STATE OF WISCONSIN

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

DISTRICT III

Case No. 2021AP001636-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD A. HOEFT,

Defendant-Appellant.

ON APPEAL FROM A DENIAL OF A POST-CONVICTION MOTION ENTERED IN PRICE COUNTY CIRCUIT COURT, ON AUGUST 24, 2021, HONORABLE KEVIN G. KLEIN, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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2. The Trial Court correctly found that the State's request that Hoeft be found in contempt did not violate Hoeft's due process rights.
3. The Trial Court correctly found that the State did not violate sec. 971.23 Wis. Stat.
4. The Trial Court correctly found that Hoeft's right to a fair trial was not violated when in its opening the State mentioned that Hoeft had been arrested on the charge he stood trial for.
5. The Trial Court correctly found the State did not improperly comment on Hoeft's decision not to testify during closing argument.
6. The Trial Court correctly denied the defendant's motion to dismiss at the close of the State's case.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The issues are fully briefed and can be resolved by the application of well-settled law to undisputed facts.

STANDARD OF REVIEW

The State will address the standards of review within each of the issues presented.

ARGUMENT

1. THE TRIAL COURT PROPERLY DETERMINED THAT HOEFT VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL.

Whether the defendant waived his right to counsel knowingly, intelligently, and voluntarily is a question of law reviewed de novo. *State v. Ernst,* 2005 WI 107, ¶10, 283 Wis. 2d 300, 699 N.W.2d 92. Whether a defendant has satisfied his burden of making a prima facie showing of an invalid waiver of counsel also presents a question of law which an appellate court reviews de novo. *Id.*

At his January 22, 2019 initial appearance, the Court gave Hoeft a notice of right to an attorney and explained that right to him. (R. 61:3-4). On March 29, 2019 at a motion hearing, the Court reiterated the defendant's right to an attorney and Hoeft informed the Court that he was representing himself. (R. 62:3-4). After a colloquy, the Court made a finding that Hoeft was competent to waive counsel and explained to Hoeft that he was free to hire an attorney as this case would move forward. (R. 62:5-10).

Again, on April 11, 2019 at a motion hearing, Hoeft informed the Court that he wanted to represent himself and that he had represented himself in the past. (R. 71:5-6). After another colloquy, the Court again found Hoeft competent to waive counsel. (R. 71:6-7).

On May 15, 2019 at a hearing the Court directly asked Hoeft, "[I]s it your intention to be represented by an attorney?" Hoeft replied, "No." (R. 70:9). The Court went on to tell Hoeft, "[I]f we get to a time a week before trial and you say I don't have an attorney, I don't have time to get an attorney, the Court is simply not going to entertain that. If you choose to have an attorney you will always have the right to bring one with you but it is going to be your obligation to take care of that and the Court is not going to entertain adjournments to

accommodate an attorney request. Do you understand that?" Hoeft replied, "Yes." (R. 70:9-10).

At a status conference on June 18, 2019 the Court informed Hoeft that Hoeft had clearly told the Court that he does not intend to have an attorney and the Court was going to hold him to that. Hoeft nodded in the affirmative to the Court's statement. (R. 69:16). At a July 22, 2019 status conference, Hoeft did not request an attorney or raise the fact that he did not have an attorney. (R. 68).

On September 19, 2019 at the next status conference, Hoeft informed the Court, "I'm probably going to get an attorney after this hearing, Judge." The Court informed Hoeft that it was not going to adjourn the trial (scheduled on October 9, 2019). (R. 67:3). The Court further informed Hoeft that he has the ability to hire an attorney, "but don't come to me a week from now and say I have got this attorney but he is not available." (R. 67:4).

On the morning of trial, October 9, 2019, outside the presence of the jury the following exchanged occurred:

> Hoeft: I'm going to reiterate, Judge, that the fact that I don't - - was denied counsels. In case there is a conviction, there probably won't be, but if there is, I need to have that for appeal that I was denied attorney. Not denied, I couldn't get an attorney, excuse me.

