STATE OF WISCONSIN

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

DISTRICT III

Case No. 2019AP524-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHAD W. KESSLER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN ST. CROIX COUNTY CIRCUIT COURT, THE HONORABLE R. MICHAEL WATERMAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Defendant-Appellant Chad W. Kessler represented himself at trial. Postconviction, Kessler filed a motion alleging that he has paranoid schizophrenia, and that auditory hallucinations (voices) told him to represent himself. He asserted he was not competent to proceed *pro se*. Following an evidentiary hearing, the court denied the motion primarily on the ground that its pre-trial colloquy satisfied *Klessig,*[1] and, in the court's view, thus ensured that his waiver of counsel was valid and he was competent to proceed *pro se*.

a. Did the court's colloquy satisfy the requirements of *Klessig*?

The circuit court answered yes.

This Court should answer yes.

b. Does a *Klessig*-compliant colloquy preclude a defendant from asserting, based on previously undisclosed evidence, that he was not competent to waive counsel and represent himself?

The circuit court appeared to answer yes.

This Court should answer no.

2. Should the circuit court's post-hearing determination that Kessler was competent to proceed *pro se* be upheld because it is adequately supported by the record?

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

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[1] *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

INTRODUCTION

Shortly before trial, Chad W. Kessler informed the court that he wished to represent himself. At the conclusion of a lengthy colloquy, the court ascertained that Kessler validly waived his right to counsel and that Kessler was competent to proceed *pro se*. Kessler proceeded to trial *pro se*, and a jury found him guilty of multiple charges.

Seeking a new trial, Kessler disclosed for the first time that he has paranoid schizophrenia. He alleged that voices told him to fire his lawyer and represent himself, and thus he did not validly waive counsel and was not competent to proceed without counsel. Following a hearing at which Kessler presented evidence, the court denied the motion on grounds that its pretrial *Klessig* colloquy was adequate to ensure that Kessler's waiver of counsel was valid and that he was competent to handle his own defense. The court then addressed Kessler's postconviction evidence, and reasserted that Kessler was competent to represent himself. Among other findings, it determined that it did not believe Kessler's assertions that voices compelled him to fire his attorney and to make certain choices at trial.

On appeal, Kessler asserts that the court's colloquy was inadequate, and that, because of his mental health condition, his waiver of the right to counsel was invalid and he was not competent to represent himself. These arguments should be rejected because (1) the court's colloquy met the requirements of *Klessig*; and (2) the court addressed Kessler's postconviction allegations, and reaffirmed its conclusion that Kessler was competent to represent himself despite his previously undisclosed mental health condition. This Court should therefore affirm the circuit court's order denying relief.

STATEMENT OF THE CASE

The State charged Kessler with multiple felonies and misdemeanors committed on September 28, 2015. (R. 1:1–9.) According to the complaint and attached police reports, Kessler stole a pickup truck from the City of St. Paul Public Works Department and used it in a St. Croix County burglary. (R. 1:5.) Kessler took a washer and dryer from a residence, put them in the truck bed, and drove off. (R. 1:5.) Kessler subsequently led law enforcement on a high-speed chase, which ended in a bean field. (R. 1:5.) With the assistance of a canine officer, police found Kessler hiding in the rafters of a nearby barn. (R. 1:5.)

Hearing on Kessler's decision to represent himself

On June 14, 2017, six days before trial, defense counsel Donald Schwab informed the circuit court that Kessler wanted to represent himself. (R. 53:1.) The next day, the court held a hearing at which Attorney Schwab reiterated that Kessler wished to proceed *pro se* with Schwab as stand-by counsel. (R. 156:3, A-App. 27.)

The court conducted a lengthy colloquy with Kessler. (R. 156:3–24, A-App. 27–48.) (*See also* Kessler's Br. 6–8.) At the outset, the court asked, "Do you have any medical or emotional conditions that interfere with your ability to understand what's happening today?" Kessler responded, "I do understand what's happening, and, no, I don't got no emotional." (R. 156:4, A-App. 28.)

The court asked, "What was that?" (R. 156:4, A-App. 28.) Kessler reiterated, "I have no emotional problems or nothing. I do understand what's going on today." (R. 156:4–5, A-App. 28–29.) The court then asked Kessler if he understood the court proceedings in his case, and Kessler said that he did. (R. 156:5, A-App. 29.) These answers were consistent with a "Waiver of Right to Attorney" form Kessler filed indicating

that he had "not received treatment in the past for mental or emotional problems." (R. 52:1–2.)

The court asked Kessler multiple times in different ways why he wanted to represent himself and what he hoped to accomplish by doing so. (R. 156:6–11, 13–14, A-App. 30–35, 37–38.) Kessler answered, variously, that: (1) he was unhappy with defense counsel for "coerc[ing]" him into allowing the State to present two witnesses via video recorded testimony when Kessler wanted them to be cross-examined at trial; (2) he just wanted the opportunity to represent himself; and (3) he thought it might be good strategy because, he said, the jury might "get to know me personally." (R. 156:6–14, A-App. 30–38.)

At one point, the court asked, "What has changed in your mind, now that you are on the eve of trial, that you want to go it alone?" (R. 156:13, A-App. 37.) Kessler responded, "I don't know," then added "I don't really feel that I'm alone ever." (R. 156:13, A-App. 37.) The court then warned Kessler that his request was made too late for the court to appoint replacement counsel. (R. 156:13, A-App. 37.)

