STATE OF WISCONSIN

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

DISTRICT II

Case No. 2023AP2192-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DANIEL J. REJHOLEC,

Defendant-Respondent.

STATE'S APPEAL FROM AN ORDER SUPPRESSING EVIDENCE ENTERED IN SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE REBECCA L. PERSICK, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

At his 2018 sentencing, Rejholec exercised his statutory right to allocution and, for the first time, admitted that he sexually abused the victim. Rejholec's statements were voluntary, and Rejholec does not argue otherwise. Courts are generally loath to exclude voluntary admissions, which "are an 'unmitigated good' 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'"[1] Nonetheless, the circuit court granted Rejholec's motion to bar the State from introducing his allocution statements at his new trial.

No statute, constitutional principle, or case law bars the future admission of allocution statements. And the Wisconsin Supreme Court has deemed similar, voluntary statements made by a defendant for use at sentencing admissible in future proceedings.[2]

Rejholec argues that his sentencing statements are evidence of his no-contest plea, and thus are inadmissible under Wis. Stat. § 904.10. He also argues that admission of the statements would violate his constitutional rights to present a defense and to due process.

Rejholec's allocution statements have little to do with his no-contest plea; they say nothing about how the conviction was obtained. They are not barred by Wis. Stat. § 904.10 because they are neither "in connection with" Rejholec's no-contest plea nor "[e]vidence of" his plea. And admission of the statements would not somehow violate Rejholec's rights to present a defense or to due process. The order barring admission of the allocution statements should be reversed.

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[1] *Maryland v. Shatzer*, 559 U.S. 98, 108 (2010) (citations omitted).

[2] *State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.

ARGUMENT

I. Rejholec's allocution statements were voluntary and may be introduced at trial under *Greve* and other applicable legal principles.

Rejholec elected to speak at his 2018 sentencing and, unexpectedly took responsibility for the repeated assaults for which he was convicted: "I'm truly sorry . . . I'm the adult, and I . . . shouldn't have allowed this to happen . . . I need to be held accountable and punished." (R. 89:21, A-App. 36.) "I will accept any help or counselling 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." (R. 89:21, A-App. 36.)

An allocution statement is a voluntary statement. The right to allocution under Wis. Stat. § 972.14(2) "allow[s]" the defendant to speak at sentencing; it does not require him to do so. *See State v. Greve*, 2004 WI 69, ¶ 35, 272 Wis. 2d 444, 681 N.W.2d 479. A defendant who elects to speak at sentencing waives the rights to silence and against self-incrimination under the Fifth Amendment of the United States Constitution and article I, section 8 of the state constitution. *See Scales v. State*, 64 Wis. 2d 485, 496, 219 N.W.2d 286 (1974). (Op. Br. 13–14.)

An allocution statement is not an immunized statement. There is no recognized federal or state constitutional right to allocution. *State v. Lindsey*, 203 Wis. 2d 423, 447, 554 N.W.2d 215 (Ct. App. 1996) (citing *Hill v. United States*, 368 U.S. 424, 428 (1962)); *Greve*, 272 Wis. 2d 444, ¶¶ 29–34 (Roggensack, J., plurality opinion as to these paragraphs); *id.* ¶ 42 (Crooks, J. concurring opinion). (*See* Op. Br. 14–15.)

Even if there were a constitutional right to allocution, it would not necessarily follow that a defendant would be immunized against later use of such statements. The courts

and Legislature have provided immunity for in-court admissions only in limited circumstances. *See, e.g., Simmons v. United States*, 390 U.S. 377, 389 (1968) (suppression hearing testimony necessary to establish Fourth Amendment standing cannot be used against defendant at trial); Wis. Stat. § 972.08(1)(a) (providing immunity for a witness's compelled statements in criminal proceedings). Rather, if found, a state constitutional right to allocution would be, like the right to testify at one's own trial, merely a right to speak—not a right to speak with immunity for one's remarks. And it is well established that a defendant's trial testimony may be used in a retrial. *Harrison v. United States*, 392 U.S. 219, 222 (1968).

