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The Wisconsin Court of Appeals
District III

21-AP-1062-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Ryan L. Bessert
Defendant-Appellant

Appeal from The Circuit Court of Langlade County
The Honorable John B. Rhode, presiding

Reply Brief of Appellant Ryan L. Bessert

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Argument

I. Wisconsin Statute §972.11(2m)(a) Violates Mr. Bessert's Right To Confront Witnesses Against Him

The State seeks to avoid a substantive discussion of whether Mr. Bessert's constitutional right confront witnesses against him was violated. It hides behind inapplicable procedural rules and a sympathetic victim. This Court should not fall for these tactics.

The question presented on appeal is whether Mr. Bessert's constitutional right was violated. This Court can and should conclude Mr. Bessert's rights were violated and remand for a new trial which comports with the United State's Constitution.

A. Mr. Bessert's Constitutional Challenge Was Not Forfeited.

The State claims Mr. Bessert's as-applied constitutional challenge was forfeited as it was not raised at the circuit court. (State's Br. 16). The State seeks to prove this point by raising an out of context, off the cuff remark made by Mr. Bessert's trial counsel during the course of debating whether G.B. would be allowed to testify via CCTV. This argument must fail.

Trial counsel began his argument stating: "we have to deal with the first principle that my client has a constitutional right to *confront in court* the witnesses who testify against him. That's an essential and fundamental constitutional right". (R124:46-47) (Emphasis added). After an interruption, counsel again stated "my client has a constitutional right to confront the witnesses and be confronted by them". (R.124:52).

The court later acknowledged this argument, saying, if "the defendant appeals…that's one more ground that they are going to have to say he's unreasonably or inappropriately denied a proper format of confrontation." (R.124:56). Before posing a

hypothetical question to trial counsel, the circuit court noted "the right to confrontation is basic to our system and [trial counsel has] made out arguments about that. This would be a denial of the traditional confrontation." (R.124:58-59).

Within the frame work of the court's hypothetical question, trial counsel did state "everyone says and everyone agrees it has survived constitutional muster." (R.124:60). This is not a repudiation of trial counsel's earlier argument, which had been acknowledged by the court, but rather a pivot, shifting from an argument which had been lost, to an argument which could still be won.

The primary purpose of the forfeiture rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. It also serves to give both parties and the court notice of the issue and fair opportunity to address the issue. *State v. Ndina*, 2009 WI 21 ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (WI 2009). These requirements are undoubtably met, and acknowledged by the circuit court.

The State's citation to *In re Guardianship of Willa L.,* illustrates how Mr. Bessert's challenge is preserved. The court. gave an example of the appellant's failure to raise preserved issues. The appellants claimed the circuit court lacked competency to proceed at a hearing. They claimed the issue was preserved, citing the record where they requested the circuit court to communicate with Willa directly, but failed to provide any legal argument as to why Willa needed to be present at the hearing. *In re Guardianship of Willa L.*, 2011 WI App 160 ¶20, 338 Wis. 2d 114, 808 N.W.2d 155 (Wis Ct. App 2011). The court correctly held this was not preserved.

In this case, counsel for Mr. Bessert began with the fundamental legal principles for his argument, citing the Constitution, and The Bill of Rights, which protect Mr. Bessert's right to confront the witnesses against him. Citation to additional authority and legal analysis on appeal does not constitute 'new argument' or advancement of a new theory on appeal. If the court had not been comfortable making a ruling because of the limited depth of the analysis, it could have simply requested further briefing." *State v. Markwardt*, 2007 WI App 242 ¶33, 306 Wis. 2d 420, 742 N.W.2d 546 (Wis. Ct. App. 2007) (Internal citations omitted).

Even if this court were to indulge the State's argument Mr. Bessert has forfeited this argument, the right to confront witnesses belongs to the category of rights which must be waived and cannot be forfeited. The Constitution requires every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections the Framers thought indispensable to a fair trial. *Schneckloth v. Bustamonte*, 412 U.S. 218, 242, 93 S. Ct. 2041, 36 L.Ed 2d 854 (1973). Constitutional rights affecting the fairness and accuracy of the fact-finding process are not lost unless the State demonstrates an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019 (1938); *Barker v. Wingo*, 407 U.S. 514, 525-529, 92 S.Ct. 2182 (1972). The right to confront witnesses in-person is one of the most fundamental and longstanding rights of western jurisprudence. Mr. Bessert's initial brief outlined this ancient history. Waiver should not be presumed; an off the cuff remark by counsel in response to a hypothetical question simply cannot suffice to show this right was knowingly, willingly, and intentionally relinquished by Mr. Bessert.

