STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP00275-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD L. WHITE,

Defendant-Appellant.

Appeal from the Judgment of Conviction Entered in the
Circuit Court for Grant County,
the Honorable Craig R. Day Presiding
Circuit Court Case No: 18CF12

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
583 D'Onofrio Dr., Suite 1011
Madison, WI 53719
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

STATEMENT OF THE ISSUES

When competency is at issue in a criminal case, the court must appoint an expert examiner to evaluate the defendant and provide a report opining whether the defendant is competent to proceed to trial. Wis. Stat. § 971.14(2), (3). If competency remains contested after the expert report, and the defendant maintains he is incompetent, the burden is on the State to prove competence by the greater weight of the credible evidence at a competency hearing. Wis. Stat. § 971.14(4)(b). Here, the circuit court *sua sponte* ordered a competency evaluation. The appointed expert attempted to examine Mr. White but was unable to offer an opinion to a reasonable degree of certainty as to competence and recommended that continued examination on an inpatient basis was necessary to come to an opinion with the required certainty. Instead, the court proceeded with the competency hearing, ruled the examiner's opinion on competency inadmissible, but allowed testimony regarding the examiner's interactions with Mr. White. The court then found Mr. White competent.

I. Did the circuit court err by proceeding with a competency hearing with no admissible expert on opinion on competency, because the expert's opinion was that the defendant required additional inpatient evaluation?

Trial court answered: The court proceeded with the competency hearing but did not admit the expert's opinion. The court then found Mr. White competent.

II. Did the circuit court err by finding defendant competent without an admissible expert opinion on competency?

Trial Court Answered: The court found Mr. White competent and proceeded to trial.

III. Did the circuit court's failure to follow the statutory procedure for competency evaluations and hearings constitute a violation of the defendant's constitutional due process rights?

Trial Court Answered: The court did not address this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. White would welcome oral argument should the court find it helpful. Publication is warranted to clarify whether section 971.14 requires an expert opinion of sufficient certainty to be admissible prior to a circuit court determining a defendant's competency to stand trial. *See* Wis. Stat. § 809.23.

STATEMENT OF THE CASE AND FACTS

This case arises out of an October 23, 2017, incident in which Mr. White, an inmate at the Wisconsin Secure Program Facility (WSPF), was alleged to have spit at a correctional officer, hitting the officer's face and shoulder. (1:1-2.) The state charged Mr. White by criminal complaint on January 24, 2018, with one count of assault by prisoner – throw/expel saliva, in violation of Wis. Stat. § 946.43(2m)(a), a Class I felony. (*Id*.)

Mr. White appeared at the initial appearance on February 12, 2018, by videoconference from WSPF without counsel.[1] (35:2.) At a status conference on April 2, 2018, Mr.

[1] During this hearing, the court informed Mr. White of the possibility of receiving an appointed attorney through the State Public Defender. (35:3.)

White again appeared by video without counsel.[2] (36:1.) The court attempted to address the issue of representation. (36:2-3.) During this conversation, Mr. White questioned whether the judge was Abraham Lincoln and requested First Lady Eleanor Roosevelt be appointed as his attorney. (*Id.*) When the court informed Mr. White that was not possible, Mr. White disconnected from the hearing. (36:3.) The court stated that Mr. White would forfeit his right to counsel at the preliminary hearing if further conversation at that time did not result in Mr. White requesting the appointment of a public defender. (*Id*.)

The Court Raises Competency

Mr. White appeared in person, without counsel, for the preliminary hearing on May 3, 2018. (37:2.) The court again addressed the issue of representation. (*Id*.) Mr. White told the court he was exercising his right not to answer questions. (*Id*.) The court advised Mr. White of his right to be represented by a lawyer and the requirement that the court find Mr. White competent to represent himself if he did not want a lawyer. (37:3.)

The court referenced Mr. White's previous comments about Abraham Lincoln and Eleanor Roosevelt, noting "that made me wonder whether you were oriented to time and place." (*Id*.) Mr. White responded that Eleanor Roosevelt was his payee, and "You got something to say to me, tell her." (*Id*.) The court asked additional questions about Mr. White's reference to Eleanor Roosevelt as his payee, as well as his age, current status as an inmate, and whether he had past experience being represented by a lawyer. (37:3-4.) Mr. White did not

[2] Prior to this hearing, the court had received an email from the State Public Defender's Office in Lancaster stating that staff in the office had spoken with Mr. White and he had declined representation by a public defender. (7.)

respond to the court's questions or statements. (37:3-5.) The court noted it questioned Mr. White's competence, stating "this Abraham Lincoln and Eleanor Roosevelt thing kind of has me wondering about your orientation to the world." (37:5-6.) The court questioned Mr. White as to his own position on competence, but Mr. White did not respond. (37:7.)

