COURT OF APPEALS DECISION DATED AND FILED

April 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1424-CR

Cir. Ct. No. 2011CF1996

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES ELVIN LAGRONE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 CURLEY, P.J. James Elvin Lagrone appeals the judgment convicting him of strangulation and suffocation, false imprisonment, second-degree sexual assault, first-degree recklessly endangering safety, and operating

a vehicle without the owner's consent—all with the domestic abuse modifier. *See* WIS. STAT. §§ 940.235(1), 940.30, 940.225(2)(a), 941.30(1), 943.23(3), 968.075(1)(a) (2011-12).[1] On appeal, Lagrone argues that the trial court erred by not conducting a colloquy at the second phase of his NGI proceeding to ascertain whether he was knowingly, intelligently, and voluntarily waiving his right to testify, and by denying his postconviction request for an evidentiary hearing.[2] Lagrone also argues, among other things, that the harmless error doctrine does not apply because it is allegedly impossible to know how the trial court's failure to conduct a colloquy or hold an evidentiary hearing would have affected the trial's outcome. We disagree. The harmless error doctrine does apply. And, for reasons we will explain herein, any error stemming from the trial court's failure to conduct an additional colloquy and its decision to deny Lagrone an evidentiary hearing was in fact harmless. Therefore, we affirm.

BACKGROUND

¶2 Lagrone was charged in May 2011 with strangulation and suffocation, false imprisonment, second-degree sexual assault, first-degree recklessly endangering safety, and operating a vehicle without the owner's consent—all with the domestic abuse modifier. According to the complaint, Lagrone forced his way into the apartment of B.J., his ex-girlfriend, at about 10:00 p.m. on April 30, 2011, and "proceeded to 'humiliate' her until

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[1] The Honorable Richard J. Sankovitz presided over the relevant hearings in this matter and entered the judgment of conviction. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Honorable Jeffrey A. Wagner entered the order denying Lagrone's postconviction motion seeking an evidentiary hearing.

approximately 1:00 p.m. on May 1, 2011." During the time that Lagrone held B.J. captive in her apartment, he choked her, urinated on her, and forced her to touch his genitals numerous times. Then, when one of B.J.'s friends came to the apartment, Legrone panicked and fled in B.J.'s car. Lagrone later turned himself in to police.

¶3 Lagrone, who had been diagnosed with Paranoid Schizophrenia, pled not guilty to the charges by reason of mental disease or defect (NGI). Consequently, a bifurcated proceeding took place. *See* WIS. STAT. § 971.165.

¶4 During the first phase of the NGI proceeding, Lagrone pled guilty to all five counts. Before accepting Lagrone's guilty plea for the first phase, the trial court conducted a colloquy with Lagrone, inquiring whether he had read the plea questionnaire and waiver-of-rights form, discussed it with his attorney, and understood all of the rights "listed in these documents," including "the right to have a trial on whether you committed these crimes" and "the right to present witnesses." Lagrone said that he did read the form and that his attorney helped him understand what the form said, and he said that he understood all of the rights he was foregoing by pleading guilty in the first phase of the proceeding. One of the rights listed on the form was the "right to testify and present evidence at trial." Next to that phrase there was an additional handwritten notation explaining that Lagrone was giving up his right to testify for "phase I," but "[n]ot for [phase] II" of the proceeding.

¶5 During the second phase of the NGI proceeding, Lagrone stood trial but did not testify. The trial court did not, during the mental responsibility phase, conduct an additional colloquy on the record regarding whether Lagrone understood his right to testify or that he was in effect waiving his right to do so.

¶6 Following the second phase of the proceeding, the trial court found that Lagrone did not lack substantial capacity to understand the wrongfulness of his actions or conform his behavior to the requirements of law, and entered a judgment of conviction finding him criminally responsible for the crimes charged. Thereafter, Lagrone was sentenced.

¶7 Lagrone subsequently filed a postconviction motion seeking an evidentiary hearing and an order granting a new trial on the second phase of the NGI proceeding. In his motion, Lagrone argued that the trial court erred in failing to conduct an on-the-record colloquy regarding the waiver of his right to testify at the mental responsibility phase, and that he (Lagrone) did not understand that he had the right to testify at that phase.