Court: Do you have any other information to present the Court regarding obtaining an attorney?

Hoeft: I went to talk to Dan Snyder, he has a trial starting today, he said he would love to take the case, he said there is hardly any evidence because the State's witnesses are admitting that I paid cash. He said I would love to take this case but he has got a child molester case in Wausau starting today.

Court: Alright. Well - -

Hoeft: I'm sorry, I don't qualify for a public defender. I already know that I wouldn't qualify for a public defender, so there is no sense in even bothering the people. I got too much stuff, so - -

Court: And would that have been the case when this matter started, that you would have had too much stuff to qualify for public defender.

Hoeft: Yes.

Court: Alright. Well, a couple of things in this regard, the Court would have explained at the beginning of this case that you have a right to be represented by an attorney. The Court would have, of course, explained that you have the right to hire your own attorney. If you couldn't afford one, one could be appointed at public expense. You would have been given the notice regarding the contact information for the public defender's office.

…

The Court will note that the last time we were in court on this matter, you brought up the idea that you wanted to hire an attorney, and the Court indicated at that time, given the same scenario of explanations the

> Court just made, that if you wanted to hire an attorney, you could do that, but the Court was not going to adjourn the trial because it had been on the calendar for some time.
>
> You've come in today and indicated that you did talk to an attorney and that attorney was not able to be present on today's date.
>
> The Court has received no specific information verifying your efforts nor whether or not that attorney was going to be in this fray.
>
> The request today that you want an adjournment is what I'm hearing you say so that you have time to get an attorney, for the reasons the Court has stated, that request is denied. (R. 72:18-21).

The Court properly forewarned Hoeft that his case would proceed to trial on the scheduled date and would not be adjourned if he did not have an attorney

because he had been given plenty of time to obtain an attorney and had done little or nothing to obtain an attorney. The morning of trial when Hoeft requested an adjournment to obtain an attorney, the Court properly decided Hoeft must proceed *pro se*. In such a situation, a waiver of counsel and the deliberate choice to proceed *pro se* occurs, not by virtue of a defendant's express verbal consent to such procedure, but rather by operation of law because the defendant has deemed *by his own actions* that the case proceed accordingly. *State v. Woods*, 144 Wis. 2d 710, 715-16, 422 N.W.2d 730 (Ct. App. 1988).

Whether a defendant has waived his right to counsel requires an application of constitutional principles to the facts of a case. A defendant must assert the right to counsel in a timely manner, in the interest of the efficient administration of justice. *See State v. Kazee*, 146 Wis. 2d 366, 372-73, 432 N.W.2d 93, 96 (1998).

The record in this case is more than sufficient to conclude that Hoeft's initial waiver of his right to counsel and multiple subsequent waivers, and having been warned that the trial would proceed if he failed to obtain counsel, is sufficient to find that Hoeft's request the morning of trial for an adjournment to obtain counsel was untimely and/or for the purpose of delaying the trial or interfering with the administration of justice. Therefore, the Circuit Court's findings should be upheld.

2. THE TRIAL COURT CORRECTLY FOUND THAT THE STATE'S REQUEST THAT HOEFT BE FOUND IN CONTEMPT DID NOT VIOLATE HOEFT'S DUE PROCESS RIGHTS.

The morning of trial while the parties were discussing preliminary matters, the State asked if the Court had received medical records from Hoeft that the Court had ordered him to provide within 30 days of September 5, 2019. When the Court indicated that it had not received any medical records from Hoeft, the State requested that Hoeft be found in contempt of court (R. 72:7-9).

The Court stated it was not going to address a contempt motion 20 minutes before the trial was supposed to start and denied the State's request. The issue was brought up no further. (R. 72:9).

Hoeft alleges that the State's request that he be found in contempt violated his due process rights and cites to *State v. Lettice*, 205 Wis. 2d 347, 585 N.W.2d 171 (Ct. App. 1998). *Lettice* is a case concerning prosecutorial misconduct. Therefore, the State infers that Hoeft is claiming his due process rights were violated due to misconduct by the prosecutor.

