STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP275-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD L. WHITE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN GRANT COUNTY CIRCUIT COURT, THE HONORABLE CRAIG R. DAY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. A defendant forfeits most issues by failing to make a specific, contemporaneous objection at the circuit court. Defendant-Appellant Donald L. White claims that the circuit court erred in finding him competent to proceed to trial without an admissible expert opinion on the issue. But he never made a specific, contemporaneous objection at the circuit court.

Has White forfeited his claim?

This Court should answer, "yes."

2. Consistent with his historical practice, White refused to cooperate with the court-appointed competency examiner. Their discussion was "very unproductive," with White providing "outlandish" answers and behaving in a "theatrical" manner. White was told that if he changed his mind and wanted to speak with the examiner, the examiner would return. But he never exercised that option, nor did he pursue his statutory right to a competency expert of his choice.

Even if White is correct that he didn't receive an admissible expert opinion concerning his trial competency, did he forfeit his right to receive one through conduct inconsistent with the assertion of the right?

This Court should answer, "yes."

3. Wisconsin's trial competency scheme requires an examiner with "specialized knowledge" to "examine and report on the condition of the defendant." The examiner must file a report with the court that opines on the defendant's competency to proceed. The report is considered evidence for purposes of the circuit court's competency determination.

Did the circuit court fail to comply with this statutory scheme in finding White competent, and if so, was any error harmless?

This Court should hold that the circuit court did not err in finding White competent because he received what he was entitled to under the statute. Alternatively, this Court should find any error harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE

White spat on a correctional officer.

In 2017, White spat on a correctional officer who was escorting him back to his cell at the Wisconsin Secure Program Facility. (R. 1.) In early 2018, the State charged him with assault by prisoner. (R. 1.)

White obstructed the prosecution from the get-go.

White appeared pro se at the initial appearance, prompting the circuit court to ask him whether he'd contacted the State Public Defender's office. (R. 35:3.) White responded, "[T]hat's the court's job to find me counsel. That ain't my job." (R. 35:3.) The court replied, "Well, I could argue with you but . . . it won't get us anywhere. We'll have the Public Defender reach out to you given that you are incarcerated." (R. 35:3.)

Three days later, the State Public Defender's office informed the circuit court that White was "adamant that he [did] not want a public defender. He want[ed] the court to appoint an attorney or" he planned to represent himself. (R. 7.)

At a virtual hearing a couple of weeks later, White began by asking whether the judge was "the president of the United States, Abraham Lincoln?" (R. 36:2.) The circuit court identified itself and informed White that the hearing was to discuss his right to an attorney. (R. 36:2.) White said he didn't

want a State Public Defender but rather "First Lady Eleanor Roosevelt" as his attorney. (R. 36:2.)

The circuit court told White that it wouldn't appoint an attorney for him because he was eligible for a public defender. (R. 36:2.) It encouraged him to get one, noting, "If you don't get a Public Defender, then you're going to end up representing yourself and that's not a good idea." (R. 36:2.)

Again, White said that he wanted "First Lady Eleanor Roosevelt" as his lawyer, to which the circuit court responded, "She's dead; I can't help you with that." (R. 36:2–3.) White retorted, "Well, bring her back." (R. 36:3.) When the court said that it couldn't do that, White cutoff his communication device with the court. (R. 36:3.) The court then scheduled a preliminary hearing, again encouraging him to get representation. (R. 36:4.) When asked whether he had any questions, White didn't respond. (R. 36:4.) The court stated for the record, "Mr. White's body language is consistent with disengagement from conversation." (R. 36:5.)

At the preliminary hearing, the circuit court immediately talked to White about getting a lawyer. (R. 37:2.) The court asked whether he understood his right, and White didn't answer. (R. 37:2.) On further prompting, White said, "I'm not talking to you, man." (R. 37:2.)

The court explained that White could not represent himself unless he was competent to do so and attempted to ask White questions in that regard. (R. 37:2–6.) After identifying Eleanor Roosevelt as his "payee," White engaged in a campaign of silence, refusing to respond to 13 of the court's questions or comments. (R. 37:2–6.) The court referred to White's conduct as a "stubborn game[ ]." (R. 37:5.) During this time, it informed him of the advantages of having counsel and again encouraged him to get representation. (R. 37:3–5.) At the conclusion of this topic, the court said, "[W]hat I probably need to do is to have a process convened to see

whether you are competent just to be a criminal defendant." (R. 37:5.)

The court then proceeded to "the next topic," which concerned White's physical resistance to appearing for court. (R. 37:6.) It noted that officers had to "forcibly extract" White from his cell and "forcibly" place him in the transport van for the preliminary hearing. (R. 37:6.) The court told White that he had a right to be present but that he'd forfeit that right if he continued to physically resist. (R. 37:6.) When asked for his thoughts on the matter, White didn't respond. (R. 37:6.)