The court also informed Mr. White that his right to be present at certain hearings could be forfeited if he did not voluntarily cooperate with officers transporting him to court. (37:6.) Noting, "apparently they had to forcibly put you in a transport van," the court warned Mr. White that "if at future hearings you give the officers physical resistance to coming to court, you're just not going to come and you're going to miss out on it." (37:6-7.) Mr. White did not respond to the court when it asked if he understood the court's warning. (*Id*.)

Mr. White's demeanor at the preliminary hearing, as described on the record by the circuit court, was:

> Mr. White's behavior here today in court, he's quiet, he does not respond, he had occasionally made eye contact with me. But for the most part not. He now has his head laying on counsel table. He is, I note, wearing a spit mask. He has muttered a few inaudible things. I thought once maybe he was going to start responding.

(37:8.) The court questioned a correctional officer who had escorted Mr. White from WSPF to court whether Mr. White was always nonresponsive and was told that he was not always so. (37:9.)

The court proceeded with the preliminary hearing, found probable cause, and bound the case over for trial. (37:12.)

The court ordered a competency examination and advised Mr. White regarding the competency proceedings, "we're not going to have the examiner spend a lot of time trying to interview Mr. White. If Mr. White wants to interact with the examiner, that would be good. If he does not, the examiner will attempt to glean information from other sources." (37:13-14.)

The Competency Report

Dr. Christina Engen was appointed to examine Mr. White. (10, 11; App. 103-04.) On June 5, 2018, Dr. Engen submitted her report opining that "Mr. White does not presently lack substantial mental capacity to understand the pending proceedings or be of assistance in his defense. However, absent his cooperation, this opinion is not offered to a reasonable degree of professional certainty." (12:4.)

The report stated Mr. White did not cooperate with the examination and Dr. Engen's discussion with Mr. White was "unproductive" because he provided "outlandish" answers to questions and "behaved in a manner that appeared to me theatrical." (12:2.) Dr. Engen's opinion was therefore based on prior determinations that Mr. White was competent, a lack of documentation of any mental health diagnosis in Department of Corrections records, records demonstrating Mr. White's ability to advocate for himself in communications with DOC staff, and Mr. White's presumed knowledge gained from his prior experience as a defendant. (12:5.) The report further stated regarding Dr. Engen's conclusions,

> I am unable to offer this opinion to a reasonable degree of professional certainty. This is based on the fact that (1) he did not cooperate with my examination, (2) I am aware of the possibility that malingering can co-exist with incompetency, and (3) ten years have passed since

> he was last evaluated and adjudicated competent. As such, this is a situation in which it might be prudent to continue examination on an inpatient basis.

(12:5.)

At a hearing on August 2, 2018, Mr. White contended that he was not competent. (38:3; App.106.) The court acknowledged it was required to hold an evidentiary hearing and that the State "bears the burden of proving by the greater weight of the credible evidence that Mr. White is competent if it wishes to proceed." (*Id.*) The court discussed with the prosecutor how to proceed given the problem with the expert report:

> [THE STATE]: Well there's a problem as far as proceeding directly to a hearing. Ms. Engen's report states that she's unable to offer her competency opinion to a reasonable degree of professional certainty due to Mr. White's not cooperating with her at all.
>
> So I guess if he wants to maintain that he's not competent, I think he should be further evaluated by Ms. Engen. I do not think it should be inpatient. He should not be getting sort of a benefit by being uncooperative.
>
> THE COURT: I didn't understand Doctor Engen to think that any more evaluation was going to be helpful.
>
> [THE STATE]: Well, if he would cooperate. But, yeah, it's -- I suppose he would have to present evidence that he isn't competent. If it's the greater weight of the evidence, I think probably even if she can't offer her opinion to a reasonable degree of medical certainty, it's still going to be more than what he can muster up is my guess.

> THE COURT: If she can't offer an opinion to a reasonable degree of certainty it's not an admissible opinion. And so her opinion doesn't get in. But a lot of what's detailed in the evaluation report are previous evaluations, if I recall correctly, five in number. And I think that even if Ms. Engen's opinion itself is not admissible, the details of her observations and conversations are. And competency proceedings are not a venue for playing games with the system. But unless expressly waived, the statute says that we're to have a evidentiary hearing and that would include, I suppose, Ms. Engen and whoever else the State wanted to present by way of past evaluators, if you want to do that. But I think we probably need to set a separate hearing date.

