STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2023AP2192-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DANIEL J. REJHOLEC,

Defendant-Respondent.

On Appeal from an Order Excluding Evidence Entered in the Sheboygan County Circuit Court, the Honorable Rebecca L. Persick, Presiding

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BRIEF OF DEFENDANT-RESPONDENT

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ISSUE PRESENTED

1. After a defendant has been allowed to withdraw his no contest plea that was induced by the circuit court's failure to suppress a statement taken in violation of the defendant's Fifth Amendment rights, whether the State may introduce the defendant's allocution statement into evidence at a subsequent trial.

   The circuit court answered no.

   This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The respondent does not request oral argument as the briefs will fully present the issues on appeal. The respondent does request publication as a decision on this issue will provide clarity and guidance to courts and attorneys.

STATEMENT OF THE CASE AND FACTS

On January 17, 2017, the State charged Mr. Rejholec with one count of sexual assault of a child under 16 years of age, contrary to Wis. Stat. § 948.02(2), one count of exposing intimate parts, contrary to Wis. Stat. § 948.10(1) and (1)(a), and one count of exposing a child to harmful material, contrary to Wis. Stat. § 948.11(2)(a). (1:1). The State alleged

that Mr. Rejholec had sexually assaulted his girlfriend's 14-year-old daughter, Natalie[1], over the period of approximately one month. (11:2).

During an in-custody interrogation with officers, Mr. Rejholec made incriminating statements regarding his contact with Natalie. (11:3). Mr. Rejholec then moved to suppress those statements as involuntary. (37:1-2). The trial court denied the motion. (86:2-5).

Mr. Rejholec pleaded no contest to one count of repeated sexual assault of the same child, in violation of Wis. Stat. § 948.025(1)(e). (93:6; 70:1). The circuit court then adjourned sentencing and ordered a PSI. (93:7). At the sentencing hearing on June 21, 2018, the trial court, consistent with Wis. Stat. § 972.14(2), provided Mr. Rejholec the opportunity to address the court before imposing sentence. (89:21). In doing so, the court noted that Mr. Rejholec was "not required to" say anything to the court. (89:21). Mr. Rejholec made the following statement at sentencing:

> Yes. I would like to – everyone to know that I'm truly sorry for what happened between [Natalie] and I. I know that I'm the adult, and I now – I understand that I should have, shouldn't have allowed this to happen. This does not take away at all my responsibility for what I did to [Natalie] and that I will fully understand I need to be held accountable and punished.

[1] The Respondent adopts the pseudonym used by the State. *See* Wis. Stat. § (Rule) 809.86(4).

> I also want the judge to consider that I went 53 years of my life and always made good decisions until this. I believe that I'm a good person, and you can rest assured that nothing like this has ever happened before.
>
> I want the judge to know I will accept any help or counseling so I can understand why I did this. I've never had any sort of sexual attraction to children. It's hard for me to understand why I did this. This wasn't planned out in any way, shape, or form. That's it.

(89:21).

Mr. Rejholec appealed his conviction, arguing that the circuit court erred in denying his motion to suppress. (140:12, 17). The Court reversed in a published opinion. *State v. Rejholec*, 2021 WI App 45, 398 Wis. 2d 729, 963 N.W.2d 121; (140:1-23). This Court concluded that the officer interrogating Mr. Rejholec "impermissibly suggested to [Mr.] Rejholec that if he exercised his right to silence and obtained a lawyer that [Mr.] Rejholec would not get the chance to tell his story to the jury." *Id.* at ¶ 30; (140:18). The Court held that the officer's misrepresentation of Mr. Rejholec's Fifth Amendment rights rendered Mr. Rejholec's waiver of those rights involuntary. *Id.* at ¶ 31; (140:19-20).

On remand, Mr. Rejholec moved to withdraw his no contest plea on the grounds that his plea was the result of the circuit court's denial of his motion to suppress his statements. (145:1-8). The State agreed that it was "proper to allow the defendant to withdraw his pleas [*sic*] at this point." (256:2). The circuit court

then ordered Mr. Rejholec's no contest plea withdrawn and the judgment of conviction vacated. (256:4). Mr. Rejholec again faces trial on the three charges in the amended information.