The court also warned Kessler about the challenges of proceeding without counsel at trial. For example, the court advised Kessler, it would be "very difficult for you to exercise your . . . right to remain silent because you'll be doing the talking for you." (R. 156:18, A-App. 42.) The court told Kessler, "the Rules of Evidence are going to apply to you the same way they apply to [the prosecutor]," and that Kessler would be "held to the same standard as a lawyer who went through law school." (R. 156:14, A-App. 38.)

The court warned Kessler that, if he represented himself, no one would be there to look out for his interests: "[Y]ou may be going down in flames," the court said, "and I'd be sitting back watching it, nothing I can do." (R. 156:18, A-App. 42.) The court also advised Kessler that the jury would

not "get to know [him]" if he represented himself: "You are not going to get to ingratiate yourself to the jury." (R. 156:14, A-App. 38.)

Asked how many charges he was facing, Kessler said eight and recited them to the court. (R. 156:5–6, A-App. 29–30.) The court told Kessler, "The stakes are pretty high," and ascertained that Kessler was aware of the maximum sentence (12 and one-half years) on the most serious charges against him. (R. 156:20, A-App. 44.)

When asked, "[D]o you honestly think that you are better off without a lawyer," Kessler responded, "Probably not." (R. 156:19, A-App. 43.) Kessler added: "I don't think I can . . . do a better job, but I'm going to try." (R. 156:20, A-App. 44.)

The court reviewed the completed "Waiver of Right to Counsel" form with Kessler. (R. 156:21, A-App. 45.) Kessler affirmed that he had read and understood the form and had signed it. (R. 156:21, A-App. 45.) Kessler said that he had no questions about the form. (R. 156:21, A-App. 45.)

At the conclusion of the colloquy, the court found that Kessler had knowingly, intelligently and voluntarily waived his right to counsel, and was competent to represent himself:

> THE COURT: . . . . Based on my conversation with Mr. Kessler, I will find that he is competent to represent himself.
>
> . . . .
>
> THE COURT: . . . . [Y]ou do have a constitutional right to represent yourself, and it's not the Court's responsibility to step in and make the decision for you. I personally think you are making a huge mistake, huge mistake, and I don't think you fully appreciate the magnitude of the mistake that you are making. But it's your life. It's your case, and it's your right to exercise. If this is the way you want to do it, and you are competent to do it, and you are

> making this decision free and voluntarily, which I believe you are, I'll grant your request.
>
> THE DEFENDANT: Thank you.
>
> THE COURT: I'm satisfied you understand your right to counsel, you understand your right to act as your own attorney. We've talked about the advantages and disadvantages of having counsel. I have emphasized, the best I can, the reality of the situation that Mr. Kessler is stepping into. I think he understands the seriousness of the charges. He understands the maximum penalties. While I disagree wholeheartedly with your decision, Mr. Kessler, it is your decision to make, so I accept your waiver of counsel and will authorize you to proceed without counsel.

(R. 156:22–24, A-App. 46–48.) Upon Kessler's request, the court appointed Attorney Schwab as standby counsel. (R. 156:21–23, A-App. 45–47.)

Trial

Kessler filed two *pro se* motions *in limine*, one of which was successful in part. (R. 55; 56; 157:10–13.) Kessler sought dismissal of the charge of taking and driving a motor vehicle without consent, contrary to Wis. Stat. § 943.23(2), a Class H felony, on grounds there was no evidence that Kessler took or drove the vehicle away. (R. 1:2; 56.) In response, the State filed an amended information charging the lesser crime of operating a motor vehicle without consent, contrary to Wis. Stat. § 943.23(3)(a), a Class I felony. (R. 157:10–11.)

On the morning of trial, Kessler arrived in his jail-issued orange uniform. (R. 157:6.) The court informed Kessler that defendants usually wear civilian clothes for trial, explaining, "It's considered prejudicial for a defendant to appear in front of a jury wearing a jail uniform." (R. 157:6.) When the court asked Kessler to explain his choice of attire, Kessler responded, "It's my right. . . . I'll just leave it at that." (R. 157:6–7.)

Kessler had no questions during *voir dire*. (R. 157:61.) In a brief opening statement, Kessler asserted, "I sit before you today a humbled man. My hope is you all look for and find the truth. The State is going to present you a story with significant gaps and assumptions. I ask you all not to just accept what the State says . . . ." (R. 157:86–87.)

Kessler also referenced his jail-issued clothes: "[T]he good lord reminded me that no matter what color they dress me in, it doesn't give them - -" (R. 157:87.) The prosecutor objected; the court instructed Kessler to limit his remarks to what the evidence would show. (R. 157:87–88.) Kessler responded, "The truth is the truth no matter how you dress it." (R. 157:88.)

Kessler cross-examined seven of the State's ten witnesses called on the first day of trial. (R. 157:3.) His cross examinations were brief. (R. 157:3.) But Kessler elicited from the State's first witness, Katie Borowicz, the fact that, the day after the burglary, she identified from a lineup someone other than Kessler as the person she saw entering the pickup truck. (R. 157:100–01.) Kessler, who is Caucasian, also elicited testimony from police witnesses that (1) the officer who was in pursuit of Kessler's vehicle told dispatch that the driver was a light-skinned African-American; and (2) there was a three-hour gap between the chase and the officers' discovery of Kessler in the barn. (R. 157:129–30, 145–46.)

