COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP820-CR **Cir. Ct. No. 2009CF13**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JARED G. MOLNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Order reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Jared Molner appeals a judgment of conviction for robbery and receiving stolen property, and an order denying his post-conviction motion for a competency examination under WIS. STAT. § 971.14.[1] The current criminal proceedings were initiated against Molner when he was found incompetent by federal authorities and released from custody. Molner generally refused to speak to the court or his attorney and displayed other bizarre behavior, and a doctor who examined Molner shortly before trial opined in a post-conviction report procured by the defense that he was not competent during the proceedings. Without ordering a competency examination, the court declared Molner to be playing a game by which he sought a tactical advantage.

¶2 A court must order a competency examination when there is "reason to doubt a defendant's competency to proceed." WIS. STAT. § 971.14(1r)(a). Because we conclude there was reason to doubt Molner's competency as a matter of law, we reverse the post-conviction order and remand for the circuit court to determine whether a meaningful *nunc pro tunc* inquiry can be made regarding Molner's competency to understand and assist in the proceedings against him. If the court determines a meaningful inquiry can be made, it must order a competency examination and hold a hearing. If a meaningful inquiry cannot be made, the court shall vacate the judgment of conviction and order a new trial.

BACKGROUND

¶3 The De Soto Bank in Crawford County was robbed on October 5, 2005. The subsequent investigation connected Molner, a twenty-seven year old

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

from an Amish family, to the De Soto robbery and several other bank robberies. Molner admitted his participation and asserted he had simply followed others' directions. Molner was charged with several felonies and a misdemeanor in Vernon County case No. 2005CF67. Though Molner was at times uncooperative, he communicated with law enforcement officers and retained counsel.

¶4 On January 30, 2006, Molner was taken into federal custody and the state proceedings were adjourned. Approximately one month later, the circuit court was advised that there was some issue regarding Molner's competency in the federal prosecution. Molner ceased verbally communicating with his federal attorney in February 2006. He was then referred to an Illinois correctional center for evaluation, but generally remained silent and uncooperative. There was some suggestion by staff that Molner was adopting "strawman" techniques he had learned at a 2005 seminar about refusing to recognize the federal government. Staff, however, opined they could not adequately evaluate Molner's mental state because of his silence, and recommended that he be referred to the Federal Bureau of Prisons' medical center.

¶5 Molner was transferred to the Federal Medical Center in Butner, North Carolina, for evaluation. Molner's evaluation team reported on several occasions that Molner continued to be a "diagnostic puzzle." Molner generally remained mute, but spoke occasionally with his family and his roommate. He often appeared anxious and fearful, and believed there were children in his mind, according to Molner's roommate. The evaluation team crafted several theories for Molner's mutism, including an anxiety disorder or obstruction:

> These range from feeling intimidated if he talks, by either his co-defendants or possibly family; that he is attempting to obstruct justice because of anti-government beliefs; that he is malingering in order to appear mentally ill when he is

> not; that his anxiety when asked to speak to authority figures or mental health providers causes him to be selectively mute; or he is employing a volitional decision not to speak to obstruct his court case.

Ultimately, the evaluation team concluded that, to a reasonable degree of medical certainty, Molner was not competent to stand trial. The Federal Medical Center's warden joined in this opinion, remarking that Molner was mentally incompetent and would be "unable to understand the nature and consequences of the proceedings filed against him or assist properly in his own defense."

¶6 On April 30, 2007, the circuit court was advised of Molner's incompetency. The State voluntarily dismissed case No. 2005CF67 in May after a federal magistrate found Molner incompetent and not likely to regain competence.

¶7 In early 2009, the Vernon County district attorney discovered Molner was not under civil commitment and was actively engaged in self-representation in a child custody proceeding in North Carolina. The State then filed the present action, charging Molner with robbery, burglary while armed with a dangerous weapon, possession of burglarious tools, carrying a concealed weapon, contributing to the delinquency of a child, and concealing stolen property, all as party to the crime. Molner was extradited to Wisconsin, and an amended information dropped the burglary and delinquency charges.

¶8 Molner made his initial appearance without counsel and refused to talk to the court, instead staring at the floor. He was advised of his right to counsel by the court but did not respond.