Mr. Rejholec then moved to prohibit the State from introducing Mr. Rejholec's allocution statement at trial. (223:1-5). After hearing argument from both parties, the circuit court, the Honorable Rebecca L. Persick, granted the motion. (234:8-10; 228:1). In so deciding, the court noted that, although the allocution was an optional statement, it was only made because the interrogating officer violated Mr. Rejholec's Fifth Amendment rights. (234:9-10). Further, the court held that Wis. Stat. § 904.10 expressly prohibits evidence a guilty or no contest plea, which is later withdrawn, from admission at trial. (234:9). The court implicitly found that Mr. Rejholec's allocution statement was "evidence" of his no contest plea. (234:9). The court noted that while "the *[State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479] case was not clear. But under the specific facts of this case, . . . it would be a miscarriage of justice to allow those statements in." (234:10).

The circuit court issued an order to that effect on October 11, 2023. (228:1). The State appeals. (231).

ARGUMENT

I. Following the withdrawal of a guilty or no contest plea, statements made by the defendant in connection with that plea are not admissible at a subsequent trial.

Wisconsin law prohibits the use of "statements made in court . . . in connection with" a guilty or no contest plea that is later withdrawn in a subsequent trial. Wis. Stat. § 904.10. The circuit court correctly decided that this rule prohibits the State from introducing statements Mr. Rejholec made at a sentencing hearing before he was allowed to withdraw his plea.

A. The plain text of Wis. Stat. § 904.10 prohibits the use of Mr. Rejholec's allocution statements against him at a subsequent trial.

"[T]he language of [Wis. Stat.] § 904.10 clearly and unambiguously indicates the intent to prohibit for any purpose the use of statements in connection with a guilty plea, later withdrawn, at a subsequent trial." *State v. Mason*, 132 Wis. 2d 427, 433, 393 N.W.2d 102 (Ct. App. 1986). Section 904.10 provides that:

> Evidence of a guilty plea, later withdrawn, or a plea of no contest, or an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or

> criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

Wis. Stat. § 904.10

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* The context and structure of the statute are also important to divining statutory meaning. *Id.* at ¶ 46. "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*

Section 904.10 is unambiguous. *Mason*, 132 Wis. 2d at 432. It prohibits the use of statements made by a defendant "in connection with" a plea of no contest. Wis. Stat. § 904.10. "Connection" is defined as a "causal or logical relation or sequence." *Connection*, Merriam-Webster.com

In one of the few cases interpreting Wis. Stat. § 904.10, the court of appeals held that incriminating

statements made by a defendant at a plea hearing were not admissible at a subsequent trial. *Mason*, 132 Wis. 2d at 433. In *Mason*, the defendant reached a proposed plea agreement with the State. *Id.* at 428. During the course of the plea hearing, the defendant made incriminating statements and admitted to the charged conduct. *Id.* at 429. The defendant was later permitted to withdraw his plea. *Id.* At the subsequent trial on the charges, the defendant denied the charged conduct and made statements contrary to the incriminating statements he made at the plea hearing. *Id.* The trial court admitted his plea hearing statements but excluded evidence that the defendant entered a guilty plea. *Id.* The court of appeals reversed, holding that, even though the defendant's plea hearing statements were voluntary, § 904.10 "clearly and unambiguously indicates the intent to prohibit *for any purpose* the use of statements made in connection with a guilty plea, later withdrawn, at a subsequent trial." *Id.* at 433.

Here, the statements made by Mr. Rejholec at sentencing were clearly in court in connection with his no contest plea that was later withdrawn and Wis. Stat. § 904.10 plainly prohibits their admission at a subsequent trial. Mr. Rejholec, much like the defendant in *Mason*, only made the incriminating statements to the court *because* of his plea. The plea and sentencing were inherently connected because the

sentencing proceedings flowed automatically from Mr. Rejholec's no-contest plea.[2]

The State appears to argue that this Court should interpret "in connection with" in Wis. Stat. § 904.10 the same as it does in the context of sentence credit. State's Br. at 21 n. 9. Though statutes using similar terms may be construed similarly, *State v. Rector*, 2023 WI 41, ¶ 35, 407 Wis. 2d 321, 990 N.W.2d 213, doing so makes little sense here, where the principles of sentence credit have nothing helpful to offer in interpreting the rules of evidence. Additionally, while courts are to interpret statutes in context, a sentencing-related statute provides no context for a rule of evidence. Moreover, "in connection with" is not a "technical or specially defined" phrase; therefore, it should be given its ordinary meaning.