On the second day of trial, Kessler arrived in civilian clothes. (R. 154:7.) Kessler advised the court that he wanted Attorney Schwab to take over and represent him for the remainder of the trial. (R. 154:5.) The court engaged Kessler in a brief colloquy to confirm that his decision to proceed with counsel was his own, and allowed Schwab to resume his representation of Kessler. (R. 154:5–7.)

The State rested after calling four additional witnesses. (R. 154:3, 37.) Kessler chose not to testify, and the defense did

not call any other witnesses. (R. 154:38–43, 48.) In his closing statement, Attorney Schwab highlighted the fact that eyewitness Borowicz identified someone other than Kessler in the lineup. (R. 154:75–76.) Attorney Schwab argued that Kessler was not at the scene of the burglary, and that this was a case of mistaken identity. (R. 154:78.)

The jury found Kessler guilty of all charges except it found him not guilty of possession of drug paraphernalia. (R. 71:1; 73:1; 154:96–97.) At an August 2017 sentencing hearing, the court imposed sentences totaling five years and six months of initial confinement and six years of extended supervision. (R. 73:1–2, A-App. 3–4.) The court also imposed nine months of jail time on the misdemeanor theft count to be served consecutive to the prison sentence. (R. 71:1–2, A-App. 1–2.)

Postconviction proceedings

In August 2018, Kessler, by counsel, filed a Wis. Stat. § (Rule) 809.30 motion for a new trial, alleging that he was neither competent to waive his right to counsel before trial, nor competent to represent himself at trial. (R. 91:1–6.) Kessler also alleged that the court's *Klessig* colloquy was inadequate to ascertain that his waiver of counsel was valid or that he was competent to represent himself. (R. 91:6–7.)

In the motion, Kessler disclosed that, despite his prior assurances that he had no "emotional problems," he had a history of mental illness, and was diagnosed in May 2015 with paranoid schizophrenia, for which he was prescribed the antipsychotic Risperdal. (R. 90:32–34; 91:4; 133:1–3.) Kessler alleged that he "did not receive any medication in the St. Croix County Jail from . . . April 17, 2017, until trial on June 19, 2017. His condition worsened and by the time of trial he was suffering from significant auditory hallucinations," i.e., voices. (R. 91:6.) "He believed these auditory

hallucinations were commands from 'God' or the 'holy spirit.'" (R. 91:6.)

Kessler further alleged that the voices "'commanded' [him] to, among other things: 1) fire his attorney and represent himself; 2) appear before the jury in his orange jail jump suit; and 3) not participate in jury selection, including the use of preemptory strikes." (R. 91:6.) With the motion, Kessler filed an appendix containing mental health records from health care providers, the county jail, and the Department of Corrections. (R. 90:1–64.)

Kessler argued that the court's colloquy did not satisfy the requirements of *Klessig* because the court failed to ask if he "had any mental health history; any mental health medication history; any prior mental health related holds or commitments; or any ongoing mental health related symptoms." (R. 91:6.)

The court ordered a hearing on Kessler's motion. (R. 117:1.) At the March 6, 2019, hearing, Kessler testified, and the mental health records filed with the postconviction motion were submitted as exhibits. (R. 127–134, hearing exhibits 1–8; 159:9–25, A-App. 59–75.) On direct examination, Kessler testified that he was diagnosed with schizophrenia in 2015, and that he had experienced schizophrenia-like symptoms for years before that. (R. 159:9–10, A-App. 59–60.) Kessler testified that he hears the "Holy [S]pirit," "God," and "[d]emons" talking to him through "TVs, radios," and strangers' conversations. (R. 159:9–10, A-App. 59–60.) He said that the voices "command[ ] [him] . . . to do certain tasks throughout the day." (R. 159:11, A-App. 61.)

Kessler's mental health records show that, in July 2015, he reported experiencing "auditory hallucination[s]," and was diagnosed with "mild paranoid schizophrenia" and prescribed "low dose [R]isperdal." (R. 90:34; 133:3.) The only pre-2015 records Kessler provided show that, in December 2004,

Kessler was admitted to a hospital with suicidal ideation and paranoia related to abuse of methamphetamine and THC. (R. 90:13; 134:13.)

Kessler testified that Risperdal "reduced" the voices "to a manageable level." (R. 159:11, A-App. 61.) Kessler testified that he stayed on the medication until April 17, 2017, when his bond was revoked and he was placed in the St. Croix County Jail two months before trial. (R. 159:12, 24, A-App. 62, 74.) Kessler said that, while in jail, "[t]he TV was commanding [him] to fire [Attorney Schwab.]" (R. 159:13–14, A-App. 63–64.)

Kessler testified that, at trial, he also heard voices through audience members and conversations between the attorneys and the judge. (R. 159:14–15, A-App. 64–65.) Kessler asserted that the voices told him to appear in court in his orange prison uniform: "Voices was telling me that I need to wear the orange because I'm guilty . . . ." (R. 159:15, A-App. 65.) When asked if he felt like he could make his own choice about what to wear, Kessler said: "Not really, no," "God's telling me what to do to handle this . . . ." (R. 159:15, A-App. 65.) He also testified that God told him not to exercise any preemptory strikes during jury selection. (R. 159:15–16, A-App. 65–66.)

