STATE OF WISCONSIN

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

DISTRICT III

Case No. 2019 AP 524-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHAD W. KESSLER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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On appeal from the Circuit Court
of St. Croix County, Hon. R. Michael Waterman,
Circuit Judge, presiding.

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ISSUES FOR REVIEW

1. Was the waiver of counsel colloquy "adequate" to the extent it prevents Kessler from challenging the waiver finding with postconviction evidence unknown to the circuit court at the time waiver was found?

   The Trial Court Answered: "Yes."

2. Did Kessler validly waive counsel and was he competent to represent himself when his decision to proceed pro se resulted from auditory command hallucinations brought on by schizophrenia?

   The Trial Court Answered: The circuit court "commented" on this issue but whether it made a formal finding is unclear. If it did, the answer is "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE[1]

1. Trial Proceedings

On September 28, 2015, Kessler allegedly stole a truck from the City of St. Paul Public Works Department and drove it to St. Croix County, Emerald Township, where he found an unoccupied home for sale. Kessler was allegedly in the process of burglarizing the house when the seller came by, saw the truck in the driveway with her washer and dryer in the bed, and called the police. The burglar took off in the truck and was quickly located by the police. A chase ensued. The truck eventually turned into a bean field and stopped as it approached a wooded area. The driver exited the vehicle and ran towards the trees. After a search of the area, Kessler was found in the rafters of a nearby shed. He was charged with three felonies and four misdemeanors.[2] (1:1-9).

Five days prior to trial Kessler's SPD appointed counsel (Donald Schwab) notified the court that Kessler wanted to discharge counsel and represent himself. A hearing was held the same day. The

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1 The Statement of the Case and the Statement of Facts are combined.

2 Attempting to Flee or Elude a Traffic Officer, contrary to Wis. Stat. § 346.04(3), a class I felony; Burglary, contrary to Wis. Stat. § 943.10(1m)(a), a class F felony; Operating a Motor Vehicle Without Owner's Consent, contrary to Wis. Stat. § 943.23(2), a class H felony; Resisting an Officer, contrary to Wis. Stat. § 946.41(1), a class A misdemeanor; two counts of Criminal Damage to Property, contrary to Wis. Stat. § 943.01(1); class A misdemeanors; and Possession of Drug Paraphernalia (meth pipe), contrary to 961.573(1), a class C misdemeanor.

An additional misdemeanor theft charge, contrary to Wis. Stat. § 943.20(1)(a), was added in the information. (10:2-3).

court questioned Kessler on his decision to proceed pro se. He was 39 years old. He had only completed the 10th grade in high school but had received his GED and attended some college. (156:3-4 (A:27-28)). Kessler agreed he understood the proceedings, the charges, the elements, the burden of proof, the right to remain silent, and the risks of self-representation. (156:5, 6, 18, 19 (A:29, 30, 42, 43); 52:1-2).

Kessler thought Schwab was "a good lawyer." (156:15 (A:39)). Kessler admitted he was "probably not" better off without a lawyer. (156:19 (A:43)). He didn't know if he could do a better job than Schwab could: "I don't know, I just – maybe I can't. I probably can't. You are right, I probably can't, but I'm going to try. …. I don't think I can probably do a better job, but I'm going to try." (156:20 (A:44)).

Kessler expressed concern about a couple of the strategic decisions Schwab had made up to that point. (156:6-7 (A:30-31)). His reasons for wanting to represent himself were otherwise vague. He wanted the "opportunity" to represent himself. (156:6, 10 (A:30, 34)). By acting pro se he believed the jury would get to know him better. (156:13 (A:37)). He thought representing himself was a good "strategy" without explaining what that strategy was precisely: "I don't know. I just think it's a good strategy standpoint." (156:19-20 (A:43-44)). The court asked Kessler why, after all this time, he had suddenly changed his mind:

> THE COURT: …. Your case has been pending for a couple of years now. What has changed in your mind, now that you are on the eve of trial, that you want to go it alone?
> DEFENDANT: I don't know. *I don't really feel that I'm alone ever.*

(emphasis added) (156:12-13 (A:36-37)).

