COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2462-CR **Cir. Ct. No. 2011CF281**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIE M. GRYCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: JON M. COUNSELL, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Julie Grych appeals a judgment, entered upon a jury's verdict, convicting her of threatening to cause harm to the property of a judge; threatening to injure the person, property or business of another; and unlawful use of a telephone. Grych also appeals the order denying her motion for

postconviction relief. Grych argues she is entitled to a new trial in the interest of justice. We reject Grych's arguments and affirm the judgment and order.

BACKGROUND

¶2 The charges in this case arose from a message the State alleged Grych left on the telephone answering machine in the office of Portage County Circuit Court Judge Frederic Fleishauer. Approximately two weeks before the phone message was received, the judge had presided over hearings that resulted in the removal of Grych's two children from her home. The phone message stated:

> Hey there girl, Barbie, I need a flush and shower.
>
> Hey, this is Julie Grych, your worst client. Rumor has it [L.H.] sent me a message on Facebook saying that you gave my child to [L.H.], because that's what she told me. Here is an order, because you know who I am. You know I am your boss. And I highly, highly, highly suggest bringing my motherfucking kid home or putting her with family first. [L.H.] is not family. I don't care how much you paid her. And that kid will be removed from that house today before you leave, because I know where you live. Okay? And if you want to bust in and take a kid, then me and my crew, which you know who we all are, that burn things down and stuff, well, I mean, come on, figure it out, do the math. Get my kid away from that bitch, and I am not kidding.
>
> No, you ain't got nothing to worry about.
>
> Still not over.

¶3 At trial, Grych presented a two-pronged defense: (1) that the State had not proven Grych was the person who left the message; and (2) that the message was not a "true threat." The jury found Grych guilty of the crimes charged and the court imposed concurrent sentences totaling nine years, consisting of six years of initial confinement and three years of extended supervision.

¶4 Grych filed a postconviction motion for a new trial in the interest of justice. At the postconviction hearing, Dr. Richard Hurlbut, a clinical psychologist, opined that Grych met the criteria for pursuing a plea of not guilty by reason of mental disease or defect [NGI]. Dr. Hurlbut also confirmed, however, that at the time when he assessed Grych's competency to proceed to trial, she "was able to evaluate information and make decisions." Dr. Hurlbut further testified, "[M]y memory is that she had indeed been asked to consider [an NGI] plea and did not want to enter it." In denying Grych's postconviction motion for a new trial, the court noted that Grych was found competent to stand trial; she made the decision not to enter an NGI plea; and nothing in Dr. Hurlbut's postconviction report altered the fact that she was competent to make that decision. This appeal follows.[1]

DISCUSSION

¶5 On appeal, Grych seeks a new trial under WIS. STAT. § 752.35, which permits this court to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Grych invokes the first basis for relief, that the real controversy was not fully tried. In order to establish that the real controversy has not been fully tried, Grych must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N. K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998)

[1] The court granted that part of the motion seeking a reduction in the sentences imposed for two of the three convictions, but the amended judgment of conviction did not alter the overall periods of initial confinement and extended supervision for these concurrent sentences.

(quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶6 Grych contends that the real controversy was not fully tried, because the real controversy in this case was not whether Grych committed the alleged crimes but, rather, whether she could be held criminally responsible for her behavior given her mental illness. However, the asserted "real controversy," whether an NGI defense would have succeeded, was not tried at all, because Grych opted against entering an NGI plea. We therefore question whether the "real controversy" analysis applies in this case. As the State points out, WIS. STAT. § 752.35 is "not intended to vest this court with power of discretionary reversal to enable a defendant to present an alternative defense at a new trial merely because the defense presented at the first trial proved ineffective." ***State v. Hubanks***, 173 Wis. 2d 1, 29, 496 N.W.2d 96 (Ct. App. 1992).

¶7 Grych attempts to distinguish ***Hubanks***, arguing that her circumstances are more like those of the defendant in ***State v. Jeffrey A. W.***, 2010 WI App 29, 323 Wis. 2d 541, 780 N.W.2d 231. There, the victim testified that the defendant gave her herpes during a sexual assault. ***Id.***, ¶3. At trial, defense counsel failed to present evidence that the defendant did not have herpes, because her research erroneously revealed that no reliable blood test for herpes existed. ***Id.***, ¶¶10-11. In exercising its power of discretionary reversal, the ***Jeffrey A. W.*** court distinguished ***Hubanks***, holding that ***Jeffrey A. W.*** "has nothing to do with a strategic choice by counsel to pursue one strategy over another and everything to do with counsel going to trial with half-a-loaf because she could not find the other half." ***Id.***, ¶19.

¶8 Here, Grych contends she does not seek a new trial because her defense proved ineffective but, rather, because her mental illness prevented her from making a rational choice among available defenses. We are not persuaded by this purported distinction. In ***Jeffrey A. W.***, trial counsel inadvertently missed information essential to a determination of the real controversy tried. Here, Grych decided to pursue an entirely different route at trial. And, to the extent Grych emphasizes the impact her mental illness had on her decision to forego an NGI defense, Grych was found competent to stand trial and does not challenge that determination.

¶9 The determination of competency to stand trial "seeks to ensure that [the defendant] has the capacity to understand the proceedings and to assist counsel." ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 (quoting ***Godinez v. Moran***, 509 U.S. 389, 402 (1993)). To be competent, a defendant must be able to "understand the proceedings and assist counsel 'with a reasonable degree of rational understanding.'" ***Byrge***, 237 Wis. 2d 197, ¶31 (quoted source omitted). Further, and relevant to the present matter, "[a]lthough a defendant may have a history of psychiatric illness, a medical condition does not necessarily render the defendant incompetent to stand trial." ***Id.***

¶10 Because Grych does not challenge the competency determination, she appears to argue that while she was competent to stand trial, she was not competent to make the decision not to enter an NGI plea. The attempt to parse her competency in this manner, however, was effectively rejected by the Supreme Court in ***Godinez***. There, the Court declined to hold that the competency standard applicable to a defendant's decision to plead guilty or to waive the right to counsel is higher than the standard applicable to a defendant's competency to stand trial. ***Godinez v. Moran***, 509 U.S. 389, 391 (1993). The Court explained that "while the

decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial." ***Id.*** at 398. Thus, a defendant who is competent to stand trial is also competent to decide, "among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses." ***Id.***

¶11 Moreover, "[d]efendants who have been found to be competent may do things during the course of their prosecution and trial that others might deem self-defeating, foolish, or even foolhardy." ***State v. Vaughn***, 2012 WI App 129, ¶22, 344 Wis. 2d 764, 823 N.W.2d 543. As the State notes, Grych's decision to forego an NGI defense may have been "self-defeating, foolish, or even foolhardy," but having been found competent to proceed, it was her decision to make. Accordingly, we conclude there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Grych a new trial.

By the Court.—Judgment and order affirmed.

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