As to his colloquy statement, "I don't really feel that I'm ever alone," Kessler testified that he meant: "God's always with me. There are spirits there, they're always with me." (R. 159:16, A-App. 66.) He agreed that this was not a statement of faith; the spirits are "actually present" for him. (R. 159:16, A-App. 66.) But when asked if the spirits "affect the way you . . . apply rational thought in a given circumstance," Kessler replied, "No." (R. 159:17, A-App. 67.)

Kessler testified that after trial, in July 2017, he asked the jail nurse for Risperdal "[b]ecause hallucinations were getting so bad that [he] couldn't even manage anything . . ."

(R. 159:17, A-App. 67.) Kessler said that he was eventually given Risperdal in the jail. (R. 159:17, A-App. 67.)

On cross examination, Kessler admitted that, in more than 20 criminal cases in Minnesota and Wisconsin, he had never previously mentioned hearing voices. (R. 159:18, A-App. 68.) Kessler affirmed that, on the day of trial, he understood the charges against him, and the roles of the jury, judge, defense counsel, prosecutor, and witnesses. (R. 159:20–21, A-App. 70–71.) Kessler also agreed that he had read through all the discovery in the case. (R. 159:21, A-App. 71.) Kessler did not believe that he had ever told "any court or any attorney that [he] did not understand the proceedings." (R. 159:22, A-App. 72.)

One week later, the court denied Kessler's motion for a new trial in an oral ruling. (R. 160:1–16, A-App. 8–23.) The court concluded that its pretrial colloquy with Kessler into the validity of his waiver of counsel and competency to represent himself was adequate under *Klessig*. (R. 160:3–12, A-App. 10–19.)

As to the adequacy of its inquiry into Kessler's competency to waive counsel and represent himself, the court observed that it asked Kessler if he had any "medical or emotional problems" that would interfere with his ability to understand the proceedings, and Kessler said that he did not. (R. 160:7, A-App. 14.) The court concluded that its question about "medical and emotional problems" was more than adequate to apprise Kessler that it wanted to know about any mental health conditions, like schizophrenia.[2] (R. 160:7, A-App. 14.)

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[2] At the postconviction hearing, the court incorrectly stated that, after the *Klessig* colloquy, it did not state on the record whether Kessler was competent to represent himself. (R. 160:6, A-App. 13.) The transcript shows that it did make such a determination following the colloquy. (R. 156:23, A-App. 47.)

The court also noted that Kessler indicated on the waiver-of-counsel form that he was not receiving treatment for mental or emotional problems, and that he read and signed the form. (R. 160:9–10, A-App. 16–17.) Further, the court also said that it observed Kessler during the colloquy and at prior appearances and that "[t]here were no signs of mental health problems or any impairment of his ability to think or communicate." (R. 160:8, A-App. 15.) It also noted that Kessler was a knowledgeable litigant; he showed that he knew he had a right of confrontation, and that the evidence did not support the taking and operating a motor vehicle charge. (R. 160:10, A-App. 17.) Finally, the court said that it took Kessler's comment, "I don't really feel that I'm ever alone," as merely "indicative of Mr. Kessler having access to other people or resources." (R. 160:9, A-App. 16.)

Having determined that its colloquy was adequate, the court opined that an evidentiary hearing was not required. (R. 160:12–13, A-App. 19–20.) But "[h]aving said . . . that," the court continued, "evidence was presented," and "I would be remiss if I did not at least comment on that evidence." (R. 160:13, A-App. 20.)

The court concluded that "[n]one of the . . . evidence" presented at the hearing "persuaded [the court] that Mr. Kessler was incompetent to represent himself." (R. 160:13, A-App. 20.) While Kessler had established that he was diagnosed with paranoid schizophrenia, the court determined that Kessler had not shown that it "impaired his competency to represent himself" or "significantly affect[ed] [his] ability [to] communicate a possible defense to a jury." (R. 160:13, A-App. 20.)

The court also indicated that it did not believe Kessler's testimony that he had been taking Risperdal up until the day he was taken into custody two months before trial:

> Contrary to Mr. Kessler's testimony, the evidence suggests that he was not taking his

> medications for years. Exhibits 5 and 6 both indicate he last filled his prescription in June 19, 2015. That is significant because when Mr. Kessler was medically screened upon his admission to the jail in April of 2017, no mental health symptoms were observed or reported. I got that from Exhibit number 3.

(R. 160:13–14, A-App. 20–21.)

The court added that the mental health documents established only that Kessler had symptoms after the trial, not during it. (R. 160:14, A-App. 21.) The court said that it was "not convinced" that Kessler actually heard voices that interfered with his judgment at the time of the trial. (R. 160:14, A-App. 21.) The court determined that it "didn't find" Kessler's hearing testimony "to be more credible than what [the court] read in the record," in light of Kessler's "vested interest in the outcome of this hearing and these proceedings." (R. 160:15, A-App. 22.) The court added that Kessler's two motions *in limine* "were exceptionally well done for a pro se litigant," which belied Kessler's claims that he lacked competency to represent himself. (R. 160:15, A-App. 22.)

After the hearing, the court issued a written order memorializing its denial of Kessler's motion. (R. 137:1, A-App. 7.)

STANDARDS OF REVIEW

Wisconsin courts treat a determination of a defendant's competency to proceed without counsel to be a question of fact. *State v. Pickens*, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980). Thus, a "determination that the defendant is or is not competent to represent himself will be upheld unless totally unsupported by the facts apparent in the record." *Id.* at 570; *State v. Garfoot*, 207 Wis. 2d 214, 224, 558 N.W.2d 626 (1997).