(37:4-5; App. 107-08.)

At this hearing, the court again asked whether Mr. White wanted a lawyer. (38:6.) Mr. White did not verbally respond. (*See* 38:6-7 (the court noted, "You're kind of wiggling your head back and forth horizontally which sometimes is non-verbal communication meaning no. But I don't want to misinterpret that.").) The court postponed a determination as to Mr. White's self-representation pending a determination of competency. (38:7-8.)

Competency Hearing

A competency hearing was held on August 28, 2018. Prior to the evidentiary portion of the hearing, the court asked Mr. White whether he wanted a lawyer. (39:2.) Mr. White did not verbally respond but shook his head no. (*Id*.) The court warned Mr. White, "if you don't say that you want a lawyer and you're not going to take steps to get one, I guess you're going to go without and that's unfortunate. But I don't know what else to do, Mr. White, under the circumstances, other than to say

that you give up your right to have a lawyer, that you forfeit your right to have a lawyer by not getting one when you could get one." (39:3.)

Dr. Engen, a psychologist with the Wisconsin Forensics Unit, testified regarding her examination of Mr. White. (39:4-5.) Dr. Engen met with Mr. White on May 23, 2018, at WSPF. (39:5-6.) She testified that Mr. White expressed confusion about why she was there and indicated he believed Eleanor Roosevelt would be the recipient of the doctor's report. (39:6.) In response to questions about Mr. White's personal history, current mental status, and his understanding of his current legal situation, Dr. Engen testified that Mr. White provided limited information of questionable reliability. (39:6-7.) Dr. Engen's impression was that Mr. White understood her questions but was "choosing to respond to them in a way that I characterize as theatrical or outlandish." (39:7.) Dr. Engen testified that during their conversation, Mr. White's answers "were not appropriate and it was my impression…that that was volitional. So he answered them incorrectly based on an effort to manipulate the situation or perhaps for diversion, for some sort of fun for him." (39:11.)

In addition to meeting with Mr. White, Dr. Engen reviewed his records with the Wisconsin Forensics Unit which included prior evaluations of his competency to stand trial and Mr. White's Department of Corrections psychological services unit file. (39:5.) Dr. Engen testified that the prior competency evaluations did not indicate any diagnosis of a major mental illness. (39:7-8.) Rather,

> the primary concerns and why opinions were difficult to reach with him were due to his failure to cooperate. There were a number of refusals of evaluation. There was actually in reference only indications that he suffered

> from manic social personality disorder and then also a diagnosis of malingering, that was the diagnoses that were provided about 10 years ago in an (unintelligible) competency evaluation.

(39:8.) Dr. Engen testified that on three prior occasions, the doctors conducting competency evaluations were unable to form an opinion and recommended inpatient evaluation. (39:8-9.) In each of those cases, Mr. White was ultimately deemed competent to proceed. (39:9.) Dr. Engen was unable to review records from Mr. White's inpatient evaluations and was unaware of how he responded to inpatient evaluations. (39:11.) Dr. Engen was unaware of any case in which Mr. White had been determined not competent to proceed. (*Id.*)

Dr. Engen testified that the information she received from WSPF psychological services was consistent with Mr. White being "generally uncooperative." (39:9.) The prison records indicated that Mr. White was diagnosed with antisocial personality disorder, and that while there had been instances where Mr. White had reported self-harm behavior or suicidal ideation, the self-harm was determined to be unfounded. (39:9-10.) Based on Mr. White's prison records, Dr. Engen also opined that he could make written and verbal requests in a coherent manner. (39:10.)

Dr. Engen believed that Mr. White was competent to proceed, however her opinion was not offered to a reasonable degree of professional certainty. (39:11-12.) Dr. Engen believed Mr. White was competent because he had previously been found competent to proceed following inpatient evaluation on more than one occasion and because she did not see an indication that Mr. White suffers from a major mental illness that would interfere with competency in his records. (39:12.) Dr. Engen inferred from Mr. White's request to

transfer from WSPF to the Wisconsin Resource Center, as documented in his prison file, that he was able to self-advocate and therefore likely competent to assist in his defense. (*Id*.) She further noted that Mr. White had prior experience as a defendant in the criminal justice system from which he could draw to inform his current understanding. (*Id*.)

The State did not present any other evidence. (39-13.)

