STATE OF WISCONSIN

COURT OF APPEALS—DISTRICT III

Case No. 2021AP000943-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HAJJI Y. MCREYNOLDS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Eau Claire County Circuit Court, the Honorable William M. Gabler Presiding and Order Denying Postconviction Relief, the Honorable Emily M. Long Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. McReynolds' Claims are Not Procedurally Barred.

A. The State waived its argument that Mr. McReynolds' claims should be denied under the successive motion bar.

The State argues that this Court should dismiss the appeal based on the successive motion bar. *See* Response Brief at 15-20. In the circuit court the State initially argued this, in reliance on *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) (interpreting Wis. Stat. § 974.06(4). However, the State then retreated from requesting a ruling in its favor on this argument, instead "highlight[ing]" the downside to the court ruling in its favor, and deferring to the court. At the postconviction hearing the court gave the State a chance to respond to Mr. McReynolds' reply brief and the State responded,

> Judge, no, I would just rely on the arguments advanced in the written submissions. I would highlight, however, that I recognize that even if you were to agree and deny this motion as procedurally barred, it would then pave the way for a subsequent post-conviction motion alleging ineffective assistance of post-conviction counsel. So I recognize that we're in sort of a cyclical pattern here. That said, I would defer to however you want to proceed.

R.305:3; App.6.[1] The circuit court agreed that "that's kind of where I come down on the issue" and determined that "it's reasonable to hear the motions today rather than get stuck on whether there's a procedural bar. There's a fairness argument. . . ." R.305:3-4; App.6-7.

By failing to ask for a ruling in its favor, and in fact actually highlighting a reason for the court not to rule in its favor, the State waived the argument. *State v. Miller*, 2009 WI App 111, ¶24, 320 Wis. 2d 724, 772 N.W.2d 188 (failure to argue an *Escalona-Naranjo* bar in the circuit court waives it on appeal).

B. Mr. McReynolds' claims are not barred.

Escalona-Naranjo involved an appeal from a collateral postconviction motion under Wis. Stat. § 974.06, and the case interpreted sub.(4) of that statute. *State v. Escalona-Naranjo*, 185 Wis. 2d at 185. Mr. McReynolds' motion is a Wis. Stat. § 974.02 postconviction motion *i.e.* part of his direct appeal. When Mr. McReynolds' first postconviction attorney asked to withdraw, a notice of appeal had been filed. Then, this Court granted the State Public Defender's request to dismiss the appeal and to extend the Rule 809.30(2)(h) deadline to file a notice of appeal or postconviction motion. R.217; R.221. Mr. McReynolds was appointed successor counsel and filed the

[1] Appendix cites are to the appendix to Mr. McReynolds' brief-in-chief.

postconviction motion that is the basis for this appeal.[2] Mr. McReynolds is entitled to a (single) direct appeal from his judgment of conviction[3]—and this is it.

II. Mr. McReynolds was Denied his Sixth Amendment Right to Effective Assistance of Counsel when Counsel Failed to Object to Inadmissible Vouching and Character Evidence.

A. Failure to object to the State's repeated elicitation of improper testimony from the investigating officer that he believed the informant was telling the truth.

The State repeatedly elicited improper, prejudicial testimony from Investigator Ranallo that vouched for the informant's credibility. *See State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). The State mistakenly suggests that a vouching violation only occurs where a witness testifies that another witness "is telling the truth *at trial*." Response

[2] In the extension motion, SPD manager Joseph Ehmann explained in detail the procedural history of the case. R.217. Despite being served with the motion, the State did not object or move for reconsideration under Rule 809.14(2). If the State believed the only appropriate relief was an extension of time to file a Rule 809.30(2)(j) notice of appeal after denial of postconviction motion (which would not have allowed for filing of a postconviction motion), it could have argued that.

[3] In *Evans*, the defendant waived his direct appeal after asking his appellate counsel to withdraw, and then attempted to reinstate the direct appeal many years later. *State v. Evans*, 2004 WI 84, 29, 273 Wis. 2d 192, 682 N.W.2d 784.

Brief at 22 (emphasis added by the State) (quoting *State v. Snider*, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784; *see also*, Response Brief at 23, 24. In *State v. Kleser*, the Wisconsin Supreme Court established that the *Haseltine* rule also prohibits vouching for out-of-court statements—*i.e.* statements other than those made during trial. *State v. Kleser*, 2010 WI 88, ¶104, 328 Wis. 2d 42, 786 N.W.2d 144.

There are a number of cases that address the issue of vouching in the specific context of police testimony. Mr. McReynolds' case is most similar to *State v. Patterson*, 2009 WI App 161, 321 Wis. 2d 752, 776 N.W.2d 602. In that case, this Court found a vouching violation where the prosecutor asked a police investigator whether they believed that a witness "was being truthful" when she gave information to him. The investigator answered, "I believe she was being truthful." The State fails to engage with *Patterson*, only mentioning it in passing for its conclusion that the violation was not prejudicial. Response Brief at 25. The State does not explain how Mr. McReynolds' case is different than *Patterson* as far as the actual error. Notably, the error was not prejudicial in *Patterson* because it was a single instance in a seven-day trial. Here, it was a repeated violation in a two-day trial (and half of the first day was voir dire and opening statements).