¶9 The hearing was adjourned until May 6, 2009, at which time Molner again appeared without counsel. The prosecutor represented that Molner was communicative in other court proceedings and with the sergeant who transported

him from North Carolina. The court concluded it would need to schedule a hearing to determine whether "there's a reason to be concerned about his competence," after which the court would decide whether to order a psychological examination. The State began listing the evidence it would present at such a hearing, including testimony from Molner's wife, and the court responded, "That's fine, because I think apparently Mr. Molner isn't going to object to anything, so you can offer pretty much anything you want."

¶10 The evidentiary hearing was held on May 20, 2009. Molner appeared without counsel and sat in a corner in the audience portion of the courtroom. He did not participate in the proceeding or object to any of the evidence offered by the State, including his wife's testimony. At the conclusion of the hearing, the court determined Molner was either malingering or engaging in selective mutism, and there was no reason to doubt Molner's competency. On appeal, the State concedes the May 20 hearing was a critical proceeding held in violation of Molner's Sixth Amendment right to counsel, and the evidence presented should not have been considered in determining whether there was reason to doubt Molner's competency.

¶11 The court appointed counsel following the May 20 hearing. On October 14, counsel filed a motion for a competency determination pursuant to WIS. STAT. §§ 971.13 and 971.14. The motion was based on the federal incompetency finding and counsel's assertion that Molner had not communicated with him verbally or otherwise since the representation began. The State opposed the motion, relying in part on the evidence it previously presented. The court denied the motion in a written order in which it concluded, primarily based on its own observations, that Molner was malingering. The court remarked, "To proceed as required under Section 971.14 would yield results redundant to the [federal]

custodial evaluation, would reward and reinforce the defendant's tactical maneuvers, would provide no new or useful information and would further delay the just resolution of this case for no good purpose."[2]

¶12 Molner, through counsel, filed a motion to reconsider, again asserting he was entitled to a competency evaluation under WIS. STAT. § 971.14. Molner asserted the May 20, 2009 hearing was "premature," and requested "a mental health professional, to both evaluate the defendant as to his competency to aide in his defense or to participate in a trial." The court refused to hear argument on the motion and stated it would be denied unless the State joined the request, which the State declined to do.

¶13 On January 6, 2010, Molner's counsel informed the circuit court he had received a suicide note from his client. The note also included threats to kill counsel and others, and other vague and unsettling assertions. Molner's counsel renewed his request for appointment of a mental health professional to evaluate Molner's competency and potentially open communications between Molner and counsel. The court responded it saw no need to appoint a mental health professional based upon a suicide threat.

¶14 On the morning of trial, prior to jury selection, Molner's counsel delivered a letter objecting based on Molner's incompetence. As one basis for the objection, counsel argued the May 20, 2009 hearing to determine competency was held in the absence of counsel and without the benefit of an examination under

[2] On appeal, Molner contends this statement shows the court believed Molner would be found incompetent if an evaluation was ordered, because he had been found incompetent to stand trial in federal court. However, we understand the circuit court to be expressing its belief that an evaluation would be pointless, as the court did not believe Molner would speak to a psychologist.

WIS. STAT. § 971.14. The court responded the May 20 hearing was not a competency hearing, but a "preliminary inquiry into whether there was reason to doubt the defendant's competence, in view of the fact that the defendant was not communicating with anyone. … So there's never been an evidentiary hearing where witnesses have testified under oath as to competence." The court stated it saw no need for an evidentiary hearing, as it had concluded "the defendant is in effect malingering."

¶15 During jury selection, Molner began ripping his clothing and pushing papers across the table. After he was allowed to speak with his father in private, Molner returned and stated he did not trust his attorney, expressed dissatisfaction with the representation, and purported to fire counsel. Molner also alleged he had been treated cruelly, threatened to tell prospective jurors he was handcuffed, and invited the court to contact newspapers and television stations. Molner asked prospective jurors whether they were United States citizens, whether they received government assistance, and if they had driver's licenses and social security numbers.[3] Molner then asserted the jury was improper because it was a "Hamas jury" that had been bribed by the International Monetary Fund. He also asserted the jury was comprised of federal employees. The court construed these comments as a motion to strike the jury panel, which it denied.

¶16 Molner was ultimately convicted of robbery and receiving stolen property. The jury found him not guilty of carrying a concealed weapon. Molner was sentenced to a total bifurcated sentence of twelve years.

[3] The court ruled these questions were irrelevant.