Pivoting back to White's trial competency, the court asked him whether he thought he was competent to proceed. (R. 37:7.) White did not answer. (R. 37:7.) Nor did he respond when the court asked him if he would talk to a competency examiner. (R. 37:7.) The court then advised White what would happen if he didn't cooperate with the examiner, explaining that the examiner would review his records and gain information by other means:

> The competency examiner will come to talk to you. I'm not going to have the competency examiner sit and talk to you for a half hour if you don't want to talk to that examiner. The examiner will attempt to communicate with you to learn about you to try to help you.
>
> If you don't respond then the competency examiner will review your records and gain information by other means. If you don't talk to the competency examiner but then change your mind and want to, you just let somebody know and I'll send that person back to talk to you. Much the same as your forfeiture of your right to be at a hearing.

(R. 37:8.)

The preliminary hearing continued with the State calling a police officer to establish probable cause. (R. 37:10–12.) White was asked whether he had questions for the officer and he didn't respond. (R. 37:12.) The court further

inquired whether White wanted to call any witnesses and White said nothing. (R. 37:12.) The court found probable cause and bound White over for trial. (R. 37:12.)

The court asked White whether he wanted to say anything on the issues of representation and personal appearances; White did not respond. (R. 37:12–13.) The court set the matter over for a competency hearing, saying that it "would be good" if White talked to the competency examiner. (R. 37:13.) If he didn't, the court reiterated that "the examiner will attempt to glean information from other sources." (R. 37:13–14.)

White refused to cooperate with the competency examiner.

The competency examiner (Christina Engen) attempted to interview White, to no avail. Her report noted that their discussion was "very unproductive." (R. 12:2.) She specified, "His responses to my questions were outlandish, and he behaved in a manner that appeared to me theatrical." (R. 12:2.) For example, he asked Engen whether she was an alien from Mars. (R. 12:3–4.) He said that he graduated from Harvard in the fourth grade, that Abraham Lincoln was his first-grade teacher, and that he attended school with the Kennedy brothers, Osama bin Laden, Saddam Hussein, and Hitler. (R. 12:4.) White also stated that the year was 1945, that they were meeting in a Neo-Nazi camp, and that Engen killed his mother. (R. 12:4.) He referenced Eleanor Roosevelt as his attorney and "payee." (R. 12:4.) But White stopped this behavior when Engen threatened to leave. (R. 12:4.)

Still, Engen deemed White "highly uncooperative" throughout the interview. (R. 12:5.) She therefore gathered information from collateral sources. (R. 12:3.) She learned that White's trial competency had been evaluated numerous times in the past, always resulting in a finding of competency. (R. 12:2–5.) One doctor determined that White wasn't

suffering from a major mental illness.[1] (R. 12:2.) Another assessment concluded that White was "malingering mental illness." (R. 12:2.) Twice, White refused to cooperate with the competency examinations, leading an examiner to decline to give an opinion to a reasonable degree of professional certainty. (R. 12:3.)

"In general," Engen's report continued, White "has been gamey." (R. 12:3.) He has faked self-harm, apparently out of "boredom." (R. 12:3.) White has either ignored psychological services staff "or shown them hostility." (R. 12:3.) Further, he made "legible and coherent" requests for information about Sand Ridge Secure Treatment Center and Winnebago Mental Health Institute during the year preceding Engen's examination. (R. 12:3.)

Engen's report concluded that White was competent. (R. 12:4.) She stressed that he'd been found competent five previous times, that he had no significant mental health diagnosis, that he was able to "self-advocate," and that he had "extensive experience functioning in the role of defendant." (R. 12:5.) She also reiterated reports of White "tending to feign mental illness." (R. 12:5.)

But because White refused to cooperate with the examination, Engen wouldn't give her opinion to a reasonable degree of professional certainty. (R. 12:4.) She concluded her report by saying, "[T]his is a situation in which it might be prudent to continue examination on an inpatient basis." (R. 12:5.)

White was encouraged to get representation for the competency hearing.

At a status hearing after Engen filed her report, White claimed that he was not competent to proceed. (R. 38:3.) The

[1] White has been diagnosed with Antisocial Personality Disorder. (R. 12:3.)

circuit court concluded that a competency hearing was necessary and asked the State how it wanted to proceed. (R. 38:3.) The prosecutor raised the issue of Engen's inability to give an opinion to a reasonable degree of professional certainty, and expressed confusion over whether the court could proceed to a hearing:

> [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.

(R. 38:4.)

The circuit court responded, "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." (R. 38:4.) But it said that it would evaluate the background information in her report and "the details of her observations and conversations" with White. (R. 38:4.) The court also stated, "[C]ompetency proceedings are not a venue for playing games with the system." (R. 38:5.)

After scheduling the evidentiary hearing, the circuit court asked whether White wanted a lawyer, noting that he was at a disadvantage without one. (R. 38:6.) White did not respond. (R. 38:7.) Reacting to White's silence, the court stated that it was "at a loss." (R. 38:7.) Twice more before

adjourning, it encouraged him to get representation for the competency hearing. (R. 38:7–8.)

The circuit court found White competent to proceed.

