**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 30, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal Nos.** **2014AP856-CR**
**2014AP857-CR**
**2014AP858-CR**
**2014AP859-CR**
**2014AP860-CR**
**2014AP861-CR**
**2014AP862-CR**

**Cir. Ct. Nos. 2012CF3469**
**2012CF5248**
**2012CM3159**
**2012CM5046**
**2012CM5170**
**2012CM5177**
**2012CM5455**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARVIN DEWAYNE CLEMENTS,**

**DEFENDANT-APPELLANT.**

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APPEALS from judgments and orders of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Marvin Dewayne Clements appeals from judgments of convictions, entered upon a jury's verdicts, on twenty-five charges. He also appeals from the trial court's orders denying his postconviction motion for a new trial. Clements contends that he has new evidence warranting a new trial, and that his removal from the courtroom for disruptive behavior violated his constitutional and statutory rights to be present during *voir dire* and the trial. We agree with the trial court's rejection of these claims, so we affirm.

## BACKGROUND

¶2 Clements was charged with twenty-nine misdemeanors and two felonies in eight circuit court cases because of his repeated violation of a harassment injunction obtained against him by L.W. Clements was charged with nine counts of violating a harassment restraining order, two counts of criminal damage to property, four counts of intimidating a victim, one felony count of solicitation of victim intimidation, one felony count of stalking, and fourteen counts of misdemeanor bail jumping, all as domestic violence incidents. The cases were joined for trial. The State dismissed one of the injunction charges before trial. The jury could not reach verdicts on one of the injunction charges, one of the criminal damage charges, and three of the intimidation charges, but convicted Clements on the remaining twenty-five offenses.[1] The trial court ultimately imposed sentences that, as structured, total twelve years' imprisonment.

[1] Two of the charges on which mistrial was declared were part of Milwaukee County Circuit Court case No. 2012CM1926. Those were the only charges in that case, so that circuit court case is not part of the current set of appeals.

¶3 During the course of trial proceedings, Clements was repeatedly disruptive. Prior to bringing the potential jury panel into the courtroom, Clements interrupted the court several times, and he was warned not to disrupt proceedings when the jury was called. The trial court further cautioned Clements that if he could not sit quietly during *voir dire*, he would be removed from the courtroom. Clements did not heed these warnings and was removed before the jury was called in.

¶4 Clements was allowed back into the courtroom when the afternoon session began. When the trial court began reading the charges to the jury, Clements again interrupted. The trial court had the jury taken out of the courtroom, and Clements continued to talk. Clements was then removed from the courtroom as well. The trial court moved proceedings to a new courtroom with a bullpen in the back from which Clements could view proceedings. Two jurors were dismissed because of possible bias, but *voir dire* continued.

¶5 Clements was allowed back into court the following morning, wearing a stun belt. Trial counsel objected, but the trial court overruled the objection and cautioned Clements to behave. Clements was quiet during the morning session, when jury selection was finished and both attorneys gave opening statements.

¶6 The State began to present its case that afternoon, first calling victim L.W. to testify. During direct examination, Clements became agitated and again interrupted the proceedings, calling to the judge. After the jury was removed, Clements continued shouting, and he was again removed from the courtroom. The

trial court refused a mistrial request from the defense and continued with L.W.'s testimony. Clements was unable to see or hear this testimony.

¶7 When the trial resumed the next day, Clements was not in the courtroom. Instead, he was in an attached room with full audio but limited visibility of the courtroom. L.W. continued her testimony, and the morning session was uninterrupted.

¶8 During cross-examination in the afternoon, Clements again became agitated and began pounding on the window of his adjoining room. The deputies removed Clements and informed the court. The trial court continued proceedings while Clements was transported back to jail.

¶9 For the remaining five days of trial, Clements was allowed to view the proceedings by videoconference from the Milwaukee County Jail. He could see and hear the proceedings but the television in the courtroom was turned off so that the jury could not see or hear him, except when he testified by the same videoconferencing system. To facilitate communication, the trial court allowed counsel to confer with Clements during breaks by using the court's telephone. The jury returned guilty verdicts on twenty-five charges.

¶10 After sentencing, Clements filed a postconviction motion. He alleged that he had new evidence regarding one of the charges—the details of which will be discussed further herein—and he claimed that his right to be present had been violated. The trial court denied the motion without a hearing. It concluded that the new evidence would not have made a difference to the verdict,

and it concluded that Clements had waived his right to be present by his actions. Clements appeals.

## DISCUSSION

### I. Newly Discovered Evidence

¶11 The decision to grant or deny a motion for a new trial because of newly discovered evidence is committed to the trial court's discretion. *See* ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60. On appeal, we review the trial court's decision for an erroneous exercise of that discretion. *See* ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152.