While no Wisconsin court has decided whether, following plea withdrawal *or* reversal of a conviction obtained by a trial,[3] a defendant's sentencing statements may be admitted in a future proceeding, the Wisconsin Supreme Court's decision in *Greve* provides guidance. There, the court concluded that a defendant's statements made for use at sentencing in a defense-prepared document were admissible in future proceedings. *See Greve*, 272 Wis. 2d 444, ¶¶ 18–25.

The court noted in *Greve* that it had previously read the Presentence Investigation Report (PSI) statute, Wis. Stat. § 972.15 to bar introduction in future proceedings of a defendant's statements in a court-ordered PSI. 272 Wis. 2d 444, ¶¶ 21–25 (discussing *State v. Crowell*, 149 Wis. 2d 859, 440 N.W.2d 352 (1989)). But it concluded that neither section 972.15 nor any statute or other authority barred admission of

[3] Rejholec was convicted upon a no-contest plea, and he was allowed to withdraw his plea after reversal of his conviction. But the issue presented here could just as easily arise in a case in which a defendant is convicted following a trial. The court's decision should therefore apply to allocution statements whether the conviction was obtained by plea or trial. As argued later, Rejholec's allocution statements had little to do with the fact that his conviction was obtained by a plea and not a trial.

a defendant's statements presented in a private PSI prepared by the defense. Such statements were voluntary and not compelled by a court-ordered process. *See Greve*, 272 Wis. 2d 444, ¶¶ 23, 25. And the court declined to adopt Greve's constitutional argument against admission of his statements on the grounds that there is no federal or state constitutional right to allocution, *Greve*, 272 Wis. 2d 444, ¶¶ 29–34 (Roggensack, J., plurality opinion as to these paragraphs), and there was no need to address whether such a constitutional right exists. *Id.* ¶ 42 (Crooks, J. concurring opinion).

Likewise, no statute, constitutional provision, or case law prohibits the admission of a defendant's sentencing statements following the withdrawal of his guilty or no-contest plea. Rejholec's allocution statement, like Greve's statement offered for use at sentencing in the defense PSI, was a voluntary, non-immunized statement, and, by making the statement, Rejholec waived his right against self-incrimination. His allocution statements are therefore admissible in later proceedings.[4] *See Harvey v. Shillinger*, 76 F.3d 1528, 1535 (10th Cir. 1996) (defendant's allocution statements are admissible in later proceedings); Caren Myers, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 Colum. L. Rev. 787, 800 (1997) (explaining that because allocution statements are neither compelled nor explicitly protected by the Constitution, they may be admitted in the event of a retrial). (Op. Br. 18–19.)

[4] Rejholec argues that *Greve* does not apply because Wis. Stat. § 904.10 bars admission of his allocution statements. (Rejholec's Br. 19–20.) He does not appear to challenge the applicability of *Greve* on any other basis. Rejholec's statements are not barred by section 904.10, as shown in the next section.

II. The allocution statements are not "in connection with" or "[e]vidence of" his no-contest plea and thus are not barred under Wis. Stat. § 904.10.

Rejholec does not dispute that his allocution statements were voluntary or that, by speaking at sentencing, he waived his right against self-incrimination. He also does not dispute that no right to allocution exists in the federal or state constitutions. Instead, Rejholec argues that his allocution statements are inadmissible under Wis. Stat. § 904.10 because they are evidence of his no-contest plea. (Rejholec's Br. 11–19.) As argued (Op. Br. 20–22), this statute does not bar admission of allocution statements, and the circuit court and now Rejholec fail to show that it does.

Under Wis. Stat. § 904.10, the State may not introduce evidence of a withdrawn plea or a plea offer, or statements made in connection with a withdrawn plea or plea offer, in any proceeding against the person:

> Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of 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.