In *State v. Smith*, 2016 WI 23, ¶ 26, 367 Wis. 2d 483, 878 N.W.2d 135, the Wisconsin Supreme Court upheld this deferential standard for reviewing competency determinations. The court also concluded that a postconviction court's retrospective competency determination is reviewed for an erroneous exercise of discretion. *Smith*, 367 Wis. 2d 483, ¶¶ 34, 58.

ARGUMENT

I. The circuit court's *Klessig* colloquy was adequate; nonetheless, the court also properly held a hearing on Kessler's postconviction motion.

On appeal, Kessler first argues that the court's *Klessig* colloquy was not adequate because it failed to uncover Kessler's mental health condition. (Kessler's Br. 18–19.) But Kessler also argues that the postconviction court's initial focus on the *Klessig* colloquy put form before substance. (Kessler's Br. 17.)

As set forth below, the court's colloquy was adequate, satisfying the requirements of *Klessig*. But, as Kessler also suggests, the dispositive question in this case is not whether the *Klessig* colloquy was adequate. It is whether Kessler's previously undisclosed mental health condition, and his assertions that voices compelled him to represent himself and directed his choices at trial, rendered him incompetent to waive the right to counsel and to represent himself.

Fortunately, the circuit court held a postconviction hearing on Kessler's motion at which he had the opportunity to present evidence in support of his motion. Then, at the conclusion of its ruling on the motion, the court addressed Kessler's postconviction evidence and made a determination about Kessler's competency to represent himself in light of that evidence.

A. Applicable legal standards

1. The right to self-representation, the *Klessig* colloquy, and Wisconsin's heightened standard for competency to proceed without counsel.

The Sixth Amendment to the federal constitution and article I, section 7 of the Wisconsin Constitution guarantee a state criminal defendant in Wisconsin both the right to counsel and the right to self-representation at trial. *Faretta v. California*, 422 U.S. 806, 819–21 (1975) (the right to self-representation "is . . . necessarily implied by the structure of the [Sixth] Amendment"); *State v. Klessig*, 211 Wis. 2d 194, 201–03, 564 N.W.2d 716 (1997). The right to self-representation is the same under the federal and Wisconsin Constitutions. *Klessig,* 211 Wis. 2d at 203.

The right to counsel and to self-representation are "mutually exclusive" rights; the exercise of one waives the other. *United States v. Traeger*, 289 F.3d 461, 475 (7th Cir. 2002). A defendant's demand to proceed without counsel thus presents a dilemma for the trial judge. *Pickens*, 96 Wis. 2d at 556. "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*, 211 Wis. 2d at 203.

"If these conditions are not satisfied, the circuit court must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel." *Klessig*, 211 Wis. 2d at 203–04. "However, if the defendant knowingly, intelligently and voluntarily waives his right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow him to do so or deprive him of his right to represent himself." *Id.* at 204.

To ensure that a prospective *pro se* defendant's waiver of the right to counsel is made knowingly, intelligently, and

voluntarily, the Wisconsin Supreme Court in *Klessig* required circuit courts to conduct a colloquy with the defendant. 211 Wis. 2d at 206. Such a colloquy must be sufficient for the court to ascertain that 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*, 211 Wis. 2d at 206. "If the circuit court fails to conduct such a colloquy, a reviewing court may not find . . . that there was a valid waiver of counsel." *Id.*

Before honoring a demand to proceed without counsel, the court must determine on the record whether the defendant is competent to proceed *pro se*. *See Klessig*, 211 Wis. 2d at 212. In *Godinez v. Moran*, 509 U.S. 389, 398–99 (1993), the United States Supreme Court held that the competency *to waive the right to counsel* is measured by the same standard as competency to stand trial set forth in *Dusky v. United States*, 362 U.S. 402 (1960).

However, in *Indiana v. Edwards*, 554 U.S. 164 (2008), the United States Supreme Court indicated that states may apply a heightened standard of competency *to proceed pro se* to some defendants with severe mental illness: "[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 178.

The Wisconsin Supreme Court has long applied such a heightened standard for measuring a defendant's competency to proceed without counsel. *Klessig*, 211 Wis. 2d at 209–12; *Pickens*, 96 Wis. 2d at 566–67. In *Klessig*, the court directed circuit courts to "consider factors such as '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'" when determining a defendant's competency to proceed *pro se*. 211 Wis. 2d at 212 (quoting *Pickens*, 96 Wis. 2d at 569).

"[T]he competency determination," the court continued, "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.'" *Klessig*, 211 Wis. 2d at 212 (quoting *Pickens*, 96 Wis. 2d at 569).

Finally, the State notes that Wisconsin's application of its heightened standard of competency for self-representation has come under scrutiny in recent years. The United States Court of Appeals for the Seventh Circuit has concluded that Wisconsin courts have denied multiple defendants the right to represent themselves by, in essence, applying a prohibitively high standard for competency to proceed *pro se*. *Imani v. Pollard*, 826 F.3d 939 (7th Cir. 2016) (ordering a new trial because Wisconsin Supreme Court's decision in *State v. Imani*, 2010 WI 66, 326 Wis. 2d 179, 786 N.W.2d 40, was contrary to, and an unreasonable application of, *Faretta*).[3]

[3] *See also Jackson v. Bartow*, 930 F.3d 930, 2–4 (7th Cir. 2019) (concluding that Wisconsin Court of Appeals in *State v. Jackson*, 2015 WI App 45, 363 Wis. 2d 484, 867 N.W.2d 814, unreasonably applied *Faretta* but denying relief because Jackson's guilty plea waived self-representation claim); *Washington v. Boughton*, 884 F.3d 692, 705 (7th Cir. 2018), cert. denied, 139 S. Ct. 1340, 203 L. Ed. 2d 582 (2019) (ordering a new trial for denial of *Faretta* right); *Tatum v. Foster*, 847 F.3d 459, 467–68 (7th Cir. 2017), cert. denied, 138 S. Ct. 355 (2017) (same).