¶8 While his motion asserted that he did not understand that he had the right to testify at the second phase of the NGI proceeding, Lagrone did not supply any facts to support his argument. There was no affidavit affirming that Lagrone did not understand that he could have testified at the second phase of the proceeding. Likewise, there was no discussion—in the motion or in an affidavit—explaining why, if Lagrone did not truly understand that he could have testified, his plea questionnaire and waiver-of-rights form contained handwritten notation indicating that Lagrone was giving up his right to testify in the first phase but not the second phase of the proceeding. Additionally, there was no explanation of what Lagrone would have testified to at the second phase of the proceeding had he chosen to do so, or how that testimony would have affected the trial's outcome.

¶9 The trial court denied Lagrone's motion. Lagrone now appeals.

ANALYSIS

¶10 On appeal, Lagrone argues that the trial court erred by not conducting an additional colloquy at the second phase of his NGI proceeding to ascertain whether he was knowingly, intelligently, and voluntarily waiving his right to testify, and erred by denying his postconviction request for an evidentiary hearing based on the lack of the aforementioned colloquy. Lagrone also argues, among other things, that the harmless error doctrine does not apply here. We disagree. The harmless error doctrine does in fact apply. And, for reasons we will explain below, any error stemming from the trial court's failure to conduct an additional colloquy and its decision to deny an evidentiary hearing was harmless. Therefore, we need not determine whether an additional colloquy was required.

A. Whether an additional colloquy was required remains an open question that we need not decide.

¶11 We turn first to Lagrone's contention that the trial court was required to conduct an additional colloquy regarding the right to testify at the second phase of his NGI proceeding. Lagrone argues that the right to testify at the mental responsibility phase, like the right to testify at the criminal responsibility phase, is a fundamental right, *see, e.g.*, ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485, and that an additional colloquy is therefore required. He also argues that the trial court erred in denying him an evidentiary hearing because that is the remedy set forth by ***State v. Garcia***, 2010 WI App 26, ¶14, 323 Wis. 2d 531, 779 N.W.2d 718 ("when the right-to-testify colloquy is absent … the evidentiary hearing is the proper procedural response"). Lagrone does not identify any case directly on point to support his contentions, however. Rather, in arguing that ***Weed*** and ***Garcia*** apply to the second phase of a NGI proceeding, Lagrone relies primarily on ***State v. Langenbach***, 2001 WI App 222, ¶20, 247 Wis. 2d 933, 634

N.W.2d 916, which held that a defendant's Fifth Amendment privilege against self-incrimination "continues through the mental responsibility stage of [a defendant's] criminal trial." In so holding, ***Langenbach*** noted that while the criminal and mental responsibility phases of an NGI proceeding served different purposes, *see* ***id.***, ¶¶16-19, the "impending threat of the deprivation of [the defendant's] liberty," and the necessity of permitting a defendant to remain silent, pervaded both phases, *see* ***id.***, ¶¶13, 19.

¶12 The State, in contrast, argues that there is no fundamental right to testify at the mental responsibility phase of a NGI proceeding and that no additional colloquy is required. Like Lagrone, the State offers no case directly on point, but relies heavily on ***State v. Francis***, 2005 WI App 161, ¶1, 285 Wis. 2d 451, 701 N.W.2d 632, which held that there is no fundamental right to a NGI plea and, therefore, a colloquy is not required prior to plea withdrawal. It also cites ***State v. Koput***, 142 Wis. 2d 370, 374, 418 N.W.2d 804 (1988), which held that at the mental responsibility phase of an NGI trial, "the defendant has the burden of proof to establish his lack of responsibility to a reasonable certainty by the greater weight of the credible evidence," and that a five-sixths, not a unanimous, verdict is all that is required. The State cites ***Koput***'s lengthy discussion comparing the first and second phases of an NGI proceeding, *see, e.g.*, ***id.*** at 392-95, to argue that because the second phase, unlike the first, "is not criminal in its attributes or purposes," *see* ***id.*** at 397, it is not necessary to require a colloquy regarding a defendant's right to testify during the second phase.

¶13 In the instant case, we need not decide this issue of first impression because the matter can be resolved on narrower grounds. *See* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (we decide cases on the narrowest possible ground). As we will explain below, regardless of whether the

trial court was required to conduct an additional colloquy, Lagrone is not entitled to an evidentiary hearing because he has failed to show that any error was not harmless. *See* ***State v. Nelson***, 2014 WI 70, ¶¶27, 51-52, 355 Wis. 2d 722, 849 N.W.2d 317 (court may "assume, without deciding, that error occurred, and analyze only whether that assumed error" was harmless).