Mr. White declined to question Dr. Engen, though he did ask the court when he was last determined competent in a previous case. (*Id*.) The court informed him that Dr. Engen's report stated that the last competency determination was ten years prior, in 2008. (39:14.) Mr. White told the court that since then, he had been approved for Supplemental Security Income (SSI) due to suffering from a mental illness. (*Id*.) Mr. White argued that Dr. Engen was lying when she reported that he had never been diagnosed with a mental illness. (39:13, 16.) Mr. White was unable to tell the court what he had been diagnosed with but, because he had received SSI, knew he had received a mental health diagnosis. (39:16-17.)[3] Ultimately, the court accepted the proposition that Mr. White had a mental illness and assumed it to be the case. (39:18; App.110.)

The court questioned Mr. White regarding his understanding of the criminal justice system:

> THE COURT: Tell me about your understanding of the criminal justice system, if you can.
>
> MR. WHITE: I can't.

[3] The court asked Mr. White whether he would like to have a lawyer help him obtain relevant records, and Mr. White declined stating "I don't trust people." (38:16.)

THE COURT: All right. Have you had lawyers before defend you?

MR. WHITE: I don't remember.

THE COURT: You've been in other court rooms other than this I take it. Have you ever had a jury trial before?

MR. WHITE: No.[4]

THE COURT: All right. What's your understanding of the prosecutor -- Attorney Riniker -- what's her job, do you know?

MR. WHITE: I don't know -- I don't want to understand. It don't matter.

THE COURT: All right.

MR. WHITE: Well, my understanding of her is she's a murderer; that's my understanding.

THE COURT: Based upon what?

MR. WHITE: She's a murderer.

THE COURT: Based upon what -- from what information do you gain that understanding?

MR. WHITE: I don't need no information, she's a murderer, that's my opinion. She's a murderer.

THE COURT: All right. And what about the role of the judge? What's your perception of my job?

MR. WHITE: You a murderer too.

---

[4] The State later informed the court that Mr. White had previously gone to trial in two prior criminal cases; he was acquitted of charges in a 2009 case and was convicted in a 2013 case. (39:29.)

THE COURT: Based upon what, sir?

MR. WHITE: My personal opinion.

(38:14-16.)

When the court again asked if Mr. White wanted an attorney, Mr. White asked, "What good would a lawyer do me if I don't understand what's going on? You keep asking me if I want a lawyer; what good would a lawyer do me if I don't understand nothing that's going on now?" (39:18.) The court stated it believed Mr. White understood what was going on, and that "people seem to think that you're faking it." (39:18-19.) Mr. White responded that he does "un-normal things. It's not the mind of a mind of a normal person." (39:19.) Mr. White went on to draw analogies between Charles Manson, Saddam Hussein, Hitler, and John Wayne Gacy and his own abnormal thinking. (39:19-20.) The court responded, "I can tell from the storehouse of knowledge that you keep in your head that you are not an un-bright fellow. I can tell by the way that you think about appropriate examples of how to quiz me that you are a bright man." (39:21.)

The court asked Mr. White additional questions regarding his knowledge of the legal process:

THE COURT: Do you know what you are charged with?

MR. WHITE: No. I really don't care.

THE COURT: Why not?

MR. WHITE: It doesn't matter. It doesn't matter to me.

THE COURT: Why not?

MR. WHITE: It doesn't matter to me.

> THE COURT: Do you have an out date from prison?
>
> MR. WHITE: I don't know. Perhaps; perhaps not.
>
> THE COURT: I don't know the answer to that.
>
> MR. WHITE: Me neither. I'm just living.

(39:22-23.)

In support of his contention that he was not competent, Mr. White argued:

> I can say this much, I am in need of treatment and where I am at I will never receive it. I can say that much. You know, that much I'm for sure of. I've been in need of treatment for years.
>
> …
>
> Psychological treatment. I've been requesting that -- like she stated in the report -- I've been asking to go to places where I can get help. Where I'm at now can't do that. You know what their solution is to help somebody in prisons? You don't know? I'm pretty sure you are aware of the abuse that goes on in prisons. I'm pretty sure you are aware of that -- how people get mistreated, you know, then they get out. They get out, you know, or a person comes to prison and the system turns them into an animal. And he gets out and kills people and do bad -- do more bad things. Sometimes prison makes a person worse, you know that right?
>
> THE COURT: I have opinions about that. I don't know but I have opinions.
>
> MR. WHITE: Okay, well, it does. You know, I've seen prison turn the nicest person into the evilest person.

I've seen it with my own eyes. You know, I've seen people come to prison with three years now they got 60 or 70 years because that's what the system does to them, you know. So what I'm telling you is I would never receive the proper treatment that I am in need of where I am at.