B. The State's Claims Mr. Bessert's Argument is Underdeveloped; this Claim is Unsupported by Legal Authority.

Next, the State claims Mr. Bessert's argument is underdeveloped as it does not address what level of scrutiny applies. The State cites to *State v. Roundtree f*or the principle a constitutional must be accompanied by a level of scrutiny.[1] This is a vast oversimplification of constitutional law. While some constitutional rights have been subjected to means-end scrutiny, other have not.[2] The State has failed to present a single Sixth Amendment case where a court has used means-end scrutiny to determine whether a defendant's constitutional rights have been violated. As this argument is not supported by any pertinent legal authority, this court should reject it. *See State v. Petit*, 171 Wis.2d 627, 492 N.W.2d 633 (Wis. Ct. App. 1992)

C. The Historical Exceptions to in Court Confrontation Are Not Applicable in This Case

1. Dying Declaration and Forfeiture by Wrongdoing

As explained in Mr. Bessert's brief, the exemptions of a dying declaration and forfeiture by wrongdoing are inapplicable. The State does not contest this.

2. The State Has Failed To Prove G.B.s Testimony Could Be Admitted as an Unavailable Witness

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[1] In *Roundtree*, our Supreme Court was asked to assess the constitutional validity of restricting a non-violent felon's right to possess a firearm. The court adopted a means-end scrutiny test which has been used by the majority of the federal circuit courts. This approach is currently facing heavy criticism. *See*, *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from denial of certiorari); *Heller v. District of Columbia*, 670 F. 3d 1244, 1285, 399 U.S. App. D.C. 314 (D.C. Cir. 2011) (*Heller II*) (Kavanaugh, J., dissenting).

[2] For further discussion on means-end scrutiny and categoricalism, *see* Joseph Blocher, Categoricalism and Balancing in First and Second Amendment Analysis, 84 *New York University Law Review* 375-434 (2009).

At the time the Confrontation Clause was ratified, a witness who was unavailable to testify could have their prior testimony admitted only if there was a prior opportunity to cross-examine this testimony. *Crawford v.* Washington, 541 U.S. 36 49-50, 53-54, 124 S.Ct. 1354 (2004). The State has failed to demonstrate G.B. would actually be unavailable, and her testimony was admitted without prior in-person cross examination.

a) The State Has Not Demonstrated G.B. Would Be Unavailable To Testify

To be unavailable, the State must demonstrate the child will suffer such serious emotional distress that the child cannot reasonably communicate. The State failed to meet this burden prior to trial and fails to meet this burden on appeal.

The evidence in the record clearly demonstrates trial would most likely be stressful for G.B.. Trial preparation had proven stressful for G.B.. No party denies G.B. experienced stress. Stress by itself is insufficient to demonstrate the child would suffer "sever emotional distress" and "not be able to communicate".

The circuit court's hypothetical questions demonstrate how the state failed to meet its burden. The very first question the court posed to the State asked why the court should not try to start in the court room, and if G.B. begins to have trouble communicating, switch to the CCTV method. (R.124:5556). If the court were convinced by the evidence presented by the State, there would be no need to ask this question; it would have already been clear G.B. would suffer the severe emotional distress and not be able to communicate.

As a father, Mr. Bessert applauds the trial court for its concern for G.B.'s emotional wellbeing. As defendant, Mr.

Bessert respectfully submits this concern over potential harm and the potential disruption to a trial must be subordinated to the actual deprivation of his constitutional rights. Without any expert testimony, or testimony from G.B. there is simply insufficient evidenced in the re old to demonstrate both that G.B. would suffer severe emotional distress and lose the ability to communicate as a result.

b) G.B.'S Testimony Was Not Subject to Prior in-Person Cross Examination

When introducing testimony of an unavailable witness the dispositive requirement is whether the testimony was subject to in-person confrontation. *Crawford* at 55-56. There can be no dispute; not only was G.B. not subject to prior in-person confrontation, she was *never* subjected to in-person confrontation. This failure is dispositive; the State cannot meet its burden to permit this out of court testimony.

c) *Maryland v. Craig* has been overturned, the *Vogelsberg* Court Erred When it Failed to recognize this.