While the court's colloquy was relatively lengthy, its inquiry into Kessler's mental health was not. The court asked one question:

> THE COURT: Do you have any medical or emotional conditions that interfere with your ability to understand what's happening today?
> DEFENDANT: I do understand what's happening, and, no, I don't got no emotional.
> THE COURT: I'm sorry, what was that?
> DEFENDANT: I have no emotional problems or nothing. I do understand what's going on today.

(156:4-5 (A:28-29)).

Kessler also submitted a written Waiver of Right to Counsel form. Boxes were checked stating "I am not" "currently receiving treatment for mental or emotional problems" and "I do not" "have physical or psychological disabilities that may affect my ability to understand what was happening in court or communicate my position or views on this case in court." (52:1). The court addressed the form very briefly. It did not specifically ask Kessler if he checked either of those boxes:

> THE COURT: Okay. Mr. Kessler, your attorney handed me a waiver of a right to counsel form. This form goes over much, if not more than what we had talked about today. Did you sign the second page?
> THE DEFENDANT: I did, yes.
> THE COURT: Did you read this form?
> THE DEFENDANT: Yes.
> THE COURT: Do you understand it all?
> THE DEFENDANT: Yes.
> THE COURT: Do you have any questions about it?
> THE DEFENDANT: No.
> THE COURT: Did you fill in the handwritten portions?
> MR. SCHWAB: I filled in the charges and the penalties when I gave it to him last night, Your Honor.

(156:21 (A:45)). The court found Kessler competent to represent himself and ordered Schwab to remain as standby counsel. (156:21-23 (A:45-47)).

On the morning of trial, Kessler appeared before the court dressed in his orange jail jumpsuit. (157:6 (A:30)). Kessler confirmed he wished to appear this way to the jury despite the potential prejudice. *Id*. When the court asked Kessler to "help [it] understand" why he wanted to appear that way he answered it was his "right" to do so and would leave it at that. (157:7 (A:31)).

The court and the state conducted voir dire. When Kessler was asked if he had any questions for the potential jurors, he answered: "I'd like to remain silent." (157:61). He forfeited his peremptory strikes. (157:65). The court ordered the clerk to exercise those strikes by random selection. (157:66). The court again asked Kessler if he wanted to reconsider his decision to not wear civilian clothes or proceed pro se. Kessler answered he did not. (157:72, 73).

Kessler's participation in the trial was minimal. His opening statement consisted of several sentences. (157:187). He asked no questions of three state witnesses. (157:107, 116, 183). He had very short cross-examinations of the remainder. (see e.g. 157:99-101; 129-130; 145-146, 147-148, 159-160, 163-164, 169, 179).

The next morning, Kessler appeared in civilian clothes and asked that his standby counsel be allowed to take over the trial. (154:187-189). The State called four additional witnesses. (154:192-219). The defense rested without calling any witnesses. (154:221, 230). The jury found Kessler guilty on all counts except counts two (resisting an officer) and six (possession of drug paraphernalia). (154:278-279).

Kessler was sentenced to concurrent and consecutive prison sentences on counts one, four and seven, resulting in an overall sentence of 5 years and 6 months of initial incarceration, and 6 years of extended supervision. (73:1-4 (A:3-6)). He was also required to serve nine months in the county jail consecutive to his prison sentence on count 8. (71:2 (A:1-2)).

2. Postconviction Hearing.

Kessler filed a postconviction motion claiming he did not validly waive counsel because his choice to do so was not knowingly, intelligently and voluntarily made, but rather the result of auditory "command" hallucinations caused by schizophrenia. (91:1-10). For the same reason he was not competent to proceed pro se. *Id*.

A hearing was held on March 6, 2019. (159). Kessler testified and presented psychiatric, medical and jail records related to his mental illness. (159:3 (A:53)).