White appeared pro se for the competency hearing, prompting the circuit court to again ask him if he wanted a lawyer. (R. 39:2.) White did not give a verbal response. (R. 39:2.) Reminding White that he was at a disadvantage without counsel, the court expressed its frustration with his behavior:

> [The Court]: [I]f 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 [one] 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. What I can't do, Mr. White, is just sit here and do nothing. I am tempted to have a stubborn contest with you and see who could sit here and say nothing longer; see who wins. But I'm afraid you might win. And then we wouldn't get anything done.
>
> I'll say to you again, sir, if you want a lawyer, just say so and we'll see that you get one. And if you don't say you want a lawyer, you're going to go without. Any questions about that?
>
> [Mr. White]: *(No verbal response.)*

(R. 39:3.)

Engen then testified consistent with her report. (R. 39:4–12.) She reiterated her impression that White was feigning a competency issue during their meeting. (R. 39:7, 10–11.) Engen noted White's previous diagnosis of malingering mental illness. (R. 39:8.) She thought that he was trying to manipulate the situation "for some sort of fun." (R. 39:11.) There were times where White simply ignored Engen, responding to her questions with "I don't know" or "silence." (R. 39:11.)

During her testimony, Engen highlighted White's past refusal to cooperate with competency examinations. (R. 39:8.) She noted that he'd been found competent every time he'd previously been evaluated, and that he he'd never been diagnosed with a major mental illness. (R. 39:8–9, 12.) For those reasons, and because White could "self advocate" and had previous experience "functioning in the role of Defendant," Engen opined that he was competent to proceed to trial. (R. 39:12.) As she stated in her report, though, she wouldn't give her opinion to a reasonable degree of professional certainty given White's refusal to cooperate with the exam. (R. 39:12.)

When asked whether he had any question for Engen, White responded, "Why would I want to talk to that dumb bitch?" (R. 39:12.) When asked whether he wanted to present any evidence at the hearing, White asked when he was last diagnosed as competent. (R. 39:13.) The court answered ten years prior, and White brought up the fact that he was receiving "SSI." (R. 39:14.) White indicated that he didn't have records to substantiate his claim, so the court asked, "Would you like to have a lawyer to help you produce those records for me?" (R. 39:16.) White answered, "No, no." (R. 39:16.) The court told White, "the best way for you to get that information compiled and to me is by having a lawyer help you." (R. 39:17.) Changing subjects, White responded, "I don't like dealing with them people that you sent to talk to me either. . . . I refused to be interviewed because they don't know what they are talking about." (R. 39:17.)

When asked to address the notion that he was faking a competency issue, White said, "[H]ow would you look at a person that talked to dead people?" (R. 39:19.) He insisted that he talked to dead people. (R. 39:19.) White then appeared to compare himself to Charles Manson, Saddam Hussein, Hitler, and John Wayne Gacy. (R. 39:19–20.) The circuit court opined that White was "a bright man," reasoning, "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." (R. 39:21.)

Again, the court asked White whether he wanted a lawyer. (R. 39:22.) White declined. (R. 39:22.) He proceeded to call the prosecutor "[d]umber than a box of rocks." (R. 39:23.) Then, he engaged in a lengthy colloquy about his need for treatment and what might happen when he's released from prison. (R. 39:25–27.) He said might "run up in a McDonald's" with an "AK-47," or maybe he'd "run up in [a] school or church." (R. 39:26.)

The circuit court found White competent to proceed. (R. 39:28–30.) It reasoned: "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." (R. 39:28.) The court continued, "You may well have a mental illness, but it's not such as prevents you from standing trial in this case. . . . [Y]ou understand the criminal justice system and who does what and you understand, based upon your comments to me, my role to make decisions." (R. 39:28–29.)

The circuit court concluded the hearing by again asking whether White wanted a lawyer. (R. 39:29 ("I can't ask enough.").) White said no, despite being reminded that he was "at a disadvantage" without one. (R. 39:29–30.)

White was convicted and sentenced.

White appeared for trial only to read a letter into the court record. (R. 40:2.) It read, "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." (R. 40:3.) It continued, "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." (R. 40:3.)

The circuit court reminded White that it had found him competent. (R. 40:3.) White said, "You not a doctor though." (R. 40:3.) He continued, "Your opinion does not override a doctor's opinion. And you told me last week you don't accept the doctor's opinion. So you making this determination on your own and you're not a licensed doctor or whatever." (R. 40:4.) White stated, "So whatever you do . . . I'll just use it against you in the long run." (R. 40:4.)

Later, before White left his trial, he reiterated that he "would rather have a professional's opinion. . . . [Y]ou making this determination on your own free will. Just because I guess you can do that in your head. You know, it's not the way it's done though." (R. 40:6.) White noted that he'd been through competency examinations "three times" and the "Judge never made a determination. He went by the report . . . that the doctor wrote." (R. 40:6.)

A jury trial then occurred in White's absence. (R. 40:8–45.) The jury found him guilty of assault by prisoner. (R. 40:45.)

White was sentenced to one-and-one-half years' initial confinement and one year of extended supervision. (R. 41:5.)

White appeals.