¶17 Unbeknownst to the defense counsel, the State, or the court, in April 2009, Molner had been treated by a medical doctor, Natalie Sadler, at his parents' request in North Carolina. Sadler found Molner had symptoms of major depression and post-traumatic stress disorder with disassociation. According to Sadler, disassociation is "a state in response to trauma … so overwhelming that a person cannot handle it, so they separate the feelings and emotions off from the event or compartmentalize the memories."

¶18 Molner filed a post-conviction motion in which he sought an order vacating his conviction and a new trial. Post-conviction counsel had Sadler review Molner's records, and she confirmed her initial 2009 diagnoses. Sadler agreed Molner's courtroom outburst was "a delay tactic," but did not believe Molner could work with his attorney or understand the consequences of his behavior. She found it "not very probable" that Molner was "making up or faking" his symptoms. Ultimately, Sadler opined that from May 2009 to February 2010, Molner "was suffering from a mental disease or defect rendering him mentally incompetent … to understand the nature and consequences of the proceedings filed against him or assist properly in his own defense."

¶19 The court orally denied Molner's post-conviction motion. The court first took issue with the federal prosecution, labeling it a "disgrace" and opining that the federal authorities had "dropped the ball." The court analogized Molner's case with the 1996 thriller *Primal Fear*:[4]

> But the plot line of that movie is a country bumpkin … [is] accused of a brutal murder. And the plot twist at the very end is that through all these legal machinations he winds up

[4] For those who have not seen the movie, we pause to caution "spoiler alert."

> being found not guilty by reason of mental disease or defect. And Richard Gere, as his lawyer, thinks he is indeed, you know, not guilty by reason of mental disease or defect. But then just as he's walking out of the defendant's cell, the defendant slips up and says something that inadvertently reveals it's all been an act and he's been pulling the wool over everybody's eyes … the whole time.
>
> And I'll be very candid about it. I'm absolutely convinced that that's what … has occurred in this case.

The court stated Molner was trying to sabotage the proceedings and concluded "there is [not] now nor ever was any reason to doubt this defendant's competency."

¶20 The court regarded the May 20, 2009 hearing not as a competency hearing, but as a hearing solely "for the purpose of determining whether there was a reason to doubt [Molner's] competency." The court labeled the fact that Molner was unrepresented a "red herring" and determined that "any error … was corrected by the fact that counsel was appointed later that same day." The court noted Molner could have contacted the public defender, but instead "he continued to play the mute game. And I'm satisfied that's what it was in this case. It was a game." The court found no Sixth Amendment violation.

¶21 The court also rejected Sadler's opinion as having an "aura of naiveté …." It believed Sadler felt sorry for Molner, which colored her opinion. The court reached this conclusion because Sadler had initially been contacted by Molner's family and had accepted a reduced rate for her testimony in Molner's case. The court labeled much of Sadler's opinion "rank speculation," which the court stated is "a problem with a lot of psychiatric testimony …." The court later stated Sadler's opinion added "virtually nothing to the analysis in this case."

¶22 Molner appeals the judgment of conviction and the order denying his post-conviction motion. He contends he was denied due process, convicted in violation of his Sixth Amendment right to counsel, and erroneously denied his right to a competency examination under WIS. STAT. § 971.14.

DISCUSSION

¶23 "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." ***Drope v. Missouri***, 420 U.S. 162, 171 (1975). This principle is "a cornerstone of our criminal justice system," ***State v. Byrge***, 2000 WI 101, ¶26, 237 Wis. 2d 197, 614 N.W.2d 477, and "fundamental to an adversary system of justice," ***Drope***, 420 U.S. at 171-72. Accordingly, under federal law, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and must have "a rational as well as factual understanding of the proceedings against him." ***Dusky v. United States***, 362 U.S. 402 (1960).

¶24 "As long as a State affords a criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial, a State is free to establish its own procedures for determining competency." ***State v. Guck***, 176 Wis. 2d 845, 850-51, 500 N.W.2d 910 (1993); *see also* ***Pate v. Robinson***, 383 U.S. 375, 385 (1966). At issue in ***Pate***, 383 U.S. at 385, was an Illinois statute that required a judge to conduct a competency hearing when the evidence raised a "bona fide doubt" as to the defendant's competence to stand trial. The Supreme Court reversed the

defendant's conviction, determining that his long history of "pronounced irrational behavior" warranted a hearing. ***Id.*** at 385-86.