At Hoeft's postconviction hearing the Circuit Court addressed the issue of the State's contempt request:

> "At that time, the Court did not proceed on the request and simply indicated it was not going to proceed on the request at that time. That entire discussion was just very few seconds, and the Court can find here today, that it would have had no effect on Mr. Hoeft being able to address issues. He never raised a concern on that day about there being any problems with

> the request and, of course, the request was of such short duration and not addressed by the Court that it could not have caused any particular problem in Mr. Hoeft's focus." (R. 128:17).

A motion for mistrial on the grounds of improper prosecutorial misconduct is addressed to the sound discretion of the trial court and the trial court's decision will not be reversed by this court unless there is evidence of abuse of discretion and prejudice to the defendant. *State v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616, 625 (Ct. App. 1983).

The *Lettice* case is not analogous. In *Lettice*, the prosecutor filed unfounded charges against the defendant's counsel on the eve of trial. The court found that the prosecutor brought the charge either to disqualify the defense or to delay the jury trial. The court further found that the prosecutor engaged in intentional misconduct which had a profoundly negative impact on the defense attorney's ability to represent his client. *Lettice*, at 354-55.

Reversing a criminal conviction on the basis of prosecutorial misconduct is a "drastic step" that "should be done with caution". *State v. Ruiz*, 118 Wis. 2d 177, 202, 347 N.W.2d 352, 364 (1984). The determination of whether prosecutorial misconduct occurred and whether such conduct requires a new trial is within the trial court's discretion. "An appellate court will sustain a discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and used a rationale process to reach a conclusion that a

reasonable judge could reach." *City of Muskego v. Godec*, 167 Wis. 2d 536, 546, 482 N.W.2d 79, 83 (1992).

The Circuit Court's finding that the discussion of possible contempt lasted just a few seconds, that Hoeft never claimed it was problematic and the Court's finding that it could not have caused any particular problem in Hoeft's focus should be upheld as a rationale and reasonable decision the trial judge reached.

3. THE TRIAL COURT PROPERLY DETERMINED THAT THE STATE DID NOT VIOLATE SEC. 971.23 WIS. STAT.

Whether the State violated its discovery obligations under Wis. Stat. § 971.23 is a question of law that this Court reviews de novo. *State v. Prieto*, 2016 WI App 15, ¶ 10, 366 Wis. 2d 794, 876, N.W.2d 154.

In anticipation of Hoeft possibly testifying on his own behalf at trial, the State instructed law enforcement (Lieutenant Cummings) to obtain additional information from the Timber Inn Motel. (R. 72:13). The information obtained by the State consisted of a two page officer's report, a one page calendar, and 40 pages of guest registries and credit card receipts. (R. 72:15).

The records were received by the prosecutor's office on October 2, 2019 and mailed to the defendant on October 3, 2019. (R. 72:16). The morning of trial, Hoeft complained that he had only gotten those materials yesterday (October 8, 2019) and hadn't had a chance to review them. (R. 72:11-12). The State informed Hoeft and the Court that it was not intending to use any of that information in its case in chief but would use it to cross examine Hoeft. (R. 72:16).

Pursuant to sec. 971.23 Wis. Stat., a prosecutor must make certain disclosures to a defendant, within a reasonable time before trial. The statute enumerates certain types of materials or information if within the possession of the State it must disclose to the defendant. The Circuit Court found that any materials the State possessed were provided to Hoeft within a reasonable time before trial and that the records were available to be obtained by either Hoeft or the State. (R. 128:9-10).

Hoeft appears to argue that the materials provided to him on October 3, 2019 were exculpatory pursuant to sec. 971.23(1)(h) Wis. Stats., but cites to no authority. This Court should decline to address this undeveloped argument. See State v. Pettit, 171 Wis. 2d 627,646-47, 492 N.W.2d 633 (Ct. App. 1992) (noting that this Court does not consider undeveloped arguments unsupported by legal authority).