STANDARDS OF REVIEW

Forfeiture. Whether forfeiture applies is a question of law that this Court decides de novo. *State v. Coffee*, 2020 WI 1, ¶ 17, 389 Wis. 2d 627, 937 N.W.2d 579.

Statutory interpretation. If this Court reaches the merits of White's argument, it involves statutory interpretation. Statutory interpretation presents a question

of law that this Court decides independently. *State v. Shoeder*, 2019 WI App 60, ¶ 6, 389 Wis. 2d 244, 936 N.W.2d 172.

Due process. White also claims a violation of his right to due process. Generally, this Court reviews constitutional issues under a "two-step" standard: it defers to the lower court's findings of historical fact, but it independently applies the law to the facts. *State v. Phillips*, 218 Wis. 2d 180, 190, 577 N.W.2d 794 (1998).

Harmless error. Whether an error is harmless presents a question of law. *Coffee*, 389 Wis. 2d 627, ¶ 17.

ARGUMENT

I. White forfeited his argument on appeal by failing to raise a specific objection at the circuit court.[2]

A. A defendant must properly preserve most issues to raise them on appeal.

"It is the often-repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal." *State v. Bodoh*, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999) (citation omitted). This includes alleged constitutional errors. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. "The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." *Id.*

"The [forfeiture] rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal." *Huebner*, 235 Wis. 2d 486, ¶ 12. "It also gives both parties and the trial judge notice

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[2] White raises three issues presented, but they all seem to pose the same question: did the circuit court err in determining his competency without an admissible expert opinion on the matter? (White's Br. 7–8.)

of the issue and a fair opportunity to address the objection." *Id.* This rule also "prevents attorneys from 'sandbagging' errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.* (citation omitted).

Relevant here, this Court has long held that "a specific, contemporaneous objection is required to preserve error." *State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490; *accord In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 26, 338 Wis. 2d 114, 808 N.W.2d 155 (stating that parties must raise "specific arguments in a timely fashion."). Regarding specificity, "the forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court." *Willa L.*, 338 Wis. 2d 114, ¶ 25.

For example, in *Willa L.*, the appellants argued that the circuit court lacked competency to proceed with a guardianship hearing because the ward was not present. *Willa L.*, 338 Wis. 2d 114, ¶ 20. They relied on two statutory provisions to support their position. *Id.* But at the circuit court, they didn't argue that the court "lacked competency to proceed based on [the two] statutory provisions." *Id.* Rather, they only "request[ed]" and "suggest[ed]" that the ward be present for the hearing. *Id.* Neither the request nor the suggestion was "accompanied by any legal argument as to why" the ward should be present. *Id.* Therefore, this Court deemed the new arguments forfeited on appeal. *Id.* ¶¶ 20–27.

B. White didn't raise a specific, contemporaneous objection to the court determining his competency without an admissible expert opinion.

By failing to make "a specific, contemporaneous objection," White forfeited his argument that the circuit court

erred in finding him competent without an admissible expert opinion on the matter. *Delgado*, 250 Wis. 2d 689, ¶ 12.

After it became clear that White might not talk to the competency examiner, the circuit court twice informed him what would happen if he didn't. It told him, "If you don't respond then the competency examiner will review your records and gain information by other means." (R. 37:8, 13–14.) The court repeated: "[T]he examiner will attempt to glean information from other sources." (R. 37:13–14.) And it said that if White didn't talk to the examiner but changed his mind, the examiner would be sent back to White. (R. 37:8.)

After Engen filed her report, the circuit court informed White that it was proceeding to a competency hearing despite not having (in its view) an admissible expert opinion on the issue. (R. 38:4.) It said that it would consider certain aspects of her report, particularly the information gleaned from collateral sources and her observations of White. (R. 38:4.) White didn't object. (R. 38:4.) Nor did he object at the competency hearing. (R. 39.) There being no "specific, contemporaneous objection," forfeiture applies. *Delgado*, 250 Wis. 2d 689, ¶ 12.

White suggests that he preserved his argument for appeal because on the morning of his *trial*, he protested that the circuit court wasn't a doctor and still found him competent. (White's Br. 23.) That's not a contemporaneous objection—the competency proceedings were over at that point. It's also noteworthy that White had notice of the court's intention to proceed without an "admissible" expert opinion roughly five weeks earlier. (R. 38:4.) Requiring a timely objection promotes judicial efficiency, *see State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612, and there's nothing efficient about objecting to the court's handling of a competency hearing *after* its completed (on the morning of trial, no less).

Further, even if White's objection was somehow contemporaneous, it wasn't specific. True, White protested the court finding him competent without a doctor's opinion on the matter. (R. 40:3–4, 6.) But as in *Willa L.*, his position was unaccompanied by any legal authority. (R. 40:3–4, 6); *see Willa L.*, 338 Wis. 2d 114, ¶ 20. He now argues that Wis. Stat. § 971.14 and due process *required* an admissible expert opinion on his trial competency. (White's Br. 28, 31.) White cannot point to any place in the record where he made those specific arguments. *Compare Willa L.*, 338 Wis. 2d 114, ¶ 20. At best, White can show that he objected because he hadn't been in the situation before. (R. 40:6 ("It's never been done like that before with me, you know.").) Raising the general issue of an expert opinion wasn't enough. *Willa L.*, 338 Wis. 2d 114, ¶ 20.