¶25 Wisconsin, like Illinois, *see* ***id.*** at 385, "jealously guards" the right to a fair trial. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." WIS. STAT. § 971.13(1). This "understand-and-assist" test forms "the core of the competency-to-stand-trial analysis." ***Byrge***, 237 Wis. 2d 197, ¶28. The legislature has enacted an extensive series of procedures to protect the due process rights of incompetent defendants. *See generally* WIS. STAT. § 971.14.

¶26 A court is required to proceed under WIS. STAT. § 971.14 "whenever there is reason to doubt a defendant's competency to proceed." WIS. STAT. § 971.14(1r)(a). If such reason exists, the court "shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant." WIS. STAT. § 971.14(2)(a), (3)(c). The parties may rest their competency case upon these reports or may request an evidentiary hearing. WIS. STAT. § 971.14(3)(b). If the court determines the defendant is competent, the criminal proceeding shall be resumed. WIS. STAT. § 971.14(4)(c). If it determines the defendant is not competent and not likely to become competent within a specified time, the proceeding shall be suspended and the defendant released or ordered to a treatment facility. WIS. STAT. § 971.14(4)(d), (6)(b). This procedure is "a critically important fail-safe device for the benefit of accused persons who may not be able to fully cooperate and assist in their defense." ***Guck***, 176 Wis. 2d at 851.

¶27 The threshold inquiry under WIS. STAT. § 971.14 is whether there was reason to doubt Molner's competency to proceed. In ***State v. McKnight***, 65 Wis. 2d 582, 595, 223 N.W.2d 550 (1974), our supreme court set a low standard—"some evidence." This standard, though, does require a minimal factual basis; the mere suggestion of counsel is not enough. ***Id.*** The standard to decide whether an inquiry into the defendant's competency is necessary demands less evidence of disability than the ruling on competency itself. ***State v. Debra A.E.***, 188 Wis. 2d 111, 131 n.17, 523 N.W.2d 727 (1994) (citing THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS & INSTRUMENTS 64 (1986)). Reason to doubt a defendant's competency may be raised by a motion setting forth grounds for belief that the defendant lacks competency, by evidence presented during the proceedings, by the court's colloquies with the defendant, or by the defendant's courtroom demeanor. ***Id.*** at 131.

¶28 The question of whether there is sufficient evidence giving rise to a reason to doubt competency is left to the sound discretion of the circuit court. ***State v. Weber***, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1998). We affirm discretionary decisions if the circuit court applied the correct law to the facts of record and reached a reasonable result. ***State v. Peterson***, 222 Wis. 2d 449, 453, 588 N.W.2d 84 (Ct. App. 1998).

¶29 Here, we conclude the circuit court erroneously exercised its discretion because there was reason to doubt Molner's competency to proceed, as a matter of law. Molner was therefore entitled to an examination under WIS. STAT. § 971.14(2). This conclusion is guided by our supreme court's decision in ***McKnight*** and our decision in ***State v. Haskins***, 139 Wis. 2d 257, 407 N.W.2d 309 (Ct. App. 1987).

¶30 In ***McKnight***, 65 Wis. 2d at 587, defense counsel petitioned the court to appoint a psychiatrist to examine the defendant, opining the defendant was "either feeble-minded or insane." The court denied the request, and the defendant himself then filed a motion to withdraw his guilty plea on several grounds including incompetency. ***Id.*** at 587-88. Our supreme court concluded there was insufficient reason to doubt the defendant's competence. ***Id.*** at 595. Defense counsel's request for an examination was not supported by facts giving rise to a reason to doubt competency, and the only factual basis in the defendant's motion was his own statement that he didn't understand the proceedings. ***Id.*** Because the defendant filed a lengthy motion seeking withdrawal of his guilty plea, the court concluded he could sufficiently understand the proceedings. ***Id.***

¶31 Here, counsel presented an adequate factual basis, at a minimum, for the post-conviction motion. Three key facets of this case provide that factual basis: (1) Molner's prior incompetency in federal proceedings; (2) defense counsel's repeated reports that Molner's behavior was the same as it had been during those federal proceedings; and (3) Sadler's opinion that Molner was incompetent during trial.

