relinquishment or abandonment of a known right.' ") (quoted source omitted). "Forfeiture," too, has two aspects: (1) the failure to object to something without intending to relinquish that which an objection might have preserved, *ibid.,* (" '[F]orfeiture is the failure to make the timely assertion of a right.' "), and (2) doing something incompatible with the assertion of a right,

State v. Vaughn, 2012 WI App 129, ¶ 21, 344 Wis. 2d 764, 787, 823 N.W.2d 543, 554–55.

Here, Wade plainly did not waive his right to be present during the jury question. There is no evidence that Wade was informed of this right, and that he intentionally relinquished it.

So the question is whether Wade *forfeited* the right to be present. Naturally, the state will argue that Wade forfeited his right to be present by not timely asserting it.

The key word, of course, is "timely." There is nothing in the record to suggest that Wade was aware of the fact that the court resolved the jury question outside of his presence until the transcripts of the trial were served on postconviction counsel. In fact, the transcript suggests the opposite. The record demonstrates that Wade was not present in the courtroom, and his lawyer told the judge that he (the lawyer) had not discussed the jury question with Wade. (R:44-70, 71) There is nothing in

the record to establish that Wade's attorney informed Wade of the jury question and the manner in which it was resolved prior to the time the jury returned the verdict; that is, at a time when Wade could have objected, and the court could have corrected the error.

Thus, on this record, the first time Wade could have become aware of the fact that his constitutional right to be present during the trial was denied was when his postconviction attorney read the transcript.

The ultimate question, then, is whether this issue should have been raised in a postconviction motion. Raising this issue in a postconviction motion would not have addressed any of the appellate waiver considerations.

Firstly, raising the issue in a postconviction motion would not have allowed the trial court to correct or to avoid the error. In other words, once the verdicts are returned, it is too late for the judge to correct the error by readdressing the jury question, this time with Wade present.

Secondly, there are no additional historical facts that must be developed. There is no question but that Wade was not in the courtroom. There is no question but that Wade's attorney did not discuss with him how to answer the jury question.

Thus, the only remaining issue is whether a fair and just hearing was thwarted by Wade's absence. "The constitution does not assure 'the privilege of presence when presence

would be useless, or the benefit but a shadow.'" *State v. Alexander*, 2013 WI 70, ¶ 22, 349 Wis. 2d 327, 339–40, 833 N.W.2d 126, 132. Whether Wade's presence would have been useless is a question of constitutional fact which the court of appeals decides without any deference to the circuit court. Concerning a similar issue, the right to present a defense, the court of appeals has said, "Whether a circuit court's evidentiary ruling abridged a defendant's right to present a defense is a question of constitutional fact for our *de novo* review." *See State v. Stutesman,* 221 Wis. 2d 178, 182, 585 N.W.2d 181 (Ct. App. 1998).

Thus, Wade did not forfeit his right to be present. He raised the issue as soon as he became aware of it. Moreover, presenting this issue to the circuit court in a postconviction motion would have served none of the principles of the appellate waiver rule.

For these reasons, the court of appeals should consider the issue.

IV. In the event that the court of appeals finds that Wade forfeited either of his hearsay objections, or waived his right to claim on appeal that he was denied his right to be present during the jury question, then the proper remedy is to remand the matter to the circuit court for a fact-finding hearing as to whether defense counsel was ineffective.

If the court of appeals determines that Wade forfeited

either of his hearsay objections by not specifically objecting; or that Wade should have filed a postconviction motion concerning the denial of his constitutional right to be present during trial; then the appropriate remedy is for the court of appeals to retain jurisdiction, but to remand the matter to the trial court for an evidentiary hearing.

The court of appeals, "[H]as the authority, in aid of its jurisdiction, to remand cases to the circuit court for fact-finding hearings. [internal citations omitted] ("When an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute, the only appropriate course for the court is to remand the cause to the trial court for the necessary findings.") . . . . [I]t appears that this court has the authority to retain jurisdiction and remand this matter to the circuit court, even in a collateral proceeding, for a motion for postconviction relief based upon the interest of justice." *State v. Maloney,* 2006 WI 15, ¶ 15, 288 Wis. 2d 551, 559–60, 709 N.W.2d 436, 440–41

Thus, if the court of appeals determines that it is confronted with inadequate facts on any of Wade's issues, then the court should remand to the circuit court for an evidentiary hearing. If defense counsel's hearsay objections were insufficient to properly preserve the issue, then the issue should be presented to the circuit court as a claim of ineffective assistance of counsel. If there are insufficient historical facts in

the record to determine whether Wade's presence at the jury question would have been useless, then the matter should be remanded for an additional fact-finding hearing.

Dated at Milwaukee, Wisconsin, this _____ day of October, 2017.

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Jeffrey W. Jensen