Kessler was first diagnosed with schizophrenia in May of 2015 when he appeared at the West Side Community Clinic in St. Paul complaining of auditory hallucinations and severe anxiety. He was 37 years old. He was prescribed Risperdal, an "atypical antipsychotic" used to treat schizophrenia. (151: 1-4). Kessler had been experiencing schizophrenic symptoms, including auditory hallucinations, since his early 20's, however, often hearing people, televisions, and radios telling him what to do. If he doesn't follow these commands "they'll say they're gonna hurt me or something bad is gonna happen, I'll get paralyzed by fear;…." (159:9, 10 (A:59, 60)). These voices appear to him as a real sound, which he believes come from God or the spiritual realm. (159:10 (A:60)). They are a constant in his life, commanding him to do certain tasks throughout the day. (159:11, 12 (A:61, 62)). The result has been a life of repeated job loss, trouble with interpersonal relationships, self-medication with illegal drugs, and frequent contact with the criminal justice system. (145:1, 159:23 (A:73)).

Based on available records, Kessler's mental health issues were first noted in 2004, when he was admitted to United Hospital in St. Paul, Minnesota "acutely suicidal and paranoid." (152:13). The admission noted "paranoid thinking", "delusions" and auditory and visual hallucinations which included his belief people were trying to poison him. (152:9, 20, 21, 30). He was living with his mother at the time and had bugged her house with microphones and cameras "to

catch the people out to get him." (152: 9, 11, 12, 21, 23, 30). He was placed on a 72-hour hold and given trazodone (an anti-depressant) and olanzapine (an anti-psychotic). (152: 13, 24-27). He was ultimately released without medication as his symptoms had improved and were thought to be primarily the result of methamphetamine use. (152:13).

Kessler believes he was hospitalized two other times for similar reasons. (145:1). He specifically recalls being admitted in 2010 for paranoid delusions and hallucinations, and again placed on a 72-hour hold. (150:6).

The use of Risperdal helped a great deal and reduced his symptoms. (159:11 (A:61)). His symptoms would increase if he was stressed. If his medication was interrupted, his symptoms got worse and could be quite severe. (159:11 (A:61)).

Kessler was arrested in this case on September 29, 2015. On April 22, 2016 he was released on a signature bond. He was reincarcerated in the St. Croix County Jail on April 17, 2017. (25:1; 159:12 (A:62)). According to the jail health screening on April 17, 2017, Kessler was asked whether he had ever been hospitalized for a mental or emotional problem or condition. Kessler answered that he had twice been put on 72-hour mental-health related holds. Once in 2005 and once in 2010. (150:6). The reason, he stated, was "maybe psychosis." (*Id*.) A CHC report dated May 1, 2017, also notes Kessler had a prior history of in-patient mental health treatment. (149:2). St. Croix County Jail records show Kessler did not request, nor was he given, any medication between the time of his re-incarceration on April 17, 2017, and trial on June 20, 2017. (146, 147, 148, 149, 150).

While awaiting trial Kessler's symptoms got "pretty severe" to the point it was an "all day, constant thing, battle with it all day." (159:12 (A:62)). Kessler turned down a plea bargain offer because the "TV" was telling him not to take the deal. (159:13 (A:63)). He later started hearing voices about Schwab, his trial counsel. Shortly before trial on a day Kessler was scheduled to see his lawyer, the TV started

talking to him. The TV told Kessler he should fire trial counsel. Trial counsel didn't have Kessler's best interests at heart and Kessler should just do the trial himself. (159:13-14 (A:63-64)). On his way up to the interview room he heard the guard's walkie-talkies telling him the same thing. Waiting in the interview room, he heard voices from next door telling him to fire his attorney. When Schwab arrived, he fired him and told him he wanted to represent himself. (159:14 (A:64)).

During the colloquy on June 14, 2017, the court asked Kessler why, on the eve of trial, he wanted to "go it alone." Kessler responded that he didn't "feel that I'm alone ever." (156:12-13 (A:36-37)). He later explained he didn't feel he was alone because spirits were physically present and talking to him: "god's always with me. There are spirits there, they're always with me. They're always around." (159:16 (A:66)). *Id*.