¶32 The dismissal of federal proceedings based on Molner's incompetency is critical. Both the warden at the Federal Medical Center and Molner's evaluation team at the facility opined that Molner was incompetent to stand trial. Further, Molner was actually found incompetent by a federal magistrate. We recognize that "while prior mental illness is a relevant factor affecting determination of reason to doubt competency, the issue is whether [the] defendant is competent at the time of the proceedings, not at some time in the distant past." ***Weber***, 146 Wis. 2d at 827. However, defense counsel's repeated

motions cited specific factual bases for his belief that Molner's incompetency continued throughout this case.

¶33 Unlike counsel in ***McKnight***, defense counsel here set forth in painstaking detail the grounds for his belief that Molner was incompetent. Counsel advised the court that Molner had been found incompetent in recent federal proceedings, and attached to his motions the relevant reports from federal authorities. Counsel further represented that Molner was engaged in the same pattern of non-communicative behavior he had displayed while in federal custody, which led to the federal incompetency finding. Counsel promptly notified the court and again requested a competency evaluation when he received Molner's suicide note and death threat. Finally, counsel's post-conviction motion included Sadler's report, in which she opined that Molner's incompetency continued through his trial.

¶34 Sadler's report forms the final component providing reason to doubt Molner's competency in this case. Sadler last treated Molner in April 2009, just weeks before he was extradited to Wisconsin. During the meeting, Molner stated his name was not "Jared" and signed documents as "Jed." Molner also identified himself as "Ty," and said he experienced nightmares and feared someone was trying to kill him. Sadler reported Molner "had problems with sleep, no appetite and not eating, depressed mood, crying spells, decreased concentration, decreased interest in things, some anxiety and panic feelings during the day, [and was] passively suicidal, no plan." Molner stated there were "other small child parts inside of him." Sadler ultimately found Molner had symptoms of major depression and post-traumatic stress disorder with disassociation, and prescribed Zoloft and Abilify. Based upon her treatment experience, a post-conviction interview with Molner, and review of records from the state proceedings, Sadler

opined that Molner was unable to understand the proceedings or assist in his defense at trial.

¶35 These three key factual components are nearly identical to those we found created reason to doubt the defendant's mental competency in ***Haskins***. There, Haskins was charged with burglary. ***Haskins***, 139 Wis. 2d at 260. Haskins had been declared incompetent in a previous judicial proceeding. ***Id.*** Despite possessing letters and documents from experts questioning Haskins' competency to proceed, defense counsel opted not to raise the issue for strategic reasons. ***Id.*** Upon a post-conviction motion alleging ineffective assistance of counsel, Haskins' attorney stated his client's mind was "in and out" and he "could not retain a train of thought for any length of time that was sufficient to really be effective in communicating." ***Id.*** at 263.

¶36 On appeal, we determined it was error not to raise the issue of competency. ***Id.*** at 262-63. As a matter of law, there was reason to doubt Haskins' competency under WIS. STAT. § 971.14. ***Id.*** at 265. The evidence at the post-conviction hearing included: (1) the testimony of trial counsel raising legitimate doubts concerning Haskins' competency based upon counsel's experience with Haskins both in this case and prior cases; (2) expert testimony that Haskins was incompetent to proceed; and (3) Haskins' prior incompetency. ***Id.*** Because defense counsel must raise the issue when he or she has reason to doubt the client's competency, *see* ***State v. Johnson***, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986), we determined counsel's performance was deficient and prejudiced the defendant. ***Haskins***, 139 Wis. 2d at 263, 265.

¶37 The State counters by painting this case strictly as a credibility question. It is true that competency to stand trial is a judicial inquiry, not a

medical determination. ***Byrge***, 237 Wis. 2d 197, ¶31. Credibility determinations are the exclusive province of the trier of fact, ***State v. Perkins***, 2004 WI App 213, ¶¶14-15, 277 Wis. 2d 243, 689 N.W.2d 684, and competency proceedings are no exception, *see* ***Weber***, 146 Wis. 2d at 826. The rule applies with equal force to lay witnesses and expert witnesses. *See* ***City of Stoughton v. Thomasson Lumber Co.***, 2004 WI App 6, ¶18, 269 Wis. 2d 339, 675 N.W.2d 487.

¶38 While the State is correct that the circuit court was in the best position to judge Molner's demeanor, that does not mean the court was entitled to rely solely on its own observations of competency under the circumstances of this case. Again, ***Haskins*** is instructive:

> The issue here is not the right of the trial court to base its finding that there is no reason to doubt a defendant's competency to proceed, in part, upon its own first-hand observations of the defendant. But when the trial court's opinion is countered by expert testimony that the accused was incompetent, trial counsel's reservations regarding the client's competency, and a history of prior incompetency for purposes of criminal proceedings, we do not hesitate to conclude that an evaluation and further proceedings under sec. 971.14, Stats., are mandated.