See State v. Mason, 132 Wis. 2d 427, 432–33, 393 N.W.2d 102 (Ct. App. 1986). This rule stems from the importance of plea bargaining in our system, and its "purpose . . . is to encourage free and open discussion between prosecutor and defendant during plea negotiations." *State v. Myrick*, 2014 WI 55, ¶ 42, 354 Wis. 2d 828, 848 N.W.2d 743.

Contrary to his arguments, Rejholec's allocution statements are not barred by Wis. Stat. § 904.10 because they are neither "in connection with" nor "[e]vidence of" his no

contest plea. (Rejholec's Br. 11–16.) Rejholec does not reference his plea in the statements; how Rejholec's conviction was obtained has nothing to do with his allocution statement. He could have made the same statement had he been convicted upon a jury verdict.

Rejholec argues that his allocution statements were "in connection with" his plea because, without his acceptance of the plea, he would not have been convicted and sentenced: "The plea and sentencing were inherently connected because the sentencing proceedings flowed automatically from Mr. Rejholec's no-contest plea." (Rejholec's Br. 13–14.) Thus, Rejholec argues, all that is required for an in-court statement to be "connected" to the plea was that it occur after (or "flow[ ] automatically from") the plea hearing. But under this logic, a defendant's statement in *any* subsequent court proceeding—including post-sentencing or postconviction proceedings—would be inadmissible under Wis. Stat. § 904.10.

By contrast, reading "in connection with" to require a factual connection, not merely a chronological one, is consistent with the statute's recognized purpose. A factual connection between the defendant's in-court statement and the plea ensures that Wis. Stat. § 904.10 bars only statements that actually threaten free and open discussion in plea negotiations. *Myrick*, 354 Wis. 2d 828, ¶ 42. Plea negotiations are not chilled by admission of in-court statements like Rejholec's that are not about the plea. And as Rejholec recognizes (Rejholec's Br. 14–15), courts have read identical language in another statute to require a factual connection. *See State v. Johnson*, 2009 WI 57, ¶ 33, 318 Wis. 2d 21, 767 N.W.2d 207 (requirement that custody time be "in connection with" the offending conduct under the sentence credit statute,

Wis. Stat. § 973.155(1)(a), means a factual connection, not just a procedural one). [5]

Rejholec next argues that, even if his allocution statements were not "in connection with" his plea, the statements are "[e]vidence of" his plea and therefore are still barred under Wis. Stat. § 904.10. As the State understands it, Rejholec's argument is that his sentencing statements are "[e]vidence of" his no-contest plea because the existence of the plea may be inferred from the fact that he was sentenced. (Rejholec's Br. 15–16.)

Rejholec's allocution statements are not "evidence of" his no-contest plea. At most, the allocution statements show that Rejholec was sentenced, which, in turn, establishes that he was convicted. But neither the substance of the allocution statement itself nor the fact that Rejholec was sentenced (and made an allocution statement) says anything about how Rejholec's conviction was obtained, whether by plea or trial.

Moreover, Rejholec pleaded no contest, rather than guilty. He purposely declined to admit guilt at the plea hearing, then had a change of heart at sentencing and took responsibility. So, even if the fact that Rejholec made an allocution statement supported an inference that he was convicted by *a* plea, Rejholec's allocution statement admitting his guilt is not "evidence of" *his* plea *of no contest*.

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[5] Here, the lack of connection between the plea and sentencing seems more obvious because sentencing was held two months after the plea hearing. (Op. Br. 21.) But, as Rejholec points out (Rejholec's Br. 14 n.2), plea and sentencing sometimes happens at the same hearing. So to clarify, the absence of a connection is shown here primarily by the substance of the allocution statements, not by the time separating the plea and sentencing hearings.

Finally, Rejholec's interpretation of Wis. Stat. § 904.10 would establish different rules of admissibility for allocution statements in later proceedings based on an arbitrary factor: how the conviction was obtained. An allocution statement of a defendant who pleads guilty or no contest would be inadmissible in later proceedings under section 904.10. But for defendants convicted at trial, an allocution statement would not be subject to section 904.10 and thus be admissible. Because there appears to be no good reason to admit or exclude allocution statements based on whether the defendant was convicted by plea or trial, such an interpretation would seem to violate equal protection. *See State v. Smart*, 2002 WI App 240, ¶ 5, 257 Wis. 2d 713, 652 N.W.2d 429 (equal protection prohibits arbitrary distinctions lacking a rational basis).