Several things Kessler did during trial were the direct result of these voices. They told him to wear his orange jail attire "because I'm guilty and that's – and they –that's –they told me." He believed he was "doing the right thing, thinking that,…, God's telling me what to do to handle this the right way…." (159:15 (A:65)). Kessler also heard voices in the courtroom during trial coming from behind him as well as from the attorneys and the judge. He would hear them talking but the voices he heard were something totally different from what was being said. (159:14-15 (A:64-65)). His decision to forgo voir dire and not exercise his preemptory strikes, that "happened right here in court." The voices told him not to judge anybody or strike anybody. (159:15-16 (A:65-66)). His apology to one of the witnesses for having to be in court was also a result of the voices "remind[ing]" him to do so. (159:16 (A:66); 157:101).

The voices did not affect his orientation as to time, space or location. Neither did they affect his ability to analyze his surroundings or think logically. (159:17 (A:67))

After the trial Kessler's hallucinations "were getting so bad" that he "couldn't manage anything [he]…was doing." (159:17). On

June 30, 2017, Kessler sent a written message to the jail nurse requesting "rispredal" (sic). (148:1). After some back and forth, the nurse responded on July 11, 2017 that she had been able to verify Kessler was prescribed Risperdal on June 19, 2015 and agreed to "restart" the medication the next day. (148:6; 147:1). At his next clinical visit on July 25, 2017, Kessler reported he could still hear the TV sending him messages from God. (146:1). On September 15, 2017 Kessler made a request to increase his Risperdal dosage because he was hearing more voices from the TV talking to him and would see "signs from God in other people." Kessler also noted that he had "blacked out during court proceedings" and didn't remember "all of what he said." (146:2). On September 18, 2017, Kessler was still hearing voices from the TV and suggested a different medication would be more helpful. (146:3).

A psychiatric evaluation was conducted upon Kessler's arrival at Dodge Correctional Institution. Kessler described how he had suffered from significant paranoia and auditory hallucinations since his 20's:

> He reports having symptoms of hearing people and the radio and TV talking to him, and he can hear people's thoughts at times. He would hear something totally different when people are having conversations than what they are actually saying. He was texting messages that were not real on his cell phone. He is spending multiple hours during the day doing that. He would surf the internet and was having illusions believing that they were different things that he was seeing, which showed on the screen. …. He had significant paranoia thinking people were talking about him, and said that marijuana helped the symptoms. …. He lost multiple jobs because of the schizophrenia and paranoia. He reports that he did not have symptoms as a teen, but he did have symptoms in his 20s.

(145:1). Kessler's schizophrenia diagnosis was confirmed and his Risperdal medication continued. Kessler reported that the Risperdal has reduced his symptoms to a manageable level. (145:1-2).

The circuit court denied Kessler's postconviction motion. The court reasoned that the colloquy was adequate as to the waiver of counsel as well as Kessler's competency to represent himself. (160:3-7 (A:10-14)). Concerning Kessler's mental health, he "denied having any medical or emotional conditions that interfere with his ability to understand what was happening." (160:7 (A:14)). The court believed that asking Kessler if he had any "emotional problems" was broad enough to cover any "mental disabilities he may have." The case had been pending for 18 months and Kessler had shown no signs of mental health problems or any impairment of his ability to think or communicate. Competency was never questioned by his attorney. (160:8 (A:15)). Kessler provided a reason for his decision to proceed pro se and was responsive to the court's questions, well-spoken, and showed some critical thinking skills. (160:11 (A:18)). Kessler also filled out a written questionnaire prior to the hearing in which he denied receiving treatment for a mental health problem, and denied he had any "physical or psychological disabilities that would affect his ability to understand what was happening in court or communicate his position or views…." (160:9-10 (A:16-17)).

As the colloquy on June 16, 2017 complied with *Klessig* and adequately addressed both the waiver of counsel and Kessler's competence to represent himself, no further inquiry was necessary. Evidence of Kessler's mental health unknown to the court at the time of trial was not material. (160:12-13 (A:19-20)).

The court further "commented" that even if the postconviction evidence were considered, it was insufficient to show Kessler lacked competence to represent himself or invalidly waived counsel. (160:13 (A:20)).

The court entered an order denying the motion. (137 (A:7)). Kessler appeals.

