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**DISTRICT II**

May 4, 2016

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You are hereby notified that the Court has entered the following opinion and order:

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2015AP609-CR

State of Wisconsin v. Trevor L. Rogers (L.C. # 2011CF1605)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Trevor L. Rogers appeals from a judgment convicting him of second-degree intentional homicide with use of a dangerous weapon. He contends that the circuit court violated his due process right to present a defense. He further contends that he is entitled to discretionary reversal. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We affirm the judgment of the circuit court.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version.

Rogers was accused of killing his stepfather, Thomas Person, in December 2011. He entered a no contest plea to the charge of second-degree intentional homicide with use of a dangerous weapon. He also entered a special plea of not guilty by reason of mental disease or defect.

The matter proceeded to a bench trial on the issue of mental responsibility. There, Rogers presented the testimony of two psychologists. They diagnosed him as having bipolar disorder with psychosis or psychotic features. They also opined that Rogers could not appreciate the wrongfulness of his conduct and conform his behavior to the requirements of the law.

The State also presented the testimony of two psychologists. They agreed that Rogers suffered from bipolar disorder. However, they disagreed that Rogers lacked the capacity to appreciate the wrongfulness of his conduct and conform his behavior to the requirements of the law.

In rebuttal, Rogers recalled one of his psychologists to testify. Rogers asked her if there were scientific studies that explained the differences in the brain and the disconnection between certain parts of the brain. She identified two articles: (1) “Post-Traumatic Stress Disorder: The Role of Medical Prefrontal Cortex and Amygdala,” and (2) “Global Prefrontal and Frontal Amygdala Disconnectivity in Bipolar I Disorder with Psychosis History.” Rogers then had the articles marked as exhibits.

The State objected to the articles on grounds of relevancy and lack of foundation. The circuit court asked the psychologist if she had relied on the articles in rendering her opinions. She replied that she did not know if “relied is the correct word.” Rather, she said the “articles validate[] and back[] up what we have been saying.” In response to further questioning from the

court, the psychologist acknowledged that (1) she did not diagnose Rogers with post-traumatic stress disorder, and (2) the second article's relevance was premised upon what she believed a scan of Rogers' brain would show. She then admitted that no scan was actually done in the case. The court subsequently sustained the State's objection.

After briefing from the parties, the circuit court issued a written decision that included a recitation of the facts surrounding the homicide, a discussion of the experts' opinions, and credibility findings related to the experts' testimony. Ultimately, the court denied Rogers' special plea and found him guilty of second-degree intentional homicide with use of a dangerous weapon. It sentenced Rogers to six years of initial confinement followed by eighteen years of extended supervision. This appeal follows.

On appeal, Rogers first contends that the circuit court violated his due process right to present a defense. He bases this argument on the court's exclusion of the two articles offered in rebuttal.<sup>2</sup> Rogers suggests that the articles would have bolstered the credibility of his experts.

The decision to admit or exclude evidence rests within the sound discretion of the circuit court, which we will not overturn absent an erroneous exercise of discretion. *State v. Novy*, 2013 WI 23, ¶21, 346 Wis. 2d 289, 827 N.W.2d 610. When the exclusion of evidence implicates a defendant's constitutional right to present a defense, however, the decision not to admit the

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<sup>2</sup> Rogers never suggested to the circuit court that the exclusion of the articles deprived him of his right to present a defense. Despite the forfeiture of this argument, we will address it on the merits. *See State v. Anderson*, 2015 WI App 92, ¶6, 366 Wis. 2d 147, 873 N.W.2d 82 (the forfeiture rule is one of judicial administration that appellate courts have the authority to ignore).

evidence presents a question of constitutional fact that this court reviews de novo. *State v. Wilson*, 2015 WI 48, ¶47, 362 Wis. 2d 193, 864 N.W.2d 52.

Here, we are not persuaded that the circuit court's exclusion of the articles violated Rogers' right to present a defense. To begin, the articles were of marginal relevance at best. The first addressed a disorder (post-traumatic stress disorder) that Rogers was not diagnosed with, while the second concerned speculation of what Rogers' brain might have looked like if a scan had been done. Moreover, the court specifically asked Rogers' psychologist if she had relied on the articles in rendering her opinions, and she could not say that she did. Accordingly, we fail to see how the articles would have bolstered the credibility of Rogers' experts.

Rogers next contends that he is entitled to discretionary reversal. He maintains that justice miscarried when the circuit court relied too heavily on the testimony of one of the State experts.

WISCONSIN STAT. § 752.35 confers discretionary authority upon this court to order a new trial whenever it is probable that justice has miscarried. We exercise that authority "infrequently and judiciously," only in "exceptional cases." *State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted).

This is not an exceptional case. Rather, this is a case where the circuit court carefully considered conflicting testimony and made credibility determinations before rendering its decision. The fact that the court found one of State experts "particularly credible" is unremarkable, as the court explained the basis of that finding in its written decision. In any event, on this record, we decline to exercise our power of discretionary reversal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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