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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

COUNTY OF GREEN LAKE,

Plaintiff-Respondent,

v.

LORI A. MELCHERT f/k/a LORI A. ZUPKE,

Defendant-Appellant.

On Notice of Appeal to Review the Denial of a Motion Contesting
Circuit Court Competency Entered in the Circuit Court for Green
Lake County, the Honorable Mark T. Slate Presiding

DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE COUNTY HAS FAILED TO ADDRESS MS. MELCHERT'S ARGUMENT THAT HER INVOCATION OF THE 5TH AMENDMENT RIGHT TO REMAIN SILENT CANNOT BE USED TO SUPPORT FORFEITURE OF HER RIGHT TO CONTEST THE CIRCUIT COURT'S COMPETENCY.

The County cites to *City of Eau Claire v. Booth*, 370 Wis.2d 595 (2016), and *City of Cedarburg v. Hansen*, 390 Wis.2d 109 (2020) to support the Circuit Court's decision to deny Ms. Melchert's motion. The County's reliance on those cases is misplaced, however, as neither of these cases address how a defendant's 5th Amendment right to remain silent affects the forfeiture of the right to contest a court's competency.

Neither *Booth*, nor *Hansen* addressed the defendant's

right not to inform the court of a prior countable offense pursuant to the 5th Amendment. Those cases addressed whether a court's competency could be forfeited. Nowhere, in either of those decisions, was there a discussion of a defendant's 5th Amendment right not to provide the court with information that may subject them to criminal penalties.

In fact, the County fails to address Ms. Melchert's 5th Amendment argument at all, devoting merely one paragraph of its brief (Brief of Appellee, p. 5) to the issue. In that paragraph, the County cites no legal authority to rebut Ms. Melchert's argument that an exercise of her 5th Amendment right to remain silent cannot be used to support a forfeiture argument.

The County makes no attempt to argue that Ms. Melchert did not have the right to remain silent during the plea hearing in question, perhaps because she clearly had such a right. "The Fifth Amendment protects a person from compelled self-incrimination *at all times*, not just upon arrest or during a custodial interrogation." *State v. Fencel*, 109 Wis.2d 224, 237 (Wis. 1982)(emphasis added).

In addition, it is undisputed that "Defendants have no obligation to disclose prior offenses, and the establishment of prior offenses is unquestionably a duty belonging to the State." *State v. Strohman*, No. 2014AP1265-CR, unpublished slip op., ¶14 (Wis. App. Feb. 3, 2015), citing *State v. Wideman*, 206 Wis. 2d 91, 94-95 (1996), and *State v. Spaeth*, 206 Wis. 2d 135, 148 (1996).

Based on the County's failure to refute Ms. Melchert's 5th Amendment argument, it should be deemed conceded. *See, Estate of Miller v. Storey*, 371 Wis.2d 669, 685 (Wis. App. 2016) ("We therefore need not resolve the issue, because we deem it conceded for purposes of this case." *Citing, Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109 (Wis. App. 1979) (unrefuted arguments are deemed conceded).").

CONCLUSION

For the reasons discussed above, Ms. Melchert respectfully requests that this court reverse the decision of the trial court, that Ms. Melchert has forfeited her right to contest the court's competency, and remand the case for further proceedings.

Respectfully submitted 11/11/2020.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 462 words.

Dated 11/11/2020:

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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated 11/11/2020:

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