For the above reasons, this Court should hold that White forfeited his argument on appeal.

C. This Court shouldn't overlook White's forfeiture.

White appears to maintain that he properly preserved his argument for appeal, so he has not offered this Court any reasons to overlook his forfeiture. (White's Br. 23.)

Should White advance his pro se status as a reason to overlook his forfeiture, this Court should reject it. "Generally, *pro se* litigants are bound to the same procedural law as attorneys." *Willa L.*, 338 Wis. 2d 114, ¶ 27 n.5. And it shouldn't be ignored that White was given an incredible number of chances to get a lawyer to help him with his case—including his competency issue. (R. 38:6–8; 39:2–3.) From the State's count, the court asked White on *five* occasions whether he wanted a lawyer to help him with his competency issue. (R. 38:6–8; 39:2–3.) Each time, the court was met with silence. (R. 39:6–8; 39:2–3.) Understandably, the court was "at a loss" and didn't know what to do to help White. (R. 38:7; 39:3.) It

repeatedly advised him that he was at a disadvantage without counsel, but White didn't seem to care. (R. 38:6; 39:3.)

On these unique facts, where the circuit court made every attempt to get White representation and warned him of the pitfalls of not having it, White shouldn't get to fulfill his promise of using the competency ruling "against [the court] in the long run." (R. 40:4.)

II. Even if White is correct that he didn't receive an admissible expert opinion on his competency, he forfeited his right to receive one through his conduct.

A. A defendant may forfeit a right through conduct incompatible with the assertion of the right.

"[F]orfeiture by conduct is not a novel concept, even where fundamental constitutional rights are concerned." *State v. Anthony*, 2015 WI 20, ¶ 64, 361 Wis. 2d 116, 860 N.W.2d 10. Indeed, our supreme court has held that a defendant can forfeit a right as significant as the right to testify "through conduct incompatible with the assertion of the right." *Id.*

The defendant in *Anthony* "display[ed] stubborn and defiant conduct that presented a serious threat to both the fairness and reliability of the criminal trial process as well as the preservation of dignity, order, and decorum in the courtroom." *Anthony*, 361 Wis. 2d 116, ¶ 72. In deciding that forfeiture by conduct was "reasonable under the circumstances," the supreme court noted that Anthony's refusal to testify within the court's parameters interfered with the court's obligation "to control the presentation of evidence so as to ensure the fairness and reliability of the criminal trial process." *Id.* ¶¶ 75, 84–85. The supreme court stated, "[W]e cannot condone Anthony's blatant disrespect for the criminal trial process." *Id.* ¶ 85.

Similarly, this Court has held that an obstreperous defendant may forfeit his right to an on-the-record colloquy designed to ensure that he knowingly, intelligently, and voluntarily waives his right to testify. *State v. Vaughn*, 2012 WI App 129, ¶ 26, 344 Wis. 2d 764, 823 N.W.2d 543. As this Court framed it, "a defendant in a criminal case may lose fundamental rights (such as the right to appear at the trial and confront the accusers) when the defendant forfeits those rights by interfering with the ability of the trial court to protect those rights." *Id.* "By refusing to come to court" for the colloquy, this Court explained, "Vaughn made it, as a practical matter consistent with safety, impossible for the trial court to explain his right to testify." *Id.*

"[M]anipulative or disruptive" conduct also has led to forfeiture of a constitutional right. *Anthony*, 361 Wis. 2d 116, ¶ 61 (citing *State v. Cummings*, 199 Wis. 2d 721, 752–56, 546 N.W.2d 406 (1996)). "In *Cummings,* the defendant repeatedly refused to cooperate with various court-appointed attorneys, constantly complained about the attorneys' performance, and made it impossible for an attorney to effectively represent him." *Id.* (citing *Cummings*, 199 Wis. 2d at 753–54). He therefore forfeited his right to counsel. *Id.*

Anthony, *Vaughn*, and *Cummings* stand for a very common-sense proposition: a defendant cannot engage in conduct that prevents a court from protecting his rights, only to later seek reversal of a conviction for a supposed denial of those rights. "The criminal trial process deserves better." *Anthony*, 361 Wis. 2d 116, ¶ 94.

B. White forfeited any right to an admissible expert opinion on competency through conduct incompatible with the assertion of the right.

"[C]ompetency proceedings are not a venue for playing games with the system." (R. 38:5.) But that's how White has treated them.

Given White's conduct leading up to the competency examination—his "stubborn" game of stonewalling the court and his physical resistance to coming to court—the writing was on the wall: he wasn't going to cooperate with the competency examiner. (R. 36:3–4; 37:2–13.) The circuit court recognized as much and informed White what would happen if he didn't: his evaluation would be based on collateral sources of information. (R. 37:8, 13–14.) The court told White that it would be "good" if he talked to the competency examiner. (R. 37:13.) If he didn't but later changed his mind, the court assured White, "I'll send that person back to talk to you." (R. 37:8.)