The State primarily relies on *State v. Snider*, 2003 WI App 172, but does not address the basis on which the *Patterson* court distinguished *Snider*. In *Patterson*, this Court found *Snider* was different

because there, the "detective's testimony [was] offered to show the detective's thought process during his investigation." 321 Wis. 2d 752, ¶36. By contrast, in *Patterson* the investigator testified about his belief at the time of trial. *See id*. The State dismisses this distinction in a footnote as "semantic." Response Brief at 23, n.7.

Finally, contrary to the State's assertion, the third instance of vouching is not "unlike the others." Response Brief at 22-23. The State asserts that the exchange "was regarding whether the confidential informant was being truthful about the altercation," not about his truthfulness about the controlled buys. Response Brief at 23. The prosecutor asked the informant about the fight he was in with Mr. McReynolds shortly before the second alleged buy. Then, the State asked when the informant next contacted police, and the informant answered it was the day of the second controlled buy. The questioning then elicited two instances of vouching. R.296:45. Regardless, vouching for the informant's truthfulness in his allegations against Mr. McReynolds was the error. It does not really matter which allegation he was vouching for.

B. Failure to object to the State's repeated elicitation of improper character evidence about Mr. McReynolds allegedly being affiliated with the Vice Lord gang.

On appeal, the State's primary argument is that the gang evidence was not character evidence because

the prosecutor "was not attempting to prove conduct in conformity" when it elicited the evidence. Response Brief at 26. The circuit court determined that this was character evidence, that it was improper, and (implicitly) that it would have excluded the evidence. The circuit court ruled that, "it's an absolutely not proper reference" and admonished the State for not preparing its witness or taking corrective action once the first Vice Lord reference had been made. R.305:19-20; App.22-23. The State appears to suggest that Mr. McReynolds has the burden to prove that the State intended to use the evidence improperly. Not so. The State has the burden to prove an exception to the rule against bad acts evidence. *State v. Marinez*, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399.

Finally, the State argues in the absence of evidence that trial counsel made a strategic decision not to object. Response Brief at 27-28. Mr. McReynolds was denied his request to call counsel as a witness. Counsel did not testify at all, let alone testify to a strategy for not objecting.

C. Mr. McReynolds was prejudiced.

The State had no real case if the jury did not believe the informant. Eliciting testimony vouching for the informant's credibility and evidence that Mr. McReynolds was supposedly in a gang, significantly and unfairly bolstered the State's case. A new trial is required.

III. Mr. McReynolds was Denied his Constitutional Rights to be Present at Sentencing and to a Public Trial when the Court Failed to State the Reasons for His Sentence in Open Court, Instead Filing a Written Statement after the Judgment of Conviction was Entered.

Section 973.017(10m)b., as applied to Mr. McReynolds, violated his right to be present at sentencing and right to a public trial. The State's brief focuses primarily on an argument that the circuit court complied with the terms of the statute and properly exercised its discretion in utilizing it. Response Brief at 38-40. This misses the point. Mr. McReynolds does not argue an erroneous exercise of discretion. He argues that the statute is unconstitutional as applied to him.

A. Right to be present.

Although the State concedes that the right to be present cannot be forfeited by inaction, it proceeds to argue that Mr. McReynolds forfeited the claim because the claim is wrong on the merits. Response Brief at 33. This is not actually a forfeiture argument. The State concedes that Mr. McReynolds had a right to be present at sentencing. Response Brief at 33, 38.[4] Its

[4] The State "assume[s]" that the statutory and constitutional rights to be present are treated the same. Response Brief at 38. *See Bruneau v. State*, 77 Wis. 2d 166, 174-75, 252 N.W.2d 347 (1977) (recognizing the federal right to be present at sentencing).

argument thus hinges on its proposition that "actual imposition of the sentence and the explanation for the sentence" are "two distinct events." Response Brief at 31. Confusingly, the State later agrees with Mr. McReynolds that "True, '[t]he sentencing rationale is intrinsic to the pronouncement of a sentence.'" Response Brief at 40 (quoting Appellant's Brief at 31-32). Nonetheless, Mr. McReynolds will address the first argument.

According to the State, Mr. McReynolds' sentencing only encompassed the utterance of the words, "five years imprisonment." For this argument, the State surveys some statues and a dictionary. Response Brief at 35-37. None of these definitions leads to a conclusion that the reasoning for a sentence is not part of the sentencing.[5] Instead, is well-established that "sentencing is a discretionary judicial act." *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). In turn, "the term [discretion] contemplates a process of reasoning." *Id.* The State emphasizes that Mr. McReynolds had the ability to make sentencing arguments and allocution, and has not alleged reliance on inaccurate information. Response Brief at 41. However, the right to be present is its own right, which the State acknowledges earlier in its brief. *Id.* at 35.[6]

[5] For example, Rule 809.30(1)(f) talks about the "imposition of a sentence." But, what constitutes the imposition of a sentence?