I might even get out, you never know, because the mind works in mysterious ways, right. And you know the mind is a terrible thing to waste. You are aware of that, right? Okay. I might get out, I might still be in need -- what if I go to the streets when I get out, whenever my release date is, I really don't know. What if I get out and just do something real hideous or, you know, crazy, you know, like run up in a McDonald's and just, you know, with an AK-47 or something.

You know what I'm gonna say? The system did it to me, because they didn't give me the treatment that I've been requesting. Or I might run up in the school or church, anything. I'm going to blame it on the system. Because they are at fault because they didn't give me the treatment I've been requesting. It's simple, simple as that.

She even states in her report I've been asking to go to places like WRC. They just say, you know, just blow you off, that's what they do in prison. You know, they blow you off. You know, you tell them you got a problem, ah, there's nothing wrong, you're okay. Take some medication you'll be all right. That's just, you know, that's their solution. Or here, take this pamphlet and read this. You know, they help you when you start having self-harm thoughts or something, you know, it's a joke man. Seriously. It's a joke.

I might get out and you might even read about me, you never know. First thing you gonna -- first thing probably going to pop in your head is, yeah, I remember

> him, I had a case in my courtroom with him. And he was telling me he might go down this road. Seriously.
>
> I tell you, I'm at that point where I am about to give up because I'm tired of talking. That's why I stopped talking, you know. That's why I don't talk that much no more. People think I'm giving them the silent treatment, you know. I'm wasting my breath, that's what I'm doing. I'm wasting my breath. Because don't nobody want to hear me when I tell them I got a problem, they don't want to hear it. usually don't want to hear it.
>
> You know, they think I'm -- the so-called doctor said in her report -- they think I'm faking or playing a game. There's no game, man. This is no game. So now it's in your hands, the best thing for you to do. I already know what I'm going to do.

(39:24-25.)

Regarding the expert testimony, the court informed Mr. White, "I cannot accept her opinion." (39:18; App.110.) Ultimately, though, the court found Mr. White competent to stand trial:

> I believe that you are competent to stand trial. You are clearly oriented to time and place and person. You are clearly intelligent. You are clearly articulate. You clearly have a grasp of history and culture and sociology and a grasp of a lot of things you need to know. That's what I need to decide today.
>
> You may well have a mental illness, but it's not such as prevents you from standing trial in this case. I find that you know that Attorney Riniker is not a murderer. You use that, perhaps, in a colorful sense. But you understand the criminal justice system and who does what

> and you understand, based upon your comments to me, my role to make decisions for better or for worse.

(39:28-29; App.112-13.)

After finding Mr. White competent to proceed to trial, the court again attempted a colloquy regarding the benefits of a lawyer and the disadvantages of proceeding without one. (39:29; App.113.) Mr. White did not respond to most questions, other than to state, "I was at a disadvantage when I walked in this room... So how much worser can it get?" (39:30; App.114.) The court found that Mr. White had "not so much…waived his right to a lawyer as he has forfeited by refusing to accept indigent public defender counsel when he is aware of that possibility and that it could help." (*Id*.) The court then found Mr. White competent to represent himself. (*Id*.)

The court gave Mr. White information about the trial process. (39:31.) Mr. White asked what would happen if he did not show up to trial and the court responded that the trial would go on without him. (*Id*.) During a colloquy about his right to appear, Mr. White's response to most of the court's questions was that, "My ghost will be here." (39:31-33.) The court requested an order to produce be done for Mr. White but stated it would not be forcibly executed. (39:33.)

Jury Trial

On the day of trial, Mr. White was transported to court, but stated he was only there to deliver a document to the court, not for the jury trial. (40:2.) Mr. White stated, "I want you to make a record of that and then they can take me back. I don't want to be here. I told you that last week." (40:2.) The court read the document into the record:

> "To whomever the person may be who it may concern. I have been advised by the voice in my head of my payee, Eleanor Roosevelt, that you order me be sent to the Winnebago or Mendota Mental Health Institute for a 30 day inpatient competency evaluation. This request is being made and submitted to the Court by the accused while being under the duress of being incompetent and unable to fully understand anything that's happening." With the… accused's signature, Donald L. White.

(40:3; App.117.)

The court informed Mr. White, "We have had extensive competency proceedings. I have found you to be competent, Mr. White. I accept that you have mental health difficulties." (*Id*.) Mr. White objected to that finding on the basis that the court was not a doctor and had made the competency determination without relying on an expert opinion from a doctor. (40:3-4, 6-7; App.117-18, 120-21.)