Haskins, 139 Wis. 2d at 266; *see also* ***Weber***, 146 Wis. 2d at 828. We appreciate that the circuit court believed Molner was engaging in an elaborate farce, but it could not deny him an evaluation under WIS. STAT. § 971.14(2) in the face of substantial evidence to the contrary.

¶39 Among that evidence was Dr. Sadler's opinion, which the circuit court rejected as naïve and unprofessionally sympathetic to Molner. Despite Sadler's citation to nine psychology references, including several on malingering, the court dismissed Sadler's opinion as "rank speculation" that added virtually nothing to the case. However, the circuit court was not entitled to summarily

reject expert testimony suggesting Molner was in fact incompetent. *See* ***Haskins***, 139 Wis. 2d at 266; ***Weber***, 146 Wis. 2d at 828. If the circuit court doubted Sadler's evaluation, the proper course under the circumstances was to obtain a court-appointed evaluation pursuant to WIS. STAT. § 971.14(2) and (3). It also could have appointed an examiner having particular experience with malingering, as § 971.14(2)(a) directs the court to appoint an examiner "having the specialized knowledge determined by the court to be appropriate."

¶40 Citing ***Weber***, 146 Wis. 2d at 823, the State points out that extensive hearings and psychiatric examinations are not prerequisites to every case. In that case, Weber's counsel twice sought a competency hearing and was denied both times because the motions lacked a factual basis. ***Id.*** at 823-24. Defense counsel sought to withdraw, and during questioning on that topic Weber stated he heard "several different voices" and, "All the chickens flew the coop." ***Id.*** at 824. The circuit court assessed Weber's statements as an act. ***Id.*** Later, counsel again sought a competency hearing based on a ten and one-half month commitment that occurred several years earlier. ***Id.*** at 824-25. The court peremptorily denied the motion, labeling counsel's mental health concerns a "delaying tactic." ***Id.***

¶41 On appeal, we affirmed. We found no reliable evidence in the record raising a bona fide doubt as to competency. ***Id.*** at 828. We credited the circuit court's assessment of Weber's conduct as tactical, and noted that defense counsel raised the issue of competency in highly equivocal language. ***Id.*** at 826. Weber had three attorneys, but only the first expressed any reservations about Weber's competency. ***Id.*** at 828. That attorney did not produce any substantiating records or offer any specific reasons for questioning Weber's competence. ***Id.*** Weber's most involved counsel expressed no doubts about Weber's competency and "[e]vidently … could not substantiate a reason to doubt competency based on

Weber's alleged psychiatric treatment …." ***Id.*** at 828-29. Further, Weber appeared capable of understanding the proceedings and assisting his defense. ***Id.*** at 827-28. In sum, there was "nothing in the record countering the trial court's determination that Weber's brief and isolated display of inappropriate behavior at arraignment was 'an act.'" ***Id.*** at 829.

¶42 We regard ***Weber*** as factually distinguishable. While the ***Weber*** record was lacking in facts establishing reason to doubt the defendant's competency, the record here does not suffer from the same defect. We have previously set forth the voluminous record in this case contradicting the circuit court's assessment of Molner's behavior. Based on this evidence, Molner's trial counsel vociferously argued, in unequivocal language, there was reason to doubt Molner's competency. The record here reflects far more than a "brief and isolated display of inappropriate behavior." *See* ***Weber***, 146 Wis. 2d at 829.

¶43 It is significant that the court's impressions of Molner were influenced in large part by an evidentiary hearing held in violation of Molner's right to counsel. At the May 20, 2009 hearing, the State engaged in an extensive presentation of evidence. The State does not respond to Molner's assertion—and therefore concedes—that much of this evidence was objectionable, including Molner's wife's testimony under WIS. STAT. § 905.04. *See* ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590 (unrefuted arguments deemed conceded). Molner, whose potential mental incompetency formed the very basis for the May 20 hearing, was unable or unwilling to object to this evidence, and lacked counsel who could have made the objection for him.