[6] Citing *Bruneau v. State*, 77 Wis. 2d at 174-75.

To deem the utterance of a numeral sentence a full sentencing and to restrict the right to be present to that event would undermine the purpose of the right to be present. As the Wisconsin Supreme Court explained in *Soto*:

> Requiring that the defendant be present in the courtroom is guided also by the belief that a courtroom is a setting epitomizing and guaranteeing "calmness and solemnity," . . . so that a defendant may recognize that he has had access to the judicial process in a criminal proceeding.

State v. Soto, 2012 WI 93, ¶23, 343 Wis. 2d 43, 817 N.W.2d 848 (citation omitted). A defendant's right to be present during sentencing is "particularly important to the actual or perceived fairness of the criminal proceedings." *Id.*, ¶40. To ensure that sentencing is fair and receives the solemnity it deserves, the defendant has a right to be in the presence of the judge when the basis for the sentence is given—unless of course the defendant waives or forfeits that right.[7]

B. Right to a public trial.

Again, the State begins with a forfeiture argument. The State argues that "such an argument can be forfeited for failing to raise it in the circuit

[7] The right to be present cannot be lost by inaction; however, under certain circumstances not present here, it can be forfeited by wrongdoing. *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

court." Response Brief at 32. Yet, Mr. McReynolds did raise the claim in the circuit court, in his postconviction motion. The State also argues that Mr. McReynolds had a duty to contemporaneously object. Response Brief at 32. Defendants do not forfeit the right to challenge a sentence based on an erroneous use of discretion by not objecting. In *State v. Grady*, the sentencing court failed to consider an applicable sentencing guideline. *State v. Grady*, 2007 WI 81, 302 Wis. 2d 80, 734 N.W.2d 364. The defendant filed a postconviction motion challenging the error. The State argued forfeiture. *Id* ¶14 n4. The court held that "[f]iling a postconviction motion is a timely means of raising an alleged error by the circuit court during sentencing." *Id.* (citing *State v. Gallion*, 2004 WI 42, ¶14, 270 Wis. 2d 535, 678 N.W.2d 197. *See also, State v. Counihan*, 2020 WI 12, ¶31, 390 Wis. 2d 172, 938 N.W.2d 530 (postconviction motion is sufficient means of challenging the court's reliance on inaccurate information at sentencing).

The State is also wrong on the merits. As a threshold matter, the State argues that, while "some jurisdictions have extended the right [to a public trial] to sentencing . . . Wisconsin does not appear to have extended the Sixth Amendment right to a public trial to sentencing." Response Brief at 42. The Sixth Amendment right to a public trial is applicable to all of the States through the Due Process Clause of the Fourteenth Amendment. *See State v. Ndina*, 2009 WI 21, ¶41, 315 Wis. 2d 653, 761 N.W.2d 612.

The State then assumes for the sake of argument that a person has a right to a public trial at sentencing, and returns to its argument that the only part of Mr. McReynolds' sentencing that qualified as a sentencing was the utterance of the numerical sentence. Response Brief at 44. Mr. McReynolds addresses this argument *supra* p. 14.

The State proceeds to argue that the closure was "trivial" given that it was "brief" and at "the very end of the sentencing hearing while the court wrote the reasons for its sentencing decision." Response Brief at 45. It is unknown and unknowable how long it took the judge to write the memorandum, nor how long it would have taken for the judge to render the decision orally. More importantly, the State cites no authority for the proposition that the length of time the public is excluded from a proceeding is dispositive.

Excluding all members of the public including Mr. McReynolds from sentencing was not a trivial closure. The purpose of the public trial right is to provide transparency. It is premised on "[t]he principle that justice cannot survive behind walls of silence . . .". *State v. Ndina*, 2009 WI 21, ¶¶42, 315 Wis. 2d 653, 761 N.W.2d 612 (internal citations omitted). Here, if the public wished to know why a member of their community received a ten-year prison sentence, they would have to surmount several logistical obstacles: they would need to know that they had a right to access the court file; they would need to know when

the court filed its written memorandum;[8] and they would need to travel to the courthouse, locate the clerk's office, and request the court file. These obstacles violate Mr. McReynolds' public trial right.

Section 973.017(10m)b. is only constitutional where a defendant relinquishes their right to be present at sentencing and right to a public trial. Mr. McReynolds did not relinquish those rights. Therefore, a new sentencing hearing is required.

[8] Here, the court did not indicate when it would file its memorandum and in fact did not file it until three days after the judgment of conviction was entered.

CONCLUSION

For the reasons stated above and in Mr. McReynolds' opening brief, Mr. McReynolds asks this Court to reverse the circuit court's order denying his postconviction motion and to remand to the circuit court with directions to grant a *Machner* hearing and a new sentencing hearing.

Dated this 22nd day of October, 2021.

Respectfully submitted,

Electronically signed by Colleen Marion

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,751 words.

Dated this 22nd day of October, 2021.

Signed:
Electronically signed by Colleen Marion
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