2. The relief for an inadequate *Klessig* colloquy—and for any credible postconviction allegation that a defendant's waiver of counsel was not valid and he was not competent to proceed *pro se*—is an evidentiary hearing.

The proper remedy for the trial court's failure to conduct an adequate *Klessig* colloquy is a retrospective evidentiary hearing. *Klessig,* 211 Wis. 2d at 206–07, 213–14. The hearing may address whether the defendant validly waived the right to counsel and whether he was competent to proceed *pro se*, or both questions. *See id.*

A retrospective evidentiary hearing is also the appropriate remedy for any credible postconviction allegation that a defendant's waiver of counsel was not valid or he was not competent to represent himself. *Klessig*, 211 Wis. 2d at 207 (recognizing that an evidentiary hearing is the "procedure is already followed in Wisconsin when the appeal stems from a postconviction motion challenging the validity of waiver of counsel.") (citing *Keller v. State*, 75 Wis. 2d 502, 511–12, 249 N.W.2d 773 (1977)); *see also State v. Velez*, 224 Wis. 2d 1, 13, 589 N.W.2d 9 (1999) (court must hold an evidentiary hearing when a defendant raises postconviction allegations that, if true, would entitle him to relief).

B. The court's colloquy satisfied the requirements of *Klessig*.

Kessler first argues that the court's *Klessig* colloquy was inadequate because it failed to uncover his mental health issues. (Kessler's Br. 17–19.) Kessler argues that, after he responded that he had no emotional problems and understood the proceedings, the court should have asked more detailed follow-up questions about Kessler's mental health history. (Kessler's Br. 18.)

As an initial matter, the State observes that Kessler received the remedy to which he would have been entitled even if the colloquy had been defective: an evidentiary hearing. *See Klessig*, 211 Wis. 2d at 206–07. Regardless, the State briefly responds to Kessler's first argument on its own terms. As developed below, the colloquy was adequate under *Klessig*.

The transcript shows that the court engaged Kessler in a thorough colloquy that was adequate to ensure that Kessler's waiver of the right to counsel was made knowingly, intelligently, and voluntarily, and that Kessler was competent to proceed *pro se*, s*ee Klessig*, 211 Wis. 2d at 206–08, 212. (R. 156:3–24, A-App. 27–48.)

The court did what was required under *Klessig* to ensure the validity of Kessler's waiver of the right to counsel. Briefly, it ensured that Kessler was aware of the "general range of penalties that could have been imposed," *id.* at 206. (R. 156:20, A-App. 44; confirming that Kessler was aware of the maximum penalty for the most serious charge.) It ensured that he was "aware of the seriousness of the . . . charges against him," *id.* (R. 156:5–6, 20, A-App. 29–30, 44; confirming that Kessler could name the charges against him and advising him, "The stakes are pretty high.") It also ensured that Kessler "was aware of the difficulties and disadvantages of self-representation," *id.,* explaining many of these at length. (R. 156:14, 18, A-App. 38, 42.) Finally, the colloquy ensured that Kessler was making a "deliberate choice to proceed without counsel." *Id.* To this end, the court gave Kessler multiple opportunities to explain why he wanted to represent himself, and got Kessler to admit that he would probably be better off proceeding with counsel. (R. 156:6–11, 13–14, 20, A-App. 30–35, 37–38, 44.)

The colloquy was also sufficient for the court to make an on-the-record determination that Kessler met the basic standard of competency necessary to represent himself. The

court asked about Kessler's age (39), educational attainment (10th grade, GED, some college), employment (self-employed), and whether Kessler had had any drugs, alcohol or medication in the past 24 hours (no). The court also engaged Kessler in a long colloquy during which it had the opportunity to evaluate Kessler's ability to respond to questions and to conduct himself in a courtroom.

The court also asked Kessler, "Do you have any medical or emotional conditions that interfere with your ability to understand what's happening today?" (R. 156:4, A-App. 28.) Kessler responded, "I do understand what's happening, and, no, I don't got no emotional." (R. 156:4, A-App. 28.) The court requested clarification: "What was that?" (R. 156:4, A-App. 28.) Kessler reiterated, "I have no emotional problems or nothing. I do understand what's going on today." (R. 156:4–5, A-App. 28–29.) The court asked Kessler again if he understood the court proceedings in his case, and Kessler said that he did. (R. 156:5, A-App. 29.)

With these responses, Kessler thus asserted twice that he had no emotional problems, and multiple times that he understood the proceedings. These answers were consistent with Kessler's indication in the waiver form that he had "not received treatment in the past for mental or emotional problems." (R. 52:1–2.)

Kessler's unambiguous denials of having any medical or emotional conditions or receiving past treatment for mental or emotional problems, coupled with his repeated assurances that he understood the proceedings, did not suggest the need for additional follow-up inquiries. Nothing about Kessler's responses suggested that he may, in fact, have had medical or emotional problems that might interfere with his ability to proceed *pro se*. The court reasonably moved on to other topics.