The Legislature is of course free to adopt a statute meant to encourage defendants to speak freely at sentencing by barring admission of allocution statements in later proceedings. But it has not enacted such a statute, and Wis. Stat. § 904.10 barring admission of evidence of a plea or plea negotiations should not be overread to also bar admission of allocution statements.

For these reasons, Rejoholec's allocution statements are not barred by Wis. Stat. § 904.10.

III. Rejholec fails to show that admission of the statements would violate his constitutional rights to present a defense or to due process.

Rejholec makes two constitutional arguments in support of the circuit court's exclusion of his allocution statements. Neither are availing.

Rejholec first maintains that the State's reading of Wis. Stat. § 904.10 would lead to unconstitutional results. (Rejholec's Br. 16–19.) Rejholec argues that, if section 904.10 were read not to exclude the allocution statement and the

State were allowed to introduce such evidence, he would be denied his right to present a defense. That's because, he asserts, he would be unable to admit the evidence needed to challenge the reliability of his sentencing admissions, citing *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (Rejholec's Br. 17–18). This argument fails.

Rejholec's right to present a defense claim is not ripe for adjudication. "If the resolution of a claim depends on hypothetical or future facts, the claim is not ripe for adjudication and will not be addressed by this court." *State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998). Here, the matter of what evidence Rejholec may or may not wish to present to challenge the reliability of his allocution statements—and whether appropriate limiting or cautionary instructions are sufficient to address any risk of prejudice or improper use of the evidence[6]—has not been litigated.

In *Crane*, by contrast, the constitutional issue was ripe. The trial court admitted Crane's confession but barred the defendant from introducing evidence challenging its reliability under state law. *Crane*, 476 U.S. at 685–87. The Court concluded that application of Kentucky's law barring evidence challenging at trial the voluntariness of his confession violated Crane's right to present a defense. *Id.* Here, no court has prohibited Rejholec from introducing evidence challenging his allocution admissions, and it is *not* a foregone conclusion that Rejholec will be unable to present such evidence. Of course, if Rejholec is later convicted following a trial, nothing would prevent him from raising a

[6] *See State v. Hurley*, 2015 WI 35, ¶ 90, 361 Wis. 2d 529, 861 N.W.2d 174 (limiting and cautionary instructions are an effective means of reducing the risk of unfair prejudice).

constitutional or evidentiary claim over the court's as-yet-undetermined rulings about his presentation of evidence challenging the allocution statements. But at this point, his right to present a defense claim is premature.

Relatedly, Rejholec argues that admission of the allocution statements would violate his right to due process because, again, he asserts that it will be presented without the context needed to defend against the admission: "Fairness should prohibit the State from presenting an inaccurate depiction of Mr. Rejholec's allocution statement by admitting it without context." (Rejholec's Br. 23.) He even goes so far as to argue that, if he were to introduce evidence of the context (presumably, that he was previously sentenced and his conviction was overturned), it would "open[ ] the door" for the State to introduce "the illegally obtained interrogation statement." (Rejholec's Br. 23.)

Rejholec's due process claim is also not ripe; it rests on speculation and assumptions about how his efforts to defend against the allocution statements would be handled by the trial court. The State fails to understand how any reasonable litigation of Rejholec's efforts to challenge the allocution statements would result in the State introducing the barred interrogation statement. Rejholec's spinning out of unreasonable, worse-case scenarios on remand only shows that the matter has not been litigated. Rejholec's due process claim is also premature.

CONCLUSION

For these reasons, and those set forth in the opening brief, the circuit court's order barring introduction of Rejholec's allocution statements should be reversed, and this case should be remanded for further proceedings.

Dated this 18th day of July 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,912 words.

Dated this 18th day of July 2024.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 18th day of July 2024.

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