Even if the court were to adopt the meaning of "in connection with" proposed by the State, it is clear that Mr. Rejholec's statements were in connection with the plea; his allocution statements were a direct result of his plea. The trial court also considered the

[2] While the plea hearing was separate from the sentencing hearing in this case, this is not always true. Many sentencing hearings occur immediately after the court accepts the defendant's plea. In a case wherein the court proceeds to sentencing after accepting the defendant's plea in the same hearing, it makes no sense to exclude those statements made during the plea portion of the hearing but to admit those statements made during the sentencing portion of the hearing. Both statements are made "in connection with" the plea and must be excluded.

connection between Mr. Rejholec's plea and allocution statement and found the allocution to be a result of the illegally obtained statement, and thus the no contest plea. (*See* 234:9).[3]

B. Even if an allocution statement is not found to be "in connection with" a later-withdrawn plea, it is still evidence of the plea, and thus inadmissible for any purpose at a subsequent trial.

Statements made during allocution are evidence of a no contest plea. Section 904.10 is clear that "[e]vidence of a . . . plea of no contest . . . is not admissible in any civil or criminal proceeding against the person who made the plea. . . ." Wis. Stat. § 904.10. Evidence generally consists of the testimony of witnesses, exhibits received by the court, and any stipulated or judicially noticed facts. *See* WI JI-CRIMINAL 103: EVIDENCE DEFINED. Evidence does not need to directly prove a fact. *See* WI JI-CRIMINAL 170: CIRCUMSTANTIAL EVIDENCE. "Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience." *Id.*

[3] Factual findings are provided deference. *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶ 11, 290 Wis. 2d 264, 714 N.W.2d 530. Factual findings are upheld unless clearly erroneous. *Id.* The trial court's factual finding that Mr. Rejholec's allocution statement was "in connection with" his no contest plea is not clearly erroneous.

While Mr. Rejholec's allocution statement may not be *direct* evidence of his no contest plea, it is circumstantial evidence of a plea other than not guilty. Allocution only occurs after conviction. *See* Wis. Stat. § 972.14(2). Introduction of evidence of a statement made by Mr. Rejholec—a statement that can only be made after a conviction—is circumstantial evidence that Mr. Rejholec has been convicted of the offense, contrary to Wis. Stat. § 904.10. *See* WI JI-CRIMINAL 170 ("Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence may prove a fact.").

C. The State's preferred interpretation of Wis. Stat. § 904.10 must be rejected as it leads to unconstitutional results.

Holding that Wis. Stat. § 904.10 prohibits *only* the introduction of direct evidence that Mr. Rejholec pled no contest, but not his allocution statement, as the State suggests, violates his constitutional right to present a complete defense. "The cardinal rule of statutory construction is to preserve a statute and to find it constitutional if it is at all possible to do so." *Redevelopment Authority of City of Milwaukee v. Uptown Arts and Educ. Inc.*, 229 Wis. 2d 458, 463, 599 N.W.2d 655 (Ct. App. 1999).

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to

present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations and internal quotation marks omitted). While the right to present a defense may be impacted by the rules of evidence, "arbitrary" rules that do not serve legitimate interests are unconstitutional. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Rules of evidence that prohibit the defendant from introducing evidence about circumstances in which a confession was made violate the defendant's right to present a complete defense. *Crane*, 476 U.S. at 691; *see also Lego v. Twomey*, 404 U.S. 477, 485-86 (1972). While the voluntariness of a statement is a threshold admissibility matter for the court to decide, the defendant retains "the traditional prerogative to challenge the confession's *reliability* during the course of the trial." *Crane*, 476 U.S. at 688.