As anticipated, White was "highly uncooperative" during the examination. (R. 12:5.) It was "very unproductive" for no reasons other than White's "theatrical" performance and stonewalling. (R. 12:2, 4.) And this wasn't the first time that White has refused to cooperate with a competency examination—he's done it three times before. (R. 12:2–3.) Nor was this the first instance where White appeared to be feigning mental illness for competency purposes: he's previously been diagnosed with malingering. (R. 12:2.) White has a history of being "gamey," faking self-harm on numerous occasions. (R. 12:3.) He also has a history of being uncooperative with psychiatry staff, either ignoring them or showing them hostility. (R. 12:3.)

On this record, was the circuit court really supposed to order *another* competency examination? The court took

reasonable steps to protect White's right to an admissible expert opinion on competency: it ordered the exam even though it was clear that he wouldn't cooperate, it encouraged him to participate, and it assured him that if he changed his mind and wanted to speak with the examiner, the court would have the examiner return.

Notably, the circuit court made clear that it was proceeding to a competency hearing without an "admissible" expert opinion because White was not cooperating and "playing games with the system." (R. 38:4–5.) Yet, White didn't take the court up on its previous offer to send the examiner back to speak with him. (R. 37:8; 38:4; 39:4–12.) Nor did he exercise his statutory right to an examination from an expert of his choice: "The defendant may be examined for competency purposes *at any stage of the competency proceedings* by physicians or other experts chosen by the defendant." Wis. Stat. § 971.14(2)(g). Quite the opposite, at the competency hearing, White doubled down on his defiance: "I refused to be interviewed because they don't know what they are talking about."[3] (R. 39:17.) Even on the morning of trial, when White asked for a "30 day inpatient competency evaluation," he still didn't say he'd actually cooperate with psychiatry staff.[4] (R. 40:3–7.)

Plainly, this is conduct "incompatible with the assertion of the right" to an admissible expert opinion on competency. *Anthony*, 361 Wis. 2d 116, ¶ 64. White "interfer[ed] with the ability of the trial court to protect" his right. *Vaughn*, 344 Wis. 2d 764, ¶ 26. He doesn't get to seek reversal of his

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[3] White's belief, of course, is difficult to square with his current position on the importance of expert testimony in deciding competency. (White's Br. 29.)

[4] White does not argue that this constituted a request under Wis. Stat. § 971.14(2)(g). (White's Br. 25–33.) Rightfully so because the competency proceedings were over at that point.

conviction on the basis that the court deprived him of that right. *See Anthony*, 361 Wis. 2d 116, ¶ 64; *Vaughn*, 344 Wis. 2d 764, ¶ 26; *Cummings*, 199 Wis. 2d at 752–56. This Court should not condone White's "blatant disrespect for the criminal trial process." *Anthony*, 361 Wis. 2d 116, ¶ 85.

For the above reasons, this Court should hold that White forfeited his right to an admissible expert opinion on trial competency through conduct incompatible with the assertion of the right.

III. The circuit court didn't err in finding White competent. If it did, the error was harmless.

A. Whenever there's a reason to doubt the defendant's competency, the circuit court must order a competency examination, and the examiner reports on the defendant's condition.

Section 971.14 governs competency proceedings before and at trial. Relevant here, competency proceedings proceed in three steps: (1) the court orders a competency examination, (2) following the examination, the examiner files a report with the court, and (3) unless expressly waived by the parties, the court holds a competency hearing.

Whenever there is a reason to doubt the defendant's competency, the process begins by the court appointing "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(2)(a). The statute requires the examiner to "personally observe and examine" the defendant, and the examiner gets access to the defendant's "past or present treatment records." Wis. Stat. § 971.14(2)(e). As noted, "at any stage of the competency proceedings," the defendant may be examined by another expert of his choice. Wis. Stat. § 971.14(2)(g).

Following the examination, the next step is for the examiner to file a report with the circuit court. Wis. Stat. § 971.14(3). Among other things, the report must include the examiner's "clinical findings" and "opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense." Wis. Stat. § 971.14(3)(b),(c). The report must also contain the "facts and reasoning, in reasonable detail, upon which the findings and opinions" are based. Wis. Stat. § 971.14(3)(e). The parties are entitled to a copy of the examiner's report. Wis. Stat. § 971.14(4)(a).

Once the report is filed and served on the parties, the court determines if a competency hearing is necessary. "If the district attorney, the defendant and defense counsel waive their respective opportunities to present other evidence on the issue, the court shall promptly determine the defendant's competency . . . on the basis of the" examiner's report. Wis. Stat. § 971.14(4)(b). But if the parties don't waive their respective opportunities to present other evidence, the court must hold an evidentiary hearing. *Id.* There, if the defendant claims he's incompetent, the State must prove competency "by the greater weight of the credible evidence." *Id.*

B. The ultimate finding of competency is a judicial determination, not a medical one.

Importantly, the "ultimate finding of competency is a judicial determination rather than a medical one." *State v. Smith*, 2016 WI 23, ¶ 52, 367 Wis. 2d 483, 878 N.W.2d 135. The circuit court is "not required to accept the testimony of experts." *Id.* ¶ 55.