Now, with the benefit of hindsight, Kessler argues that the colloquy was defective because it did not uncover Kessler's

schizophrenia diagnosis and the alleged existence of auditory hallucinations. Even assuming that Kessler might have disclosed his condition under follow-up questioning, the record did not disclose the need for additional inquiry into Kessler's medical and emotional health. The sort of questions Kessler argues should be been asked—"whether he had ever been diagnosed with a psychiatric condition, hospitalized for psychiatric reasons, or prescribed any psychotropic medications"—were not necessary based on Kessler's prior statements. (Kessler's Br. 18.) And Kessler cites no case that requires a court to ask such detailed questions about the defendant's mental health history to satisfy it duties under *Klessig*. (Kessler's Br. 17–19.)

Kessler also faults the court for not asking a follow-up question when, in response to a question about why he wanted to "go it alone," Kessler responded, "I don't know. I don't really feel that I'm ever alone." (Kessler's Br. 18.) But, again, only in hindsight does this statement seem as though it might have something to do with a potential mental health issue. On its face, the statement, "I don't really feel that I'm ever alone," would appear to be about religious faith or, as the court determined, "Kessler having access to other people or resources." (R. 160:9, A-App. 16.)

In sum, the problem here was not the court's inquiry, but Kessler's failure to disclose his condition during the colloquy or on the waiver form. The court cannot be faulted for failing to conduct a better colloquy when the defendant's answers to its questions are non-responsive, misleading, or false.

C. Nonetheless, the court properly held a retrospective evidentiary hearing to address whether Kessler was, in fact, competent to waive counsel and proceed *pro se*.

Kessler next argues that, postconviction, the circuit court focused too much of its attention on whether its *Klessig* colloquy was adequate. (Kessler's Br. 17–20.) Kessler argues that the main issue was not whether the colloquy was adequate; it was whether he is entitled to a new trial based on the postconviction evidence. (Kessler's Br. 19–20.)

The State agrees that this is not a defective-colloquy case. It is not about whether the court's prophylactic inquiry satisfied the formula set forth in *Klessig*. It is about whether, based on the record, including Kessler's previously undisclosed evidence of a mental health condition, Kessler validly waived his right to counsel, and whether he was, in fact, competent to waive counsel and to represent himself.

However, to be clear, the court's emphasis on the *Klessig* colloquy at the postconviction hearing is not grounds for a new trial. Despite the court's post-hearing remark that Kessler was not entitled to a hearing (R. 160:12–13, A-App. 19–20), it provided him with one—a retrospective evidentiary hearing, the remedy appropriate to the allegations in his postconviction motion and appendix (*See* R. 90; 91). *Klessig*, 211 Wis. 2d at 207 (recognizing that an evidentiary hearing is "the procedure is already followed in Wisconsin when the appeal stems from a postconviction motion challenging the validity of waiver of counsel.") (citing *Keller*, 75 Wis. 2d at 511–12). At this hearing, Kessler presented evidence about his diagnosis of paranoid schizophrenia, his claimed symptoms at the time of trial, and the alleged effect these symptoms had on both his decision to forgo counsel and his capacity to represent himself at that time. (R. 159:9–25, A-App. 59–75.)

Importantly, the court addressed Kessler's postconviction evidence, and found that Kessler was competent to waive his right to counsel and to represent himself at trial. The State turns next to those determinations.

II. The postconviction court did not erroneously exercise its discretion in determining that Kessler was competent to represent himself; this determination, and associated factual findings, have substantial support in the record and should be upheld.

After determining that the *Klessig* colloquy was adequate, the court postconviction said that "[it] would be remiss" if it did not address the evidence presented at the hearing. (R. 160:13, A-App. 20.) The court then made an unambiguous determination that, despite Kessler's postconviction evidence, Kessler possessed the level of competency necessary to waive counsel and to represent himself at trial. (R. 160:13, A-App. 20.) As developed below, this determination is amply supported by the record, and should therefore be upheld as a proper exercise of the circuit court's discretion. *Smith*, 367 Wis. 2d 483, ¶¶ 26, 34, 58.

The circuit court concluded that "[n]one of the . . . evidence" presented at the hearing "persuaded [the court] that Mr. Kessler was incompetent to represent himself." (R. 160:13, A-App. 20.) The court noted that the mental health records established that Kessler was diagnosed in 2015 with "mild paranoid schizophrenia" and prescribed "low dose [R]isperdal." (R. 90:34; 133:3; 160:13, A-App. 20.) Critically, the court was not persuaded by Kessler's testimony and the mental health records that his condition "impaired his competency to represent himself" or "significantly affect[ed] [his] ability [to] communicate a possible defense to a jury." (R. 160:13, A-App. 20.)

Portions of Kessler's testimony indicated that Kessler was not, in fact, meaningfully impaired by his condition at the time of trial. While asserting that he heard "spirits" speaking to him through the TV and elsewhere, Kessler indicated on direct examination that these voices did not interfere with his ability to "analyze" or "apply rational thought in a given circumstance." (R. 159:17, A-App. 67.) On cross-examination, Kessler acknowledged that he understood the proceedings at the time: Kessler affirmed that, on the day of trial, he understood the charges against him, and the roles of the jury, judge, defense counsel, prosecutor, and witnesses. (R. 159:20–21, A-App. 70–71.)