In *Crane*, the defendant was arrested and made a series of voluntary admissions. *Id.* at 684. The defendant moved to suppress his statements and the trial court concluded that the statements were voluntary and admissible. *Id.* at 685. The prosecution then moved, pursuant to rules of evidence that prohibited admission of evidence as to the voluntariness of a confession once the court ruled on the voluntariness, to prohibit the introduction of any evidence about the circumstances of the defendant's incriminating statements. *Id.* The Supreme Court held that a state rule of evidence excluding evidence that goes to the credibility or reliability of a confession violated the defendant's right to present a complete defense. *Id.* at 691. In so holding, the Court noted that "stripped of the power to describe to the jury the

circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Id.* at 689.

Allowing the State to introduce Mr. Rejholec's allocution statement, but barring any evidence of the circumstances surrounding that statement violates Mr. Rejholec's right to present a complete defense, but would be the effect if the State's proposed interpretation of Wis. Stat. § 904.10 is adopted. Without the power to describe to the jury the circumstances that prompted his statement (e.g., the officer's violation of Mr. Rejholec's *Miranda* rights, the trial court's denial of his motion to suppress the illegally obtained interrogation statement, and advice from his attorney), he is effectively disabled from answering the one question that every rational juror needs answered: If he is innocent, why did he make incriminating statements and apologize to the court? Much as the circumstances surrounding the confession in *Crane* were necessary to presenting the full picture to the jury, so too are the circumstances surrounding Mr. Rejholec's allocution statement necessary to present the full picture.

Section 904.10, however, expressly prohibits admission of evidence that Mr. Rejholec entered a no contest plea "for any purpose." *See Mason*, 132 Wis. 2d at 433. Even if Mr. Rejholec were able to present the circumstances surrounding the incriminating statements to the jury, that would not cure the

constitutional issue. This Court previously held that the interrogating officer violated Mr. Rejholec's *Miranda* rights and any statements he made after the *Miranda* violation must be suppressed. *Rejholec*, 2021 WI App at ¶ 35. Allowing Mr. Rejholec to present the context to his allocution statement opens the door to presenting the whole of his interrogation—allowing the State to benefit from the violation of Mr. Rejholec's Fifth Amendment rights.

Because the State's proposed interpretation of Wis. Stat. § 904.10 would result in the unconstitutional deprivation of Mr. Rejholec's right to present a complete defense, this Court should take pains to avoid this result. *See Redevelopment Authority of City of Milwaukee*, 229 Wis. 2d at 463.

D. The State's reliance on *State v. Greve* is misplaced.

The State relies primarily on *State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479, to support its claim that voluntary statements made by a defendant at sentencing after entering a no contest plea are admissible at a subsequent trial after the defendant has withdrawn his plea. This reliance is misplaced.

In *Greve*, the defendant made incriminating statements to a clinical social worker hired by the defense to prepare a sentencing memorandum. *Greve*, 2004 WI 69, at ¶ 3. Greve's conviction, however, was later overturned by the court of appeals. *Id.* at ¶ 4. Greve argued that the incriminating comments in the

defense-prepared sentencing memorandum were inadmissible at the subsequent trial because Wis. Stat. § 972.15(4)[4] also applied to the sentencing memorandum. *Id.* at ¶ 13. Greve argued his paid-for sentencing memorandum was akin to the court-ordered and Department of Corrections-prepared Presentence Investigations (PSIs). *Id.* Importantly, Greve did not make any argument about the applicability of Wis. Stat. § 904.10 to his sentencing memorandum. *Brief of Defendant-Respondent* at e, *Greve*, 2004 WI 69.

Ultimately, the Wisconsin Supreme Court in *Greve* held that a defense-prepared sentencing memorandum was not barred from admission in a subsequent trial as Wis. Stat. § 972.15 only applied to court-ordered PSIs. *Greve*, 2004 WI 69, at ¶ 25. The *Greve* court did not consider the applicability of Wis. Stat. § 904.10. *Id.* at ¶ 66 (Prosser, J., dissenting). Justice Prosser, writing for the dissent, noted that "the lead opinion dodges the obvious question whether a statement made by a defendant *inside* the courtroom at a sentencing hearing is protected from use in a new trial." *Id.*

Greve does not function to allow the State to introduce statements otherwise excluded by Wis. Stat. § 904.10.

[4] Wis. Stat. § 972.15(4) provides that: "Except provided in sub. (4m), (4r), (5), or (6), after sentencing the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court."

II. Due process considerations should bar the use of an allocution statement made after a guilty or no contest plea that is later withdrawn in a subsequent trial.