ARGUMENT

I. KESSLER WAS NOT COMPETENT TO WAIVE COUNSEL OR REPRESENT HIMSELF AT TRIAL DUE TO AUDITORY COMMAND HALLUCINATIONS BROUGHT ON BY UNMEDICATED SCHIZOPHRENIA.

1. Legal Standards.

Both the Sixth Amendment to the U.S. Constitution and Article I, § 7 of the Wisconsin Constitution give a defendant the right to conduct his own defense. *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). When a defendant seeks to proceed pro se, the circuit court must insure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel and, (2) is competent to proceed pro se. *Klessig,* at 203; see also Wis JI -- Criminal SM-30; Wis JI-Criminal SM-30A.

To show a valid waiver of counsel, the record must reflect the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him and, (4) was aware of the general range of penalties that could have been imposed on him. *Klessig*, at 205-206. Denial of the right to counsel can never be treated as harmless error. *Hall v. State*, 63 Wis. 2d 304, 313, 217 N.W.2d 352 (1974); *Klessig*, at 207.

The record must also show the defendant is competent to represent himself. *Klessig*, at 212. In Wisconsin, the standard for defending oneself is higher than competence to stand trial. The circuit court must consider "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury" (emphasis added). *Pickens v. State*, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980). In certain instances, an individual may well be able to satisfy basic competency standards and be able to work with counsel at trial, “yet at the same time he may be unable to carry out the

basic tasks needed to present his own defense without the help of counsel." *Indiana v. Edwards*, 554 U.S. 164, 175-176, 128 S. Ct. 2379, 2386, 171 L. Ed. 2d 345, 356. Insofar as a defendant lacks capacity to represent himself, he is denied a fair trial. *Id*. *Pickens* likewise emphasized that a competency determination should not prevent persons of average ability and intelligence from representing themselves unless "a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist." *Pickens*, at 569. A colloquy with the defendant must "do more than merely record the defendant's affirmation of understanding" but rather, "get the accused to speak in his or her own words so that the accused's mental condition and understanding can be evaluated." *State v. Smith*, 2016 WI 23, ¶131-133, n. 27, 367 Wis. 2d 483, 878 N.W.2d 135 (dissent), citing *State v. Brown*, 2006 WI 100, ¶58, n. 27, 293 Wis. 2d 594, 627, 716 N.W.2d 906, 922. See also Robert D. Miller & Edward J. Germain, *The Retrospective Evaluation of Competency to Stand Trial*, 11 Int'l J. L. & Psychiatry 113, 124 (1988) ("Unfortunately [court] records will usually not reveal as much about a defendant's mental state as a focus[ed] clinical evaluation, unless it was so disordered as to have been obvious to everyone involved in the process."). Whether a defendant is competent to proceed pro se is reviewed under what is "essentially a clearly erroneous standard of review." *State v. Marquardt*, 2005 WI 157, ¶21, 286 Wis. 2d 204, 705 N.W.2d 878 (quoting *State v. Garfoot*, 207 Wis. 2d 214, 224, 558 N.W.2d 626 (1997)).

When the colloquy is "inadequate[,]" and the defendant makes a motion for a new trial or other postconviction relief from the circuit court's judgment, the circuit court must first hold an evidentiary hearing on whether defendant's waiver of the right to counsel was knowing, intelligent, and voluntary. *Klessig*, 211 Wis. 2d 194, 206-207. Non-waiver is presumed. *Id*., at 204. The State must overcome the presumption by proving a knowing, intelligent and voluntary waiver with clear and convincing evidence. *Id*., at 206-207.

If the State is able to prove by clear and convincing evidence that the defendant has waived his right to counsel knowingly,

intelligently, and voluntarily, the circuit court must then determine whether the defendant was competent to represent himself. *Id*., 206-207.

The circuit court must first determine whether it can make an adequate and meaningful nunc pro tunc inquiry into the question of whether the defendant was competent to proceed pro se. If the circuit court concludes that it can conduct such an inquiry, then it must hold an evidentiary hearing. If the circuit court finds that a meaningful hearing cannot be conducted, or that the defendant is not competent to proceed pro se, then the defendant must be granted a new trial. *Klessig*, at 213-214.