The court advised Mr. White of his right to be personally present at trial and suggested he should remain present for the trial as he would have a better chance at a favorable result if he were present. (40:4-5, 7; App.118-19, 121.) Mr. White declined, stating he was only present to deliver the document for the record and that he did not want to participate in the trial. (40:5; App.119.) Further discussion did not change Mr. White's mind. (40:7; App.121.)

After Mr. White left, the court found he had waived his right to personally appear at the trial and proceeded to the jury selection and trial in his absence. (40:8-9; App.122-23.) The jury found Mr. White guilty. (23; 40:45.)

Sentencing

Mr. White appeared personally for sentencing without counsel.[5] (41:2.) He declined to make any statement or argument. (41:5.) The court sentenced Mr. White to one year and six months initial confinement and one year extended supervision, consecutive to his current sentence. (41:5; 27; App.101-02.)

Postconviction Proceedings

Mr. White filed a timely notice of intent to seek postconviction relief. (30.) On appeal, counsel filed a no merit report. On September 29, 2021, the court ordered further review of "the circuit court's decision that White was competent to proceed, and whether the court erred by making that decision without first obtaining an expert opinion of sufficient certainty to be admissible." After review of the issue as directed by the court, Mr. White requested to proceed with a meritorious appeal under Wis. Stat. § 809.30. The court rejected the no merit report by summary disposition on November 18, 2021, and Mr. White proceeded with this appeal.

[5] Prior to sentencing, the court informed Mr. White by letter of the jury's verdict and his right to be present and represented by counsel at the sentencing hearing, advising Mr. White to contact the State Public Defender if he wished to have an attorney at sentencing. (24.)

ARGUMENT

MR. WHITE WAS STATUTORILY ENTITLED TO AN ADMISSIBLE EXPERT OPINION REGARDING HIS COMPETENCY TO STAND TRIAL; THE CIRCUIT COURT'S DETERMINATION THAT MR. WHITE WAS COMPETENT WITHOUT AN EXPERT OPINION WAS ERROR AND A VIOLATION OF DUE PROCESS

A. Wisconsin's competency statutes codify due process protections against being tried while incompetent

1. The fundamental right not to be tried while incompetent

Ensuring a defendant is competent to stand trial is "a cornerstone of our criminal justice system," *State v. Byrge*, 2000 WI 101, ¶ 26, 237 Wis. 2d 197, 614 N.W.2d 477, and "fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896 (1975) "[T]he conviction of an accused person while he is legally incompetent violates due process." *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836 (1966).

The standard for competency established by the United States Supreme Court requires that a person being charged with a criminal offense: 1) "have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and 2) have "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 403, 80 S.Ct. 788 (1960). Under the *Dusky* standard, "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to

assist in preparing his defense may not be subjected to a trial." *Drope*, 420 U.S. at 171.

It is within the purview of the state to establish specific procedures to be used during competency proceedings, so long as they are sufficiently protective of the right not to be criminally tried while incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 367-68, 116 S.Ct. 1372 (1996).

2. Relevant statutory provisions

Wisconsin codified the *Dusky* standard in Wis. Stat. § 971.13(1): "No person who lacks substantial mental capacity to understand the proceeding or assist in his or own defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." Under Wisconsin's competency statute, "if a defendant claims to be incompetent, the court shall find him incompetent to proceed unless the state can prove by the greater weight of the credible evidence that the defendant is competent under the two-part *Dusky* standard as explained by the court in *Drope*." *State v. Garfoot*, 207 Wis. 2d 214, 221, 558 N.W.2d 626 (1997).

Section 971.14 establishes procedures for determining competency, which are mandated "whenever there is reason to doubt a defendant's competency to proceed," Wis. Stat. § 971.14(1r)(a). The court "shall" appoint one or more examiners having appropriate specialized knowledge to examine and report upon the condition of the defendant. Wis. Stat. § 971.14(2)(a). The examiner "shall" personally observe and examine the defendant and have access to his or her past or present treatment records. Wis. Stat. § 971.14(2)(e).

After examining the defendant, the examiner "shall submit to the court a written report which shall include all of the following": a description of the nature of the examination

and the individual interviewed, the clinical findings of the examiner, the examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and to assist in his defense, and the facts and reasoning upon which the findings and opinions are based. Wis. Stat. § 971.14(3)(a)-(c). If the examiner opines that a defendant is not competent, the statute also requires that the report include the examiner's opinion on whether competency may be restored, and, "[i]f sufficient information is available to the examiner to reach an opinion, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment." Wis. Stat. § 971.14(3)(d), (dm).

