STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2023AP001464-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORDELL L. GRADY,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Waukesha County Circuit Court, the Honorable Paul Bugenhagen, Jr., Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Grady's right to due process was violated by this defective procedure.

A. It was the circuit court's obligation to ensure a hearing consistent with due process principles; the court's decision to go "off the record" without doing more to facilitate an attorney-client conversation does not satisfy that obligation.

In this case, Mr. Grady has argued that the procedure utilized by the circuit court at the restitution hearing was fundamentally unfair and, as such, constituted a denial of Mr. Grady's right to procedural due process. Here, Mr. Grady was at a disadvantage because he was the only participant in the courtroom appearing via Zoom. When it came time for him to consult with his lawyer, this procedure deprived him of his ability to do so privately. Thus, although the court went "off the record" to facilitate Mr. Grady's request to speak with counsel, it made no effort to clear the courtroom. Instead, based on this record, it is clear that the circuit court and the prosecutor were standing by and eavesdropping on the remarks Mr. Grady made to his lawyer.

Thus, despite "warning" Mr. Grady that other persons could hear what he was talking about, the very procedure chosen by the circuit court renders that warning ineffectual. Mr. Grady should not have faced

the choice of either speaking to his lawyer in open court with opposing counsel listening in or simply not consulting with his lawyer at all. Thus, while Mr. Grady agrees with the State that due process permits an "informal" restitution procedure, (State's Br. at 17), it simply does not permit the procedurally unfair mechanism used in this case.

By focusing on other factors—whether Mr. Grady should have lowered his voice or invoked the privilege (an imposing ask for this severely mentally ill and legally uneducated defendant) or whether his lawyer bears the fault for not speaking in a low voice or proactively taking control of the proceedings and moving to a "break-out room" (State's Br. at 19)—the State ignores the broader contours of Mr. Grady's argument, which focus on the way in which this hearing was structured to impede Mr. Grady's access to his lawyer in a confidential and protected fashion.

Mr. Grady was powerless in this situation; instead, it was the circuit court which had the authority to ensure Mr. Grady could meaningfully consult with his lawyer. The chosen response—going off the record but permitting opposing counsel to listen in to the communication between lawyer and client—simply fails to respect constitutional norms. It is that imposition of an impediment which rendered this process unfair and distorted Mr. Grady's ability to fully consult with his lawyer and exercise his legal rights; accordingly, this Court must reverse.

B. Although the State attempts to deflect attention from the defective procedure by focusing on the technical components of Wis. Stat. § 905.03(2), those arguments are unavailing.

Faced with an unjust procedure, the State resorts to technical arguments about the attorney-client privilege. First, the State argues there can be no violation of the attorney-client privilege because, under these circumstances, the conversation between lawyer and client was not intended to be confidential. (State's Br. at 19). The record problematizes that assertion. Here, Mr. Grady interrupted the proceedings and requested to speak with his lawyer. (65:4). In response, the court went "off the record" to facilitate his request. (65:4). In doing so, it was ensuring that Mr. Grady's conversation with his lawyer would not be transcribed by the court reporter. It was after these steps were taken that Mr. Grady began conversing with his lawyer about the dispositive issue in this case—his ability to pay restitution.

Thus, while Mr. Grady—a mentally ill person later found incompetent due in large part to his bizarre behavior during postconviction proceedings—did not heed the court's warning that other persons could hear him speak (a warning which, as argued above, was ineffectual given the structural unfairness of this proceeding), all the other signs point toward an attempt on Mr. Grady's part to confidentially disclose information to his lawyer. Although Mr. Grady continued speaking to his lawyer after having been

warned—and without having been given other options—that conduct does not constitute a knowing waiver of his attorney-client privilege nor does it support the State's claim of forfeiture. Mr. Grady accepted the court's offer to go "off the record" to discuss the matter with his lawyer; when the structural components of this hearing frustrated true confidentiality, he made a Hobson's Choice to proceed with his conversation.

Because the State was permitted to eavesdrop on Mr. Grady's conversation with counsel—and the court made no effort to offer Mr. Grady a truly confidential space in which to discuss matters with counsel—this Court must reverse for a new restitution hearing. *State v. Meeks*, 2003 WI 104, ¶ 61, 263 Wis. 2d 794, 666 N.W.2d 859.

II. Mr. Grady was entitled to a hearing on his postconviction motion.

Here, the insurance company sought, and obtained, $19,071.28 in restitution despite only suffering $18,071.28 in losses. The additional $1,000 actually represented a loss sustained by a different party, the City of Muskego. Because restitution is limited to the victim's "actual pecuniary losses," *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999), the ensuing order awarding the full amount to the insurance company is clearly erroneous. As a result, reasonably competent counsel should not have stipulated.

The State disagrees, calling Mr. Grady's deficient performance argument "entirely conclusory and insufficient to warrant a hearing." (State's Br. at 23). It claims Mr. Grady needed to prove this resulted in a "double recovery" for the insurance company. (State's Br. at 23). Rather than a "double recovery" scenario, this is simply a situation where one party is awarded $1,000 that never left their pocket and was never sustained as a loss. Under these facts, there was no basis to award that money to this claimant. The party sustaining the loss is the party to be made whole; awarding that money to some other party simply makes no sense and contravenes the overall function of the restitution statute.

In order to get around this commonsense argument, the State relies on the circuit court's speculation that the insurance company had a contractual relationship entitling it to request the money on the City of Muskego's behalf. (State's Br. at 24). There was, however, no such documentary proof in the record to support that speculation. The circuit court assumed the existence of such a relationship based only on the insurance company's request; it did not base it on actual evidence. And, even if it had, it is still not clear that a party who does not actually sustain a loss is entitled to be reimbursed for another party's loss in context of a restitution proceeding, notwithstanding any agreements between those two parties. Thus, while the insurance company could have conceivably requested that the court order restitution to the municipality, it is unclear why or how it was empowered to request that money for itself.

Lacking legal authority, counsel should simply not have stipulated.

As to prejudice, the State asserts that because the total losses were $19,071.28—and this is what Mr. Grady was ordered to pay—it is irrelevant who that money was paid out to. (State's Br. at 25). Restitution, however, is a legal matter in which precision counts. If the insurance company did not have standing to receive that money, and the municipality did not request it, then, legally speaking, Mr. Grady did not owe it. In no other context can Mr. Grady understand a court permitting the erroneous award of funds to one party on the theory that, somewhere along, that money will *probably* be funneled to the correct party. Thus, had Mr. Grady objected, he would not have been required to pay the $1,000; that is cognizable prejudice.

Because Mr. Grady made these averments in his postconviction motion, this Court should therefore reverse and remand for an evidentiary hearing on his claim.

CONCLUSION

For the reasons set forth herein, Mr. Grady asks this Court to grant the requested relief.

Dated this 18th day of January, 2024.

Respectfully submitted,

Electronically signed by Christopher P. August
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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 1,356 words.

Dated this 18th day of January, 2024.

Signed:

Electronically signed by
Christopher P. August
CHRISTOPHER P. AUGUST
Assistant State Public Defender