2. The circuit court applied the wrong legal standard when it denied Kessler's postconviction motion based on an "adequate" colloquy at the time of waiver despite new evidence to the contrary.

The circuit court held that its colloquy covered the lines of inquiry required by *Klessig*, produced no evidence of mental disability, and therefore no further inquiry was required. That Kessler may have had mental health issues unknown to the court at the time of the colloquy and which could have affected his waiver of counsel or his competence to represent himself, was not relevant. (160:12-13 (A:19-20)).

As a threshold matter, the court's holding must be rejected because it places form over substance. The colloquy required by *Klessig* is merely a process which is meant to, and in most cases will, create a record to support a valid waiver. The colloquy, however, is merely a threshold requirement. A reviewing court "may not find, based on the record, that there was a valid waiver of counsel," if the circuit court fails to engage a defendant in the four lines of inquiry as prescribed in *Klessig*. *State v. Imani*, 2010 WI 66, ¶34, 326 Wis. 2d 179, 786 N.W.2d 40. No case holds that a reviewing court *must* find a valid waiver if the colloquy meets some undefined minimal standard but fails in its essential purpose. See also *Klessig*, at 205 ("While it is

true that a valid waiver must affirmatively appear on the record, and the best way to accomplish this is for the trial court to conduct a thorough and comprehensive examination of the defendant as to each of the factors mentioned, it is the accused's apprehension, not the trial court's examination, that determines whether the waiver is valid.")

The colloquy was inadequate because it failed to uncover or address Kessler's mental health issues. The court asked one question related to mental health, and that was whether Kessler had "any medical or emotional conditions that interfere with [his] ability to understand what's happening today[.]" Kessler answered that he understood what's happening and "I don't got no emotional." (156:5 (A:29)). Kessler's counsel also provided the court with a written "waiver of right to counsel form" and boxes were checked stating "I am not" "currently receiving treatment for mental or emotional problems" and "I do not" "have physical or psychological disabilities that may affect my ability to understand what was happening in court or communicate my position or views on this case in court." (52:1). Kessler agreed he signed, read, understood the form, and did not have any questions about it. The court then asked if Kessler filled in the handwritten portions. Kessler never answered the question. Before Kessler could answer, his attorney spoke, stating he had filled in the charges and penalties. (156:21 (A:45)). The court should have asked Kessler about his mental health history more directly. The court should have asked, for example, whether he had ever been diagnosed with a psychiatric condition, hospitalized for psychiatric reasons, or prescribed any psychotropic medications. The colloquy must be "designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, …." *Klessig*, at 206.

In addition, Kessler's answer to one of the Court's questions should have prompted further follow-up. The Court asked Kessler: "What has changed your mind, now that you are on the eve of trial, that you want to go it alone?" Kessler answered: "I don't know. I don't really feel that I'm ever alone." (156:13 (A:37)). Kessler never felt "alone," it turns out, because God was giving him direction through his auditory commands. (159:16 (A:66)).

It's certainly possible Kessler would not have answered direct questions honestly. His auditory delusions did not affect his orientation to time and place, nor did they affect his ability to analyze his surroundings or think logically. (159:17 (A:67)). He knew that if he told the court the real reason he wanted to represent himself he "probably wouldn't have been…able to…" (159:14 (A:64)). He did not raise his mental illness in prior criminal proceedings because his condition is "quite embarrassing" to him and he tries "not to talk about it" if he doesn't need to. (159:23 (A:73)). In the past he always "just pled guilty and just got the court proceedings done as quickly as possible." (159:18 (A:68)). Nonetheless, in this case the court's questions were vague enough that Kessler's answers were not clearly deceitful. Schizophrenia is not usually described as an "emotional" condition; Kessler was not, in fact, receiving any treatment; and he certainly believed any psychological condition he may have had did not affect his ability to understand what was happening in court or prevent him from communicating his position.