B. The harmless error doctrine applies.

¶14 In ***Nelson***, the supreme court held that the harmless error doctrine applies to a trial court's alleged denial of a defendant's right to testify. *See* ***id.*** The ***Nelson*** court began with the "'strong presumption' that an error is subject to a harmless-error review," *see* ***id.***, ¶29 (citation omitted), and went on to describe the difference between the vast majority of errors, which *are* subject to harmless-error review, and the "'very limited class of cases'" that require automatic reversal, *see* ***id.***, ¶¶29-30 (citation omitted). The court explained that the denial of the right to testify fell into the first category because it was easy to discern whether the denial meaningfully impacted the trial's outcome:

> An error denying the defendant of the right to testify on his or her own behalf bears the hallmark of a trial error. That is, its affect on the jury's verdict can be "quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."

See ***id.***, ¶32 (citation omitted).

¶15 Despite the clear holding in ***Nelson***, Lagrone argues that harmless error does not apply to an error that was similar in effect to a denial of the right to testify. Lagrone argues that harmless error does not apply in his case because the effect of his testimony on the trial's outcome "is not capable of assessment." That is only true, however, because he refuses to tell us what his testimony would have

been. In other words, Lagrone claims the outcome is not capable of assessment because the trial court failed to hold an evidentiary hearing at which he could testify.

¶16 We reject Lagrone's argument and conclude that a trial court's failure to hold an evidentiary hearing following the failure to conduct a colloquy regarding a defendant's right to testify is no different than the direct denial of a defendant's right to testify at trial. *Cf.* ***id.***, ¶¶14-17 (trial court refused to allow defendant to testify at trial because her alleged testimony would have been "'completely irrelevant'"). In both instances, we can "quantitatively assess[]" what the defendant would have testified to "'in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'" *See* ***id.***, ¶32 (citation omitted). Doing so is as easy as reviewing an affidavit set forth by the defendant explaining what his or her trial testimony might have been and evaluating whether that testimony would sufficiently undermine our confidence in the trial's outcome. *See* ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397 (our inquiry in reviewing harmless error is whether the error "sufficiently undermines the court's confidence in the outcome of the judicial proceeding").

¶17 Consequently, we hold that ***Nelson*** applies to the instant case and we review the trial court's failure to conduct an additional colloquy and denial of an evidentiary hearing for harmless error.

¶18 While it is of course the State's burden to prove that an error was harmless, *see* ***id.***, 355 Wis. 2d 722, ¶44, it has adequately met that burden in a case where there was, by Lagrone's own admission, plenty of evidence to support the

trial court's verdict and where Lagrone has not submitted any evidence to the contrary.[3] *See* ***Harris***, 307 Wis. 2d 555, ¶42. As noted, Lagrone failed to offer any evidence regarding what his testimony at the second phase of his trial might have been. While his motion asserted that he did not understand that he had the right to testify at the second phase of the NGI proceeding, there was no affidavit explaining that he did not understand that he could have testified at the second phase of the proceeding. Likewise, there was no discussion, in the motion or in an affidavit, explaining why, if Lagrone did not truly understand that he could have testified, his plea questionnaire and waiver-of-rights form contained handwritten notation indicating that Lagrone was giving up his right to testify in the first phase but not the second phase of the proceeding. And again, there was no explanation of what Lagrone would have testified to at the second phase of the proceeding had he chosen to do so, or how that testimony would have affected the trial's outcome. Without any sort of offer of proof from Lagrone regarding what his testimony might have been, we cannot conclude that Lagrone's decision not to testify—regardless of whether that decision resulted from the trial court's error—had any effect on the trial's outcome. *See* ***id.***; *see also* ***State v. Winters***, 2009 WI App 48, ¶¶14-19, 21-24, 317 Wis. 2d 401, 766 N.W.2d 754 ("Without an offer of proof, the trial court could not consider the potential for prejudice and neither can we.").

¶19 In sum, we conclude that any error by the trial court in failing to conduct an additional colloquy and/or denying Lagrone's request for an

[3] Lagrone does not argue that the evidence at the mental responsibility phase of his proceeding was insufficient to support the trial's verdict that Lagrone did not lack substantial capacity to appreciate the wrongfulness of his actions or to conform his behavior to the requirements of law.

evidentiary hearing was harmless. The judgment of conviction and order denying postconviction relief are therefore affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.