¶12 In a motion for a new trial because of newly discovered evidence, the defendant must show that: (1) the evidence was discovered after the defendant's conviction; (2) the defendant was not negligent in failing to discover the evidence before trial; (3) the evidence is material; and (4) the evidence is not merely cumulative. *See* ***Avery***, 345 Wis. 2d 407, ¶25; ***Morse***, 287 Wis. 2d 369, ¶15. If the defendant makes a sufficient showing on those four points, then the trial court must determine whether there is a reasonable probability that the evidence would have yielded a different result at trial. *See* ***Avery***, 345 Wis. 2d 407, ¶25. "A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." ***Id.***

¶13 Clements was charged with solicitation of witness intimidation because L.W. had received a letter, addressed inside to her daughter N.W., telling

N.W. to "coach your mommy through getting that statement sign and notorize by the DA or Marvin Attorney then you'll can keep that money." (Errors in original.) Included with the letter was a draft statement for L.W. to sign, recanting her allegations against Clements. L.W. identified the letter as written in Clements' handwriting, though it bore the return address of Jeremy Anderegg, who lived in the same jail housing unit as Clements.

¶14 Clements' "new evidence" was a letter from Maxwell Hargreaves, another cellmate in the housing unit, claiming he saw Anderegg write a letter to N.W. Clements claimed that this evidence warranted a new trial because it casts doubt on whether he wrote the solicitation letter to N.W. However, Hargreaves never saw the contents of any letter that Anderegg may have been writing to N.W. Thus, the trial court rejected the request for a new trial because Hargreaves' testimony would not create a reasonable probability of a different result.

¶15 We agree with the trial court. According to Hargreaves, Anderegg intended to start some sort of relationship with N.W., pen pal or otherwise. Any letter Hargreaves saw Anderegg write to N.W. could be consistent with that intent, especially since Hargreaves does not know the contents of the letter he supposedly saw Anderegg write. This vague evidence, when considered against L.W.'s testimony that the letter was in Clements' handwriting, does not cast doubt on whether Clements wrote the solicitation to N.W.

## II. The Right to Be Present

¶16 "There can be little question that an accused has a right under the confrontation clause and the fourteenth amendment to be present in the courtroom at every stage of his trial." ***State v. Haynes***, 118 Wis. 2d 21, 25, 345 N.W.2d 892 (Ct. App. 1984). This right may be lost by misconduct or consent. *See* ***State v. Divanovic***, 200 Wis. 2d 210, 220, 546 N.W.2d 501 (Ct. App. 1996). Although we

> must indulge every reasonable presumption against the loss of constitutional rights … a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

***Illinois v. Allen***, 397 U.S. 337, 343 (1970) (citation omitted). The right to be present can, however, "be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *See* ***id.*** Similarly, WIS. STAT. § 971.04(1)(b)-(c) (2011-12)[2] requires a defendant to be present at *voir dire* and at trial, though § 971.04(3) recognizes that a trial will not be delayed when a defendant voluntarily absents himself from the process.

¶17 Here, the trial court had cautioned Clements to behave appropriately multiple times, but he chose not to do so, instead being argumentative and

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

disruptive. Several attempts at alternative arrangements were made to try to keep Clements present for the proceedings, but the attempts during *voir dire* and L.W.'s testimony were unsuccessful, resulting in Clements' total removal from portions of those proceedings. After each half day, the trial court gave Clements an opportunity to rejoin the proceedings and remain, but he did not take advantage of some of those opportunities.

¶18 The trial court, denying the postconviction motion, found that Clements had waived his right to be present by his actions. On appeal, Clements "acknowledges he was removed due to his own behavior and that the court was justified in removing him." He contends, however, that once he was removed from the courtroom, he should have been allowed to observe the proceedings through technological means. Specifically, he believes that videoconferencing should have been provided so he could be "present" for *voir dire* and L.W.'s testimony.

¶19 Clements' acknowledgement on appeal, that the trial court properly removed him, adequately addresses both the constitutional and statutory presence requirements. That is, he concedes that by his own actions, he waived the constitutional right to be present and voluntarily absented himself from statutorily required appearances. We therefore need not discuss the trial court's determination of waiver further.

¶20 However, there is no current requirement in the law that the trial court must provide an alternate means of appearance for disruptive defendants. Clements suggests that this is because ***Allen*** was decided in 1970, when

technology was significantly different. The age of the ***Allen*** decision notwithstanding, Clements' argument misses the point: a finding of waiver means the defendant has given up the opportunity to be present, period.

¶21 Here, the trial court did ultimately allow Clements to appear for the final days of trial via videoconferencing, after switching courtrooms to place Clements in a bullpen and removing Clements to an adjoining room failed to control his behavior. This does not mean, however, that it was somehow an erroneous exercise of discretion for the trial court to try non-videoconferencing options in the first instance. Indeed, the trial court was admirable in its persistent efforts to find a viable means for Clements to view proceedings, despite his repeatedly disruptive actions.

¶22 "[T]rial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." ***Allen***, 397 U.S. at 343. A trial court is not required to find ways to accommodate a defendant's lack of decorum. We therefore decline to impose a rule that would require trial courts to provide alternate, audiovisual modes of being present for defendants who have waived that right. Videoconferencing is, however, a valid option for trial courts to utilize, subject to availability and to the trial court's discretion.

*By the Court.*—Judgments and orders affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.