The State makes no substantive argument addressing Mr. Bessert's claim *Maryland v. Craig* was overturned by *Crawford v. Washington.* The State's argument rests on the "limited" powers of this court. In 1997, our State Supreme Court concluded "the constitution and statutes must be ready to provide that only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals". *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (WI 1997). Curiously, the Court did not chose to quote any of the provisions of the statutes or constitutional provisions it was interpreting, and the provisions cited seem

devoid of guidance as to this issue, which explains why judges on the Court of Appeals had split opinions.

The *Cook* Court also wrote the Court of Appeals is primarily an error correcting court. When this court errs, it should certainly exercise its authority as an error correcting court and correct its error. This is not an abandonment of s*tare decisis*, or an effort to supplant the supremacy of the Supreme Court of Wisconsin's in the development of the law. This is the critical duty of the courts, a common sense exercise of judicial review which is cautiously undertaken by intermediate appellate courts across the country.

The question of the power of judicial review was first raised in 1803. Writing for an unanimous court, the great John Marshall reasoned:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict…the courts must decide on the operation of each.
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
> *Marbury v. Madison*, 5 U.S. 137, 177-78, 2 L.Ed.60 (1803).

The State would have this court abandon its duty to the constitution. Doing so risks violating Mr. Bessert's right to meaningful appellate review. If this court is inclined to follow the limiting rule of *Cook*, it must certify this case to the Supreme Court. Any other option threatens to deprive Mr. Bessert of meaningful judicial review.

D. The Error in Depriving Mr. Bessert of His Constitutional Right to Confrontation is not harmless beyond a reasonable doubt.

The State claims the error in allowing G.B. to testify via CCTV was harmless as "[e]veryone agrees that [G.B.] didn't testify about the assaults that occurred when she was an infant." (State's Br. 20). The State provides a record citation for this bold claim. This citation precludes this argument.

The record citation includes the end of the State's closing argument, and the beginning of Mr. Bessert's summation. On page 184, the State argues "what [A.H.] describes is very consistent with the information that [G.B] describes but its not the same". (R.128:184). This continuity is again highlighted at the end the State's remark: "the evidence is clear with this corroboration that you can [find Mr. Bessert guilty]". (R.128:188).

When the circuit court stated its verdict, it did not outline its factual findings, credibility determinations, or what evidence it had used to establish the facts necessary for a conviction. Without this information, and given the State's argument that G.B. and [A.H.] substantiated each others accounts, it is impossible to state this constitutional deprivation was harmless.

II. When the Courthouse Locked its Doors Prior to the Reading of the Verdict, Mr. Bessert's Right to a Public Trial Was Violated. The Only Effective Remedy Is To Grant Mr. Bessert a New Trial.

While the State questions whether a locked courthouse where people inside could hear the verdict constitutes a constitutional violation, the State does not develop an argument to this point. Mr. Bessert and the State seem to disagree only as to the appropriate remedy for the closure of his trial. The State again disparages Mr. Bessert, characterizing him as an "opportunistic defendant". Mr. Bessert simply insists his trial comport with the Constitution. He wants nothing more than the fair trial guaranteed to him by the Constitution.

The American distrust of closed court proceedings stems from very real and egregious abuses of power. Secret trials were held by the Spanish Inquisition, the Court of Star Chamber, and the French monarchy's abuse of the *letter de cachet*. *In re Oliver*, 333 U.S. 257, 268-69, 68 S. Ct. 499, 92 L.Ed. 682 (1948). Scholar Jeremy Bentham is far from the only person to worry secret proceedings will lead to a corrupt, indolent and arbitrary judicial system. *Id.* at 271. Without publicity, all other checks are insufficient, closed proceedings chip away at the integrity of the American system of criminal justice. *Id.*

Sustaining confidence in our justice system and preventing the abuses of State power were why the right to a public trial was codified in the Sixth Amendment. Conducting a new trial is not a windfall for Mr. Bessert. It is a vindication of all of our rights. It is a promise that our court system will never become the menace to liberty which courts in a despotic regime can be. This is not a windfall — it is the bare minimum our constitution mandates.

Conclusion

The trial Mr. Bessert received too closely resembles the abuses of the notorious Court of the Star Chamber. He was denied the right to confront the witnesses against him, and the verdict was read behind locked doors. These abuses are exactly what the Framers sought to protect against when they ratified the Sixth Amendment. It is necessary to grant Mr. Bessert a new trial. Anything less would strike at the heart of our republic and threaten to usher in an era of Star Chamber abuses.

Dated: Wednesday, December 8, 2021
Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)
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 2,667 words.
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