Unless the parties waive the opportunity to present additional evidence, the court "shall" hold an evidentiary hearing on the defendant's competency. Wis. Stat. § 971.14(4)(b). If the defendant stands mute or claims to be incompetent, "the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent." *Id.*

3. Standard of review

Statutory interpretation is a question of law that appellate courts review de novo. *Nowell v. City of Wausau*, 2013 WI 88, ¶19, 351 Wis. 2d 1, 838 N.W.2d 852.

The trial court's determination of whether there is reason to doubt the defendant's competence and order an examination, as well as the court's determination of competency, are decisions "disturbed on appeal only if the trial court exhibited an erroneous exercise of discretion or if the trial court decision was clearly erroneous." *Garfoot*, 207 Wis. 2d at 223-24.

B. Section 971.14 entitled Mr. White to an evaluation sufficient to produce an admissible expert opinion on his competency to stand trial

The plain and unambiguous language of sections 971.14(2) and (3) mandate that a defendant whose competency to stand trial is in question examined by an expert and that expert must provide to the court a report containing the expert's opinion on the defendant's competence. Wis. Stat § 971.14(2)(a) ("The court shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant"); Wis. Stat. § 971.14(3), (3)(c) ("The examiner shall submit to the court a written report which shall include…[t]he examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense."). Courts construe statutes to determine the legislature's intent, beginning with the plain language of the statute. *State v. Green*, 2021 WI App 18, ¶ 48, 396 Wis. 2d 658, 957 N.W.2d 583, *citing State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶ 37-38, 271 Wis. 2d 633, 681 N.W.2d 110. The court may also consider the context and structure of the statute. *Kalal*, 2004 WI 58, ¶ 46.

This court recently construed the provisions of section 971.14(3) in *State v. Green*. 2021 WI App 18, ¶¶ 49-50. There, the court distinguished the mandatory requirements for expert reports set forth in subsections (c) and (d) – reports must include "the examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense" and "the examiner's opinion regarding the likelihood that the defendant, if provided with the treatment, may be restored to competency within the time period permitted" by statute – with subsection (dm), which requires the examiner to make a determination regarding

whether the defendant requires medication to be restored to competency only "if sufficient information is available to the examiner to reach an opinion" on the issue. *Id.*

The examiner's report plays a substantial role in the process of determining competency. *See State ex rel. Haskins v. Cnty. Court of Dodge Cnty.*, 62 Wis. 2d 250, 266, 214 N.W.2d 575 (1974) ("Our statute…clearly recognizes the legislature's belief that psychiatric testimony is highly relevant.") The plain language of section 971.14(4)(b) anticipates the use of the expert report to determine competency. If the parties waive their opportunities to present evidence, the court "shall promptly determine the defendant's competency ... on the basis of the report" by the examiner. Wis. Stat. § 971.14(4)(b). If competency is contested, the court shall hold an evidentiary hearing. *Id*.

While the statutory sections do not explicitly require an expert opinion to a particular degree of certainty, interpreting the statute to require anything less than an admissible opinion would lead to the absurd result reached in this case – an evaluation of the defendant and expert report that cannot be considered by the court in reaching its decision on competency. Experts are required to testify to a reasonable degree of professional certainty or probability. *McGarrity v. Welch Plumbing Co.*, 104 Wis. 2d 414, 429, 312 N.W.2d 37 (1981); *Pucci v. Rausch*, 51 Wis. 2d 513, 519-20, 187 N.W.2d 138 (1971); *see also* Wis. Stat. § 907.02 (expert opinion testimony must be based upon "sufficient facts or data" and "is product of reliable principles and methods" applied to the facts of the case).

Here, the court correctly concluded that the examiner's opinion was not admissible as it was not made to a reasonable degree of professional certainty. Where the court erred was in

refusing to order additional examination sufficient to produce an admissible opinion on competency. The statutory requirements for a competency examination and expert report are rendered meaningless if, as here – *after* finding reason to doubt competency under Wis. Stat. § 971.14(1r)(a) – a court can simply proceed without the benefit of an admissible expert report and opinion. The practical effect of what happened in this case is no different than if the court had simply declined to appoint an examiner in the first place, but still held a hearing and decided competency.