Hoeft has been unable to flesh out a coherent explanation of why the materials would be exculpatory, other than making an undocumented assertion that they contained a forged credit card receipt. The trial court was unpersuaded (R. 128:18), as should this court be.

4. THE TRIAL COURT CORRECTLY FOUND THAT HOEFT'S RIGHT TO A FAIR TRIAL WAS NOT VIOLATED WHEN IN ITS OPENING STATEMENT THE STATE MENTIONED THAT HOEFT HAD BEEN ARRESTED ON THE CHARGES HE STOOD TRIAL FOR.

Hoeft alleges that the State lied in its opening statement and therefore his due process right were violated.

"[N]ot all inappropriate statements by a prosecutor result in a due process violation that gives rise to plain error." *State v. Jorgensen*, 2008 WI 60, ¶ 41, 310

Wis. 2d 138, 754 N.W.2d 138. "To determine whether a prosecutor's comments constitute a due process violation, the court must ask whether the statements 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* ¶40 (quoting *State v. Mayo*, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115). The defendant bears the burden to demonstrate "that the unobjected to error is fundamental, obvious, and substantial." *Id.* ¶23.

Hoeft mistakes the record in his brief. (Hoeft's Br. 8). He states in section four (4) of his brief that "[the prosecutor] lied to the jury by telling them that I was arrested and jailed on this charge."

In his opening the prosecutor did say, "[T]he next day, Lieutenant Cummings did locate the defendant, Richard Hoeft, and arrested him for fraud on a motel keeper" (R.72:58). Testimony at trial revealed that Lieutenant Cummings did not take Hoeft into physical custody, but directed the corrections officers at the Price County Jail to process Hoeft for his crime (R. 72:95). The Trial Court found that the jury was properly instructed that open statements are not evidence and that the issue was clarified during testimony (R. 128:17-18).

Hoeft has not shown that the unobjected to statement by the prosecutor was inappropriate, and even if it was inappropriate, has not met his burden that the statement fundamentally affected the fairness of the trial denying Hoeft due process. The Trial Court's ruling should be upheld.

5. THE TRIAL COURT CORRECTLY FOUND THAT THE STATE DID NOT IMPROPERLY COMMENT ON HOEFT'S DECISION NOT TO TESTIFY DURING ITS CLOSING ARGUMENT.

During closing argument, the State told the jury that the testimony of the motel manager, Rachel Livingston, was uncontradicted and that there was no evidence received from the witness stand or from the exhibits that Hoeft had paid for his stay at the motel. (R. 72:138). Regarding Lieutenant Cumming's testimony, the prosecutor told the jury "and, again, you've heard no evidence from the witness stand or from the exhibits that contradict what he [Cummings] told you." (R. 72:140). Hoeft argues that these comments violate his 5th amendment right not to testify.

Hoeft never made an objection to the prosecutor's closing. The Circuit Court concluded that the prosecutor's closing did not comment on Hoeft's decision not to testify (R. 128:21).

Hoeft cites *Griffin v. California*, 380 U.S. 609 (1965) and an unpublished Wisconsin case *State v. Hoyle*, 2020 AP 1876-CR.

In *State v. Johnson*, 121 Wis. 2d 237, 358 N.W.2d 824 (Ct. App. 1984), this court held that to decide whether particular language used by the prosecutor in closing constitutes an improper comment on the defendant's decision not to testify, the trial court must consider "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be comment on the failure of the accused to testify." *Johnson*, 121 Wis. 2d at 246 (quoting "*Bontempo v. Fenton*, 692 F.2d 954, 959 (3d Cir. 1982))." "Questions about the absence of facts in the record need not be taken as comment on defendant's failure to testify." *Id*.