"The aims of a competency hearing are modest, seeking to verify that the defendant can satisfy the understand-and-assist test. *State v. Byrge*, 2000 WI 101, ¶ 48, 237 Wis. 2d 197, 614 N.W.2d 477. That is, a "court must determine whether the defendant can understand the proceedings and assist

counsel 'with a reasonable degree of rational understanding.'" *Id.* ¶ 31 (citation omitted). "The hearing need not establish a psychiatric classification of the defendant's condition." *Id.* ¶ 48. "Elaborate psychiatric evaluations sometimes introduce a clinical diagnosis that may not speak to competency to proceed." *Id.* In determining whether the defendant has the "present mental capacity" to understand the proceedings and assist with his defense, the circuit court may rely on its own interactions with the defendant. *See id.* ¶ 53; *see also Smith*, 367 Wis. 2d 483, ¶¶ 52–57.

A circuit court's finding of competency is upheld unless it's clearly erroneous. *Smith*, 367 Wis. 2d 483, ¶ 56. A reviewing court searches the record for evidence that supports the lower court's finding. *Id.*

C. White received the process he was entitled to under the competency statute.

White argues that he "was entitled to a competency evaluation sufficient to produce an admissible [expert] opinion as to his competency." (White's Br. 31.) The State agrees. The parties' disagreement concerns whether he received what he was entitled to under the statute.

When the circuit court questioned White's competency to proceed, it ordered a competency examination under section 971.14(2)(a). (R. 37:5, 8, 13–14.) Engen (a licensed psychologist) then personally observed and examined White, and she also accessed his "past or present treatment records." Wis. Stat. § 971.14(2)(e); (R. 12.)

So far so good.

Next, Engen prepared a written report for the circuit court, as section 971.14(3) requires. (R. 12.) She described "the nature of the examination," identified "the person[ ] interviewed," and detailed "the specific records reviewed and any tests administered to the defendant." Wis. Stat.

§ 971.14(3)(a); (R. 12:1–2, 4.) She also stated her "clinical findings." Wis. Stat. § 971.14(3)(b); (R. 12:2–4.) And, consistent with the plain language of section 971.14(3)(c), she gave her "opinion" as to whether White was competent to proceed. (R. 12:4–5.) Her opinion was that White was competent. (R. 12:4.)

Here's the sticking point: White claims that Engen's competency opinion wasn't an "opinion" as contemplated under section 971.14(3)(c). (White's Br. 29–31.) Although he recognizes that the statute does not "explicitly require an expert opinion to a particular degree of certainty," he contends that those words should be read into the statute. (White's Br. 29.) In his view, unless an opinion is rendered to a "reasonable degree of professional certainty," it's not an admissible expert opinion. (White's Br. 29.)

This Court should reject White's argument for two reasons: (1) it offends principles of statutory construction, and (2) it's based on a flawed premise, namely that an expert opinion is inadmissible unless it's offered to a reasonable degree of professional certainty.

First, White's argument offends principles of statutory construction. The plain language of a statute controls. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Section 971.14(3)(c) requires the examiner to give an "opinion"—not an opinion to a reasonable degree of professional certainty. Therefore, this Court would need to add words to the statute to adopt White's position, which is a statutory-interpretation no-no. *In re A.P.*, 2019 WI App 18, ¶ 10, 386 Wis. 2d 557, 927 N.W.2d 560 ("We cannot, however, read language into the statute that does not exist."). Indeed, this Court recently stressed how important it is to defer to legislative language in this very context. *State v. Green*, 2021 WI App 18, ¶¶ 58–60, 396 Wis. 2d 658, 957 N.W.2d 583.

Granted, context and purpose are "perfectly relevant to a plain-meaning interpretation of an unambiguous statute," and statutory language should be interpreted "reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶¶ 46, 48. But none of these principles of statutory interpretation help White. Perhaps this is best demonstrated by addressing the second reason why this Court should reject White's argument: he's wrong that an expert opinion is inadmissible unless it's offered to a reasonable degree of professional certainty.