¶44 "[T]he colonists appreciated that if a defendant were forced to stand alone against the state, his case was foredoomed." ***United States v. Wade***, 388 U.S. 218, 224 (1967) (citation omitted). Accordingly, the Sixth Amendment "safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process." ***Iowa v. Tovar***, 541 U.S. 77, 80-81 (2004). The State concedes competency proceedings are a "critical stage" of the criminal process, and the May 20 hearing was held in violation of Molner's right to counsel. As a result, the State acknowledges that none of the evidence presented at the May 20 hearing may be used in determining whether there was reason to doubt Molner's competency.

¶45 The constitutional violation here was anything but the "red herring" the circuit court labeled it. At the conclusion of the May 20 hearing, the court deemed Molner a malingerer, a characterization it repeated when counsel subsequently raised the issue. Thus, the violation permeated the proceedings and continued through the post-conviction hearing, at which the court reiterated its view that Molner was playing a game. It appears the May 20 hearing heavily affected the court's perception of Molner and directly led to its refusal to order a competency examination. Unlike the State, we cannot so neatly confine the Sixth Amendment violation to the May 20 hearing.

¶46 The circuit court also believed that any error resulting from the Sixth Amendment violation was remedied by the subsequent appointment of counsel the same day. However, the court then stated it would have denied any post-hearing objection to the evidence presented based on waiver. Such reasoning is vacuous. If the court was going to apply a waiver rule to any issues raised after counsel was appointed, then it was not possible to remedy errors stemming from the evidentiary proceeding.

¶47 The circuit court also stressed that "the defendant's Sixth Amendment rights were honored in the way that they needed to be honored" given the extent to which Molner remained mute. To the contrary, the court was constitutionally forbidden from inferring waiver of the right to counsel from Molner's silence at the May 20 hearing. Waiver of the right to counsel must be knowing, intelligent, and voluntary. ***Tovar***, 541 U.S. at 81. The right to counsel does not depend upon a request by the defendant, and we indulge in every reasonable presumption against waiver. ***Brewer v. Williams***, 430 U.S. 387, 404 (1977). The circuit court has a duty to safeguard the right to counsel. ***Carnley v. Cochran***, 369 U.S. 506, 514-15 (1962). "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." ***Id.*** "Presuming waiver from a silent record is impermissible." ***Id.*** at 516.

¶48 We stress that it was not per se improper for the circuit court to hold an evidentiary hearing to determine whether there was reason to doubt Molner's competency. *See* 9 CHRISTINE M. WISEMAN & MICHAEL TOBIN, WISCONSIN PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE § 17:13 (2d ed. 2008) (court may hold an evidentiary hearing to determine "if the defendant's odd behavior is indeed indicative of an inability to understand the proceedings or assist counsel"). However, the court's failure to ensure that Molner was represented and its invitation to the State to present whatever evidence it wanted because Molner would not object was error and clearly prejudicial. We further note that in a competency hearing under WIS. STAT. § 971.14(4), a mute defendant is presumed incompetent. *See* WIS. STAT. § 971.14(4)(b). We see no reason why Molner's silence should have been held against him to the extent it was in this case.

¶49 Accordingly, we reverse the post-conviction order. However, Molner is not necessarily entitled to a new trial. *See* ***Haskins***, 139 Wis. 2d at 266. When a defendant establishes that there was reason to doubt his or her competency but the circuit court fails to order a pre-trial competency evaluation, the critical question is whether the defendant was actually competent at the time of trial such that the result should stand. *See* ***id.*** at 266-67.

¶50 The circuit court must first determine whether a meaningful *nunc pro tunc* inquiry can be made regarding Molner's competency to understand and assist in the previous proceedings against him. ***Id.*** at 267. If the court determines that a meaningful inquiry can be made, it must order an examination and hold a competency hearing. ***Id.*** The competency hearing may be held as part of a multipurpose hearing designed to first determine whether a meaningful inquiry can be made. ***Id.***

¶51 It may well be that a *nunc pro tunc* competency hearing cannot be held. Such retrospective determinations of an accused's competency to stand trial are "inherently difficult" and present obvious hazards. ***Johnson***, 133 Wis. 2d at 224 (citing ***Pate***, 383 U.S. at 387; ***Drope***, 420 U.S. at 183; ***Dusky***, 362 U.S. at 403). If the court concludes a meaningful hearing cannot be held, or finds that Molner was incompetent during trial, the court shall vacate the judgment of conviction and order a new trial.

By the Court.—Order reversed and cause remanded with directions.

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