A defendant who enters a plea and later is allowed to withdraw that plea should have the expectation that the plea will not be used against him in a subsequent trial. This is clearly the policy underlying Wis. Stat. § 904.10. This policy of ensuring that proposed pleas that do not materialize or pleas that are withdrawn cannot be used against the defendant in a subsequent proceeding is present not just in the Rules of Evidence, but also explicitly in the rules of criminal procedure. *See* Wis. Stat. § 971.08(3) ("Any plea of guilty which is not accepted by the court or which is subsequently permitted to be withdrawn shall not be used against the defendant in a subsequent action.").

The purpose of plea withdrawal, as noted by the trial court, is to return the parties to the position they were in prior to the entry of the plea. *See State v. Briggs*, 218 Wis. 2d 61, 73-74, 579 N.W.2d 783 (Ct. App. 1998). While plea bargaining has been analogized to contract law, contract law is not always dispositive as plea bargaining also implicates a defendant's due process rights. *State v. Toliver*, 187 Wis. 2d 346, 355, 523 N.W.2d 113 (Ct. App. 1994). Fundamental to the doctrine of due process is a sense of "decency and fairness." *State v. Rivest*, 106 Wis. 2d 406, 414, 316 N.W.2d 395 (Ct. App. 1982) (citing *Breithaupt v.*

Abram, 352 U.S. 432, 436 (1957); *Austin v. State*, 49 Wis. 2d 727, 736, 183 N.W.2d 56 (1971)).

A plea is generally only allowed to be withdrawn after the defendant can show that plea withdrawal is necessary to correct a "manifest injustice." *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). If a plea occurs after the trial court erroneously rules on a motion to admit or suppress evidence, that plea may be withdrawn if there is a reasonable probability that the trial court's decision contributed to the conviction. *State v. Armstrong*, 223 Wis. 2d 331, 372, 588 N.W.2d 606 (1999). "Only if the error contributed to the conviction must a reversal" and plea withdrawal be the result. *State v. Semrau*, 2000 WI App 54, ¶ 21, 233 Wis. 2d 508, 608 N.W.2d 376.

In the present case, after holding that portion of Mr. Rejholec's interrogation statement must be suppressed, this Court remanded the case for the trial court to consider whether the erroneous admission of the interrogation contributed to the conviction. *State v. Rejholec*, 2021 WI App 45, ¶ 35 n. 14. Upon a filing of a motion to withdraw Mr. Rejholec's plea, the State conceded that it could not meet the harmless error standard. (256:2). The trial court subsequently allowed Mr. Rejholec to withdraw his plea. (256:3). Mr. Rejholec only entered his plea and made his allocution statement because of the trial court's erroneous ruling on his motion to suppress the interrogation. It runs contrary to notions of decency and fairness that the State should now benefit from the trial court's erroneous decision.

Fairness should prohibit the State from presenting an inaccurate depiction of Mr. Rejholec's allocution statement by admitting it without context. The context that is necessary to accurately and fairly present to the jury Mr. Rejholec's allocution statement is barred from admission "for any purpose." *See Mason*, 132 Wis. 2d at 433. However, even if the court were to allow Mr. Rejholec to introduce the context in which his allocution statement was made, this is inconsistent with the due process notions of fairness and decency. Mr. Rejholec would be placed in an impossible catch-22 of either allowing the State to introduce his allocution statement without context or providing context and explaining that the allocution statement was only made because the court denied his suppression motion, thus opening the door to admitting the illegally obtained interrogation statement. Because Mr. Rejholec is prevented from providing the context necessary for the allocution statement, due process demands it be excluded from evidence.

CONCLUSION

This Court should affirm the circuit court's order excluding Mr. Rejholec's allocution statement from evidence at a subsequent trial because Wis. Stat. § 904.10 prohibits its use for any purpose. However, if the Court finds that § 904.10 does not bar the use of an allocution statement after plea withdrawal, this Court should find that due process requires the exclusion of Mr. Rejholec's allocution statement.

Dated this 21st day of June, 2024.

Respectfully submitted,

Electronically signed by Olivia Garman

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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 3,880 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of June, 2024.

Signed:
Electronically signed by
Olivia Garman
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