White cites to two cases for the proposition that experts "are required to testify to a reasonable degree of professional certainty or probability." (White's Br. 29.) It's true that an expert opinion is often "cast in terms of a 'reasonable degree of certainty' in the pertinent field or discipline." 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 702.603, at 701 (4th ed. 2017). "There are, however, no magic words or other talismans that govern admissibility. The proponent need only show that the expert testimony otherwise comports with § 907.02." *Id.* "*Short of speculation*, the expert's degree of certainty runs to the testimony's weight." *Id.* at 702 (emphasis added). "Case law sometimes distinguishes between opinions predicated upon 'probabilities' versus 'possibilities.' *Admissibility does not turn on simple word choice*." *Id.* (emphasis added). Professor Blinka continues, "[S]emantic quibbles should not cloak the real focus of the analysis: relevancy and helpfulness depends upon the reliability of the underlying theories and the techniques predicated upon those theories, especially in [the] area of scientific evidence." *Id.*

So, it's not quite right to say that experts "are required to testify to a reasonable degree of professional certainty or probability." (White's Br. 29.) Wis. Stat. § 907.02 governs the admissibility of expert opinions, and there's no requirement

there that the expert must use those magic words.[5] *See In re Commitment of Jones*, 2018 WI 44, ¶ 29, 381 Wis. 2d 284, 911 N.W.2d 97 (discussing the "five determinations" a court must make before admitting expert testimony).

Because White is wrong that experts "are required to testify to a reasonable degree of professional certainty or probability" (White's Br. 29), he's wrong that interpreting section 971.14(3)(c) to not require those magic words would lead to an absurd result (namely, a report that the circuit court can't consider in deciding competency). (White's Br. 29.) Similarly, he'd be wrong to argue that rejecting his position would be contrary to the statute's purpose (it bears repeating that a competency determination is legal, *not* medical, and that the aims of a competency hearing are "modest"). *Byrge*, 237 Wis. 2d 197, ¶ 48. Further, any context argument would fail given that section 907.02 says nothing about White's preferred magic words.

In short, this Court should decline White's invitation to read language into section 971.14(3)(c). White received what he was entitled to under the competency statute: the examiner's opinion on his trial competency. (R. 12:4.)

That said, the State acknowledges that before the competency hearing, the circuit court said that Engen's opinion wasn't "admissible" because of the lack of the magic words. (R. 38:4.) But at the competency hearing, Engen gave her opinion on White's competency: she said that he was

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[5] Query whether the examiner's opinion even needs to satisfy the requirements of Wis. Stat. § 907.02. The competency statute says nothing about that, and it certainly could have. Moreover, as noted, where the parties waive their right to a hearing, the court "shall" determine competency of the basis of the examiner's report. Wis. Stat. § 971.14(4)(b). There's no requirement that the report be ruled admissible—indeed, hearing or not, the statute seems to treat the report as evidence once its filed.

competent. (R. 39:12.) The court didn't exclude that evidence. (R. 39:11–12.) Rather, it did what it was fully entitled to do: it refused to accept Engen's opinion and based its competency determination on its own interactions with White. (R. 39:18–29); *Smith*, 367 Wis. 2d 483, ¶¶ 52–57; *Byrge*, 237 Wis. 2d 197, ¶ 53.

Thus, White received the process that he was entitled to under the statute. The circuit court did not err in finding him competent.[6]

D. If the circuit court erred, the error was harmless.

It's the State's burden to show that any error was harmless. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The test is whether there's a "reasonable possibility that the error contributed to the conviction." *Id.* Stated otherwise, this Court asks whether there's "[a] reasonable possibility of a different outcome." *State v. Smith*, 2002 WI App 118, ¶ 18, 254 Wis. 2d 654, 648 N.W.2d 15.

If this Court determines that the circuit court erred in not considering Engen's opinion at the competency hearing, the analysis is very easy. She opined that White was competent, so there's not a reasonable possibility of a different outcome.

If this Court decides that the circuit court should have ordered *another* competency examination, there's still no reasonable possibility of a different outcome. Both the competency examiner and the circuit court believed that White was playing games with the system. (R. 38:4–5; 39:7, 10–11.) That's just what White does "for some sort of fun." (R.

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[6] White's due process argument depends on his position that the circuit court "failed to follow statutorily mandated competency procedures." (White's Br. 31.) As shown above, the court did not err in this regard.

39:11.) He's been diagnosed with malingering, and he's faked self-harm. (R. 12:2–3; 39:8.) He's never been diagnosed with a serious mental illness, he's able to "self-advocate," and he's had "extensive experience functioning in the role of defendant." (R. 12:2, 4–5; 39:12.) Every time he's been evaluated for trial competency (apparently five times), he's been found competent. (R. 12:5; 39:8–9.) That includes the three times he initially refused to cooperate with the competency examiner. (R. 12:2–3.) Further, the record from White's proceedings (much of which is detailed in the Statement of the Case) reveals that the court was spot-on in its assessment that White had no trouble understanding the proceedings and could assist with his defense.

All this evidence shows that there's no reasonable possibility of a different outcome had the circuit court gone through the motions of ordering another competency examination. In the face of this record, it's pure speculation to say that a competency examiner suddenly would have deemed White incompetent. Courts consistently find harmless error where "the possibility of prejudice is found beyond a reasonable doubt to be merely speculative or hypothetical." *State v. Mills*, 107 Wis. 2d 368, 372, 320 N.W.2d 38 (Ct. App. 1982).

For the above reasons, if there was error, it was harmless.

CONCLUSION

This Court should affirm White's conviction.

Dated this 31st day of March 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,616 words.

Dated this 31st day of March 2022.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 31st day of March 2022.

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