Instead, the statute should be interpreted to require that, where an expert is unable to form an opinion on competency to a reasonable degree of medical certainty, that the court must appoint a second examiner and/or order an inpatient evaluation.[6] "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *Kalal*, 2004 WI 58, ¶ 44. Wisconsin courts "consult our own prior decisions that examined the same statute as part of our plain meaning analysis." *Adams v. Northland Equip. Co., Inc*., 2014 WI 79, ¶ 30, 356 Wis. 2d 529, 850 N.W.2d 272. The purpose of section 971.14 is to protect the fundamental constitutional rights of defendants who may be incompetent: "the procedure spelled out by section 971.14, on the determination of incompetency to proceed, is a critically important failsafe device for the benefit of accused persons who may not be able to fully cooperate and assist in their defense." *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 322, 204 N.W.2d 13 (1973). "The purpose of section 971.14 is to maximize rather than minimize the rights afforded criminally accused persons." *Id.* at 324.

[6] As Mr. White is asking this court to interpret section 971.14, he has also served all necessary legislative parties as required by Wis. Stat. § 806.04(11) with copies this brief by mail.

Mr. White was entitled to a competency evaluation sufficient to produce an admissible excerpt opinion as to his competency. His conviction should be reversed because the statutory procedures were not followed.

C. The circuit court failed to follow statutorily mandated competency procedures in violation of Mr. White's due process rights

Once there is reason to doubt a defendant's competency to proceed, the court "shall proceed" under section 971.14. Wis. Stat. § 971.14(1r)(a). Thus, the decision to appoint an examiner is not discretionary. Wis. Stat. § 971.14(2)(a). The appointed examiner shall submit a report to the court that includes the examiner's opinion about the defendant's competency to proceed. Wis. Stat. § 971.14(3)(c). The court is to make a decision as to competency based, at least in part, upon the expert report. § 971.14(4)(b). The court should not have proceeded to a competency hearing without an admissible expert opinion. Instead, to satisfy the statutory requirements of section 971.14, the court should have appointed a second examiner and/or ordered an inpatient evaluation prior to holding the hearing and determining competency.

Mr. White was aggrieved by the court's failure to obtain an examiner opinion of sufficient certainty to be admissible, as it was his statutory right to have an opinion that could potentially assist him in protecting his right not to be tried while incompetent. This failure also violated his due process rights to a fair trial: "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope*, 420 U.S. at 172; *see also Pate*, 383 U.S. 375 at 385-86 (failure of state courts to invoke statutory procedures deprived defendant of the inquiry into the issue of

his competence to stand trial to which he was constitutionally entitled).

The court's decisions to proceed with the hearing, and ultimately to find Mr. White competent to proceed, are particularly problematic here because Mr. White was unrepresented by counsel. *See Riggins v. Nevada*, 504 U.S. 127, 139–40, 112 S. Ct. 1810 (1992) ("Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.").

The facts of this case demonstrate with particularity the United States Supreme Court's warning regarding the risk of error in competency proceedings: "[f]or the defendant, the consequences of an erroneous determination of competence are dire." *Cooper*, 517 U.S. at 264. After finding Mr. White competent, the court later found that, based on his behavior, Mr. White forfeited both his right to counsel and his right to appear at trial. However, Mr. White's decisions to waive or forfeit his right to an attorney and right to appear at trial must also be evaluated in light of the competency question and may in fact demonstrate his lack of competence. *Riggins*, 504 U.S. at 140 ("defendant's waiver of the right to be tried while competent would cast doubt on his exercise or waiver of all subsequent rights and privileges through the whole course of the trial"); *see also Matalik*, 57 Wis. 2d at 324 ("The procedure for declaring an alleged criminal defendant incompetent to stand trial stops the criminal process because the defendant is not mentally competent to look after his own interests and to cooperate in the preparation of his defense at trial.")

The court's failure to follow these statutory procedures violated Mr. White's constitutional due process rights and therefore renders his conviction unconstitutional.

CONCLUSION

For the foregoing reasons, Mr. White respectfully requests the Court to reverse and remand with directions to the circuit court to determine whether a retrospective determination of whether the defendant was, in fact, competent during the trial and other proceedings that occurred. *State v. Smith*, 2016 WI 23, ¶ 44, 367 Wis. 2d 483, 878 N.W.2d 135. If a meaningful retrospective competency hearing can be held, the circuit court must hold the hearing. *Id.* If, at the hearing, it is determined that Mr. White was not competent when he was tried, the circuit court must vacate the judgment of conviction and order a new trial. *Id.*

Dated this 28th day of December, 2021.

Respectfully submitted,

Electronically signed by

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
583 D'Onofrio Dr., Suite 1011
Madison, WI 53719
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of the brief is 7,208 words.

CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (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 circuit 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 28th day of December, 2021.

Electronically signed by

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
583 D'Onofrio Dr., Suite 1011
Madison, WI 53705
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page