Whether the colloquy met some minimal standard under *Klessig*—whatever that means—the determinative question remains. Was Kessler's waiver of counsel knowing, intelligent and voluntary, and was he competent to proceed pro se? Whether a defendant has validly waived his right to counsel requires the application of constitutional principles to the facts of the case, which is reviewed independently as a question of law. Nonwaiver is presumed. The State, moreover, has the burden of overcoming the presumption of nonwaiver by clear and convincing evidence. *Klessig*, at 204.

Assuming Kessler's allegations are true, and his choices were driven by schizophrenic delusions, his waiver of counsel was not knowing, intelligent and voluntary. For the same reasons, he was not competent to represent himself. Competency to represent oneself and a constitutionally adequate waiver of counsel are often interrelated. See *People v. Lego*, 660 N.E.2d 971, 979, 168 Ill. 2d 561, 577 (1995) ("To disregard the cause of a defendant's misperceptions and to take the position that delusion borne of mental illness has no bearing on the

knowing and intelligent choice to waive the assistance of counsel would do violence to the most fundamental principles associated with waiver."). Kessler, therefore, was entitled to challenge his waiver of counsel and his pro se competency based on his postconviction evidence. The State bore the burden of proving the waiver of counsel by clear and convincing evidence. Kessler was entitled to a retrospective determination of competence (or a new trial). *Klessig*, at 213-214.

3. Alternatively, Kessler did not waive counsel nor was he competent to proceed pro se when his decisions were motivated by auditory "command" hallucinations caused by schizophrenia.

The circuit court denied Kessler's postconviction motion based on its finding the colloquy was adequate under *Klessig*. (160:12 (A:19)). Nonetheless, the court asserted it "would be remiss if [it] did not at least comment on the [postconviction] evidence." Whether these "comments" are formal findings is unclear. Assuming they are, Kessler will address them on the merits.

The court agreed Kessler suffered from paranoid schizophrenia but found "there was insufficient evidence it impaired his competency to represent himself." (160:13 (A:20)). The court did not specifically find Kessler's postconviction testimony lacked credibility, but did find it was not "more credible" than the records he presented. The records, according to the court, show Kessler "last filled" his Risperdal prescription on June 19, 2015. (160:14 (A:21); 148:6). Therefore, when he was re-incarcerated in the St. Croix County Jail in April of 2017, he had gone some 22 months without his medication. At the April 17, 2017 jail health screening, moreover, "no mental health symptoms were observed or reported." (160:14 (A:21)). There was no evidence of any symptoms until June 30, 2017, when Kessler made a request for Risperdal. (*Id*.; 148:1). Auditory hallucinations were not specifically mentioned in the jail health reports until September 15, 2017. (160:14 (A:21) ; 146:2). The court reasoned that because Kessler did not show or report auditory hallucinations in April of 2017

after 22 months without medication, he could not credibly claim he was suffering from auditory hallucinations at the June 14, 2017 waiver hearing from only being off his medication for two months. While "the evidence suggests Mr. Kessler may have had some form of symptomology around the time of trial, enough to ask for Risperdal, there was no evidence that those symptoms were auditory hallucinations, much less overwhelming, as Mr. Kessler described." (160:14-15 (A:21-22)).

The court's reasoning is both flawed and based on unsupported assumptions.

The court's assumption Kessler "last" filled his Risperdal prescription on June 19, 2015 is speculative at best. It may have been the last date he obtained Risperdal *from the West Side Community Health Services*, at least according to the nurse at the St. Croix County Jail. Assuming that's true, and assuming Kessler had a 90-day supply, which is typical, he would have had enough Risperdal to last him until September 17, 2015—12 days before he was arrested on these charges. Kessler was released from the St. Croix County Jail on April 22, 2016, nearly a year before trial. He was promptly incarcerated in Minnesota on an outstanding warrant. (25:1; 28:1; 33:2; 147:3). He was released from Minnesota custody on September 2, 2016 and lived at home in St. Paul with his mother, a nurse, until he was re-incarcerated in St. Croix County on April 17, 2017. (37:1). The court's assumption that Kessler had no access to Risperdal between his release on April 22, 2016 and his re-incarceration on April 17, 2017, or that the West Side clinic was the only place he would have obtained it, has no support in the record. In other words, nothing in the records contradicts Kessler's testimony that he was taking Risperdal at the time of his arrest on April 17, 2017. (159:12 (A:62))

The court's reasoning is also flawed in that Kessler's auditory hallucinations are not likely to be "observed" by third parties. The court's assumption that such symptoms, had they been present, would have been observed by the health screener on April 17, 2017 is unfounded. If these symptoms were observable, on the other hand,

their absence would just as likely suggest Kessler *was* taking Risperdal prior to his re-incarceration, especially given his history.