Contrary to his claims, Kessler's conduct of his defense was purposeful and demonstrated competency to proceed *pro se*. Prior to trial, Kessler submitted two motions *in limine*, one of which caused the State to file an amended information to charge a lesser offense on one of the counts. (R. 55; 56; 157:10–13.) At trial, Kessler effectively cross examined an eyewitness, eliciting testimony that she identified from a line up someone not Kessler as the burglar the day after the crime. (R. 157:100–01.) Kessler also crossed examined two police witnesses, eliciting testimony that the officer following the alleged burglar's truck initially identified the driver as a light-skinned African American (Kessler is Caucasian). (R. 157:129–30, 145–46.)

The trial transcript indicates that even Kessler's unconventional decision to appear in his orange jail uniform was strategic—and not, as Kessler testified, because voices told him that he needed "to wear the orange because I'm guilty." (R. 159:15, A-App. 65.) In his opening statement, Kessler referenced his orange uniform, suggesting (falsely) that the State made him wear it at trial: "[T]he good lord reminded me that no matter what color they dress me in, it doesn't give them - -" (R. 157:87.) After the court instructed Kessler to limit his remarks to what the evidence would show,

Kessler added, for good measure: "The truth is the truth no matter how you dress it." (R. 157:88.)

Thus, Kessler's choice to wear the orange uniform appears to have been a part of a calculated (if unusual) choice to cast himself as a powerless victim of a wrongful prosecution, not an involuntary act of sabotage commanded by auditory hallucinations. *See also State v. Ruszkiewicz*, 2000 WI App 125, ¶ 43, 237 Wis. 2d 441, 613 N.W.2d 893 ("[A] defendant's unusual conduct or beliefs do not necessarily establish incompetence for purposes of self-representation.").

More fundamentally, the court was not required to accept Kessler's postconviction testimony about the presence and intensity of the alleged voices directing his conduct before or at trial, particularly where that testimony was not corroborated by the mental health records. Those records did not address whether, in the days leading up to the trial, Kessler was hearing voices. (R. 160:14, A-App. 21.) They merely established that Kessler requested Risperdal about ten days after trial, and reported hearing voices one month after trial. (R. 90:55; 159:17, A-App. 67.) The court, sitting as fact-finder, determined that it was "not convinced" by Kessler's testimony that the voices essentially told him to sabotage his case. (R. 160:14, A-App. 21.)

Similarly, the court reasonably determined that the mental health records appeared to contradict Kessler's testimony that he had been regularly taking Risperdal until he was taken into custody. (R. 160:13–14, A-App. 20–21.) Kessler objects that the court's determination that Kessler was already off Risperdal when he was taken into custody in April 2017 is unsupported. (Kessler's Br. 21.) But the records reasonably support such this determination.

In early July 2017, Kessler asked the jail nurse to seek a refill of his prescription for Risperdal. (R. 90:47–48.) When the nurse requested the name of the pharmacy at which the

prescription had been most recently filled, Kessler responded "open cities." (R. 90:48–49.) The nurse contacted the Open Cities Health Center in St. Paul, which responded by fax that Risperdal was not on Kessler's medication list. (R. 90:49–50.) The nurse later discovered that Kessler was prescribed Risperdal at another St. Paul clinic in July 2015. (R. 90:53.) It is possible that there was a mistake in Open Cities' records. But the court could and did draw a different inference from these facts: That the prescription had not been filled in the time leading up to Kessler's April 2017 entry into the jail, and that the last time it was filled was in July 2015—incidentally, the only time Kessler's records show that the prescription was filled. (R. 90:32.)

Based on the forgoing, the court's retrospective determination that Kessler was competent to waive counsel and to represent himself is supported by the record and should be upheld as a proper exercise of the court's discretion.

Finally, the State acknowledges that the court did not expressly declare on the record that, despite Kessler's postconviction evidence, his waiver of the right to counsel was made knowingly, intelligently, and voluntarily. (R. 160:13–16, A-App. 20–23.) The State briefly addresses why this omission does not warrant relief.

Kessler's basis for arguing that his waiver of the right to counsel was not valid is that voices directed him to fire his attorney and represent himself. (Kessler's Br. 23) ("Kessler cannot knowingly, intelligently and voluntarily waive his right to counsel if his decision to do so is caused by schizophrenic delusions.") But the court rejected much of Kessler's postconviction evidence, including his claim that voices compelled him to waive his right to counsel. (R. 160:14, A-App. 21.) In view of these findings, no additional factual grounds exist on which the court could reach a different determination about the validity of Kessler's waiver than the

one it made following the *Klessig* colloquy. (R. 156:23–29, A-App. 47–53.)

Because Kessler's rejected postconviction evidence about his mental health condition was the only new evidence presented to challenge his waiver of counsel, the circuit court's determination after the *Klessig* colloquy that his waiver was valid should stand. A fresh, retrospective determination of the validity of the waiver is unnecessary in these circumstances.

If this court nevertheless disagrees, and concludes that the circuit court erred by not expressly addressing whether Kessler's waiver was valid in light of the postconviction evidence, it should remand with directions for the court to address this issue on the record.

CONCLUSION

This Court should affirm the circuit court's order denying Kessler's postconviction motion.

Dated this 15th day of August 2019.

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 7,695 words.

Dated this 15th day of August 2019.

_____
JACOB J. WITTWER
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 15th day of August 2019.

_____
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