After *Johnson*, this court set out a three-factor test for determining when a prosecutor's argument can be held "to constitute an improper reference to the defendant's failure to testify." *State v. Jaimes*, 2006 WI App. 93, ¶21, 292 Wis. 2d 656, 715 N.W.2d 669 (Discussing *United States v. Robinson*, 485 U.S. 25, 34 (1988)). First, "the comment must constitute a reference defendant's failure to testify," using the *Johnson* analysis. *Id. ¶21.* Second, "the comment must propose that the failure to testify demonstrates guilt." *Id.* Third, "the comment must not be a fair response to a defense argument." *Id.*

The prosecutor's comments that Livingston's testimony was uncontradicted and that the jury did not hear any evidence from the witness stand or from the exhibits that contradict the State's witnesses do not violate the second prong of the *Jaimes* test in that the comments by the prosecutor did not state or intimate that Hoeft's failure to testify indicated guilt.

Unlike *Hoyle,* a sexual assault case in which only the defendant and victim could provide evidence of what occurred, this case is a non-payment case. Evidence contradicting what Livingston testified to would not be limited to testimony by Hoeft, but could have come in the form of a cancelled check, credit card records, bank records or receipts.

Additionally, Hoeft has forfeited review of his 5th amendment claim. A defendant forfeits automatic appellate review of a complaint about a prosecutor's closing argument by failing to make a contemporaneous objection and failing to move for mistrial. *See State v. Davidson*, 2000 WI 91, ¶86, 236 Wis. 2d 537, 613 N.W.2d 606: *State v. Doss*, 2008 WI 93, ¶83, 312 Wis. 2d

570, 754 N.W.2d 150; *See also State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Here, Hoeft made no objection and did not move for a mistrial (R. 72:136-143).

Additionally, the Circuit Court instructed the jury that "[a] defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner." (R. 72:150).

The law presumes jurors follow such cautionary instructions. *State v. Grande*, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). And the law presumes such cautionary instructions "eliminate or minimize the potential for unfair prejudice." *State v. Hammer*, 2000 WI 92, §36, 236 Wis. 2d 686, 613 N.W.2d 629. Those presumptions support harmlessness here.

Lastly, the State's challenged comments, even if improper, cast no reasonable doubt on the guilty verdict. The State presented substantial, persuasive evidence of Hoeft's guilt. In sum, the State's argument was not improper under the *Jaimes* three-prong test, but even if an impropriety occurred, it is harmless in light of the complete record.

6. THE TRIAL COURT CORRECTLY DENIED HOEFT'S MOTION TO DISMISS AT THE CLOSE OF THE STATE'S CASE.

The standard of review in determining whether the evidence was sufficient to support a conviction is that "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no

trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). According to the record, Rachel Livingston testified that she worked as a manager for the Timber Inn Motel in Phillips, WI. (R.72:62). She further testified that Hoeft stayed at the motel from December 1 to December 5 and paid for his stay with a credit card. Hoeft returned to the motel on December 9th and as of December 15th had yet to pay for his stay. Livingston confronted him at that time and told him that he needed to pay (R. 72:63).

On December 16th, Hoeft had left the motel and had taken all of his belongings with him, he did not pay for his six day stay, and on December 17th, Livingston contacted law enforcement. (R. 72:64-65).

Trial testimony supports the jury's verdict. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence introduced at trial to find the requisite guilty, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it. *Poellinger* at 507. Further, the determination of the credibility of witnesses and the resolution of conflicting testimony are matters are within the jury's province. *See Wheeler v. State*, 87 Wis. 2d 626, 634, 275 N.W.2d 651, 655 (1979).

The State submits that the court should conclude that the evidence at trial was sufficient to support the jury's finding that Hoeft was guilty and deny his claim of insufficient evidence to convict.

CONCLUSION

For the reasons stated, the State of Wisconsin respectfully submits that this Court affirm the conviction, sentence, and order denying postconviction relief entered in the court below.

Dated this 12th day of September, 2022.

Respectfully submitted,

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Electronically signed by:

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Cc: Richard Hoeft via U.S. mail

CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with monospaced font. The length of this brief is 3819 words and eighteen (18) pages including this Certification and not including the Appendix.

Dated this 12th day of September, 2022.

Electronically signed by:

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