The court also misstates the post-trial medical evidence. The court agreed Kessler asked for Risperdal on June 30, 2017, which "suggests Mr. Kessler may have had some form of symptomology around the time of trial,…." (160:15 (A:22)). The court found this "symptomology" did not include auditory hallucinations because no mention was made of them in the jail medical records until mid-September. On the contrary, Kessler reported auditory hallucinations much earlier. At a clinical visit dated July 25, 2017, the health care provider noted Kessler had "ideas/beliefs the TV sends him messages from God." (146:1). In short, Kessler requested Risperdal 10 days after trial and at his next health appointment, on July 25, 2017, he reported auditory hallucinations. These records do not contradict but rather support Kessler's testimony he was suffering from auditory hallucinations at the time of trial.

In addition, the record shows several otherwise inexplicable decisions Kessler made at trial which corroborate he was suffering from auditory hallucinations. First, his decision to represent himself five days before trial, after the case had been pending for nearly 21 months, took both the court and trial counsel by surprise. (156:3, 13 (A:27, 37)). Kessler's explanation, that he "just maybe" wanted "the opportunity" to represent himself, and that it would help the jury to get to know him "personally" (156:10, 13 (A:34, 37)), while plausible, were not particularly persuasive reasons, especially when he agreed trial counsel "was a good lawyer" and would probably do a better job than he could. (156:15, 19-20 (A:39, 43-44)).

The first day of trial Kessler appeared in his orange jail jumpsuit. (157:6). This, of course, is contrary to all conventional wisdom. The court was rightly concerned that Kessler understand how prejudicial this could be and suggested he should discuss it with standby counsel. (157:6-7). Kessler's explanation was that he had "a right to" appear that way. (157:7). His decision to forgo his preemptory strikes likewise had no tactical rationale. These are all

choices, Kessler later testified, he was "commanded" to make. ((159:13-14, 15-16 (A:63-64, 65-66)).

In summary, the court did find Kessler was diagnosed with paranoid schizophrenia, that he did have some "symptomology" at the time of trial, and that he did suffer from auditory hallucinations in September of 2017. Its reasoning that he did not suffer from auditory hallucinations at the time of trial, however, is based on a flawed reading of the records and unfounded assumptions. There is no dispute Kessler received no medication between his arrest on April 17, 2017 and June 14, 2017, the day he waived counsel. If he were prone to auditory hallucinations, which is clearly documented, then two months without medication would have been more than enough time for them to appear. Indeed, one would expect them to appear. Kessler's sudden decision to proceed pro se, try the case in his orange jumpsuit, and waive his preemptory strikes merely confirm this. The circuit court's finding Kessler did not suffer from auditory hallucinations at the time of trial, or at the time he waived counsel, is clearly erroneous.

The State did not meet its burden of proving Kessler validly waived his right to counsel. Kessler cannot knowingly, intelligently, and voluntarily waive his right to counsel if his decision to do so is caused by schizophrenic delusions. It doesn't matter how articulate he may be, or whether he can draft pre-trial motions. Likewise, he is not competent to represent himself if his choice to do so and his trial tactics are dictated by delusions.

CONCLUSION

This Court should remand for a formal determination of Kessler's postconviction claim that he did not validly waive his right to counsel and was not competent to represent himself based on the postconviction evidence. Alternatively, if the circuit court did decide this question adversely to Kessler, the circuit court erred, and this Court should reverse the convictions and remand for a new trial.

Respectfully submitted this May 28th, 2019.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b)&(c)

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

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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.

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated this May 28th, 2019.

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I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on May 28th, 2019. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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APPENDIX OF DEFENDANT-APPELLANT

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