STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP000870-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DESHAWN J. DRIVER,
Defendant-Appellant.

On appeal from a judgment of conviction entered in the circuit court for Milwaukee County, the Honorable Dennis R. Cimpl presiding, and from an order denying postconviction relief, the Honorable Dennis P. Moroney presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Mr. Driver was denied his statutory and due process right to be heard and to present evidence at the restitution hearing.

The restitution statute guaranteed Mr. Driver "an opportunity to be heard, personally, or through counsel." Wis. Stat. § 973.20(14)(d). The statute is silent as to who decides which it will be. The State assumes, without offering any supporting authority or reasoning, that the judge can decide in what manner the defendant will be heard and can preclude him from being heard personally so long as his lawyer is permitted to speak. (Response Brief at 5). Mr. Driver asserts that a better interpretation of the statute's language is that the defendant and his attorney decide how to present their case—they decide whether the defendant will elect to personally testify or whether he will be content to allow his lawyer to speak for him. In any case, the question is academic because the statute clearly guaranteed Mr. Driver the right to "present evidence." Wis. Stat. § 973.20(14)(d).

The State's position is that the statute and due process were satisfied when the judge preliminarily asked Mr. Driver's lawyer what aspects of the restitution claim were being challenged and allowed her to speak in response before summarily rejecting her challenges without allowing her to present any

evidence. The State claims that once Mr. Driver's lawyer told the court that he disputed that some of the items were in the vehicle, "the evidence was presented; the court did not need to hear those words coming from Mr. Driver's mouth." (Response Brief at 7). This argument reveals a basic misunderstanding of what evidence is. *See*, WIS JI-CRIMINAL 103 EVIDENCE DEFINED ("Evidence is: First, the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness."); WIS JI-CRIMINAL 157 REMARKS OF COUNSEL ("Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion.").

The judge *did* "need to hear the words coming from Mr. Driver's mouth." Otherwise, he did not hear evidence from the defense. The State says the judge was not required to hear the proffered testimony because it was "not necessary to" his decision. (Response Brief at 6, n. 2). But the proffered testimony was directly relevant to a central question at the hearing — what was in the car? The testimony was only "not necessary" because the judge preemptively decided that he would not believe it if he heard it. To be clear about what happened here, the judge asked preliminary questions of counsel before hearing from the victim. They explained what their client's position was. The judge refused to hear the proffered evidence, explaining that he was not going to believe it anyway, so why bother? It is disappointing that the State defends this.

The only evidence Mr. Driver had was his testimony and that of his co-actor about their observations of the contents of the car. Any defendant in this position certainly has an up-hill climb. It is unlikely that the judge will believe him. But that does not mean that the judge can dispense with the formality of actually hearing the evidence. In the realm of due process, the formalities matter. There is value in following procedure. *See, Press-Enter. Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 104 S. Ct. 819, 820 (1984) (The appearance of fairness is "essential to public confidence in the criminal justice system."); *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11 (1954) ("justice must satisfy the appearance of justice.").

II. Mr. Driver is entitled to a restitution hearing before another judge.

The State begins by claiming that Mr. Driver forfeited his judicial bias claim when his lawyer did not call out the judge for bias at the restitution hearing. The State cites *State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992). (Response Brief at 8-9). The State ignores the decisions of the Wisconsin Supreme Court subsequent to *Marhal* that established that judicial bias is a structural error that requires automatic reversal. *See Neder v. United States,* 527 U.S. 1, 8, 119 S.Ct. 1827 (1999) (listing a biased judge as among structural errors resulting in automatic prejudice); *State v. Nelson*,

2014 WI 70, ¶ 34, 355 Wis. 2d 722, 738, 849 N.W.2d 317, 324 (stating that a biased judge is structural error, *citing Tumey v. Ohio,* 273 U.S. 510, 534, 47 S. Ct. 437); *State v. Carprue,* 2004 WI 111, ¶ 59, 274 Wis.2d 656, 683 N.W.2d 31; See also, *State v. Goodson*, 2009 WI App 107, ¶ 6, 320 Wis. 2d 166, 172 (review by this Court of judicial bias claim first raised in postconviction motion).

The State further argues that there was nothing wrong with the circuit court judge declaring at the outset that he was going to believe the victim and disbelieve Mr. Driver and his co-actor. The State brazenly states that "the court was entitled to express that it was going to believe P.B.'s word over Driver's" regarding what was in the car. (Response Brief at 9-10). As support for this rather jarring proposition, the State cites *Nicholas v. State*, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971), in which the Court noted the legal presumption that one who has been convicted of a crime is less likely to be a truthful witness than one who has not. But this merely means that a witness' criminal record is relevant evidence relating to his credibility. *Id*. It is not a substitute for hearing his testimony.

It bears repeating that the judge found the victim's testimony to be more credible *before he even heard it*. The judge found the defendants incredible because they were the defendants and the victim credible because she was the victim before hearing testimony from *any* of them. (37: 21). Certainly, a witness' criminal record is relevant evidence for the

fact-finder to consider while hearing and evaluating the credibility of the witness' testimony. This does not justify dispensing with the testimony altogether and making a credibility finding based on the witness' criminal record alone. That is what happened here.

Besides, there was never any inquiry into whether P.B. had a criminal record or not. The record does not establish that she did not. No one ever asked. The number of convictions each witness did or did not have was not an issue at this hearing. Instead, the judge expressly found the victim to be more credible than Mr. Driver and his co-actor because she was the victim, and they were the defendants in this case. (37: 21).

What the judge did here was a fundamental abuse of his role as fact-finder. The law recognizes that a criminal defendant may face bias by the fact-finder simply because he is the defendant. The law also recognizes that this is not something to embrace (as the State does in its brief); it is something to guard against. Circuit courts go to the trouble of instructing jurors not to act on such a bias. *See*, WIS JI-CRIMINAL 300: CREDIBILITY OF WITNESSES ("The defendant has testified in this case, and you should not discredit the testimony just because the defendant is charged with a crime."). A judge *really* ought to know better.

It is surprising that the State thinks what this judge did was fine. The judge pre-judged the issue.

What's more, he was astonishingly frank about it. It would be difficult to find a clearer example of judicial bias.

CONCLUSION

Mr. Driver respectfully requests that this Court reverse the order of the circuit court denying his postconviction motion and order that the case be remanded for a restitution hearing before a different judge.

Dated this 26th day of October, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,285 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 26th day of October, 2018.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender