COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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 Nos. 2016AP1296-CR
2016AP1297-CR
2016AP1298-CR
2016AP1299-CR

Cir. Ct. Nos. 2013CF760
2013CF1863
2013CT1282
2014CF213

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELIGIO R. BACALLAO, JR.,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Dane County: NICHOLAS MCNAMARA, Judge. *Affirmed.*

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Eligio Bacallao was convicted of multiple offenses after a trial to the circuit court at which he represented himself. Then, represented by counsel, Bacallao filed a postconviction motion for relief alleging that there was insufficient evidence to convict him of one of the offenses, third degree sexual assault, and that the circuit court erred when it allowed Bacallao to represent himself before and at trial. The court denied Bacallao's motion without a hearing. Bacallao renews his postconviction arguments on appeal, and also argues that the circuit court erred in denying his postconviction motion without a hearing and that he is entitled to a new trial in the interest of justice. We reject each of Bacallao's arguments and affirm.

I. Sufficiency of the Evidence

¶2 Bacallao was convicted of third degree sexual assault, which is defined as "sexual intercourse with a person without the consent of that person." WIS. STAT. § 940.225(3) (2015-16).[1] Bacallao argues that the evidence was insufficient. More specifically, Bacallao points to the undisputed fact that he had consensual sexual intercourse with the victim shortly before the alleged assault and that the evidence was insufficient because there was no evidence that the victim "unambiguously communicate[d] that she withdrew her consent" to subsequent sexual intercourse in a different room." Bacallao's argument is without merit.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 The term "consent" in WIS. STAT. § 940.225(3) is defined in WIS. STAT. § 940.225(4) as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse." Consistent with this definition, the jury instruction for third degree sexual assault provides that the element "without consent" requires a finding "that [the victim] did not freely agree to have sexual intercourse with the defendant. In deciding whether [the victim] did not consent, you should consider what [the victim] said and did, along with all the other facts and circumstances. This element does not require that [the victim] offered physical resistance." WIS JI—CRIMINAL 1218A.

¶4 Thus, WIS. STAT. § 940.225(3) requires proof that "the victim did not by either words or overt actions freely agree to have sexual contact or intercourse with the defendant." ***Gates v. State***, 91 Wis. 2d 512, 520, 283 N.W.2d 474 (Ct. App. 1979). "The element 'without consent' ... requires no affirmative act, such as the withholding of consent, on the part of the victim. Rather, the State must prove that there was *no affirmative consent*.... The State does not have to prove that the victim withheld consent." ***State v. Grunke***, 2008 WI 82, ¶28, 311 Wis. 2d 439, 752 N.W.2d 769. On the contrary, "[i]n the context of sexual assault, consent in fact requires an affirmative indication of willingness. A failure to say no or to resist does not constitute consent in fact." ***State v. Long***, 2009 WI 36, ¶31, 317 Wis. 2d 92, 765 N.W.2d 557.

¶5 When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that it can be said as a matter of law "that no trier of fact, acting reasonably,

could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.***

¶6 Here, the victim testified that she and Bacallao had consensual sexual intercourse in the bedroom of her apartment; that she then went into the bathroom, where Bacallao proceeded to have sexual intercourse with her; and that she did not want the sexual intercourse in the bathroom and "pulled away" and "turned away" from him. Specifically, she testified, "I'm not sure if I told him [I did not want it], but my body language like I said was denying it, rejecting it." No other witness testified as to the encounter in the bathroom.

¶7 Bacallao does not argue that the victim "by either words or overt actions freely agree[d]" to engage in sexual intercourse in the bathroom. ***Gates***, 91 Wis. 2d at 520. Indeed, Bacallao asserts that without the prior consensual encounter in the bedroom, the evidence might suffice to show "that the intercourse [in the bathroom] was not consensual." Rather, Bacallao pins his sufficiency of the evidence argument entirely on the victim's failure to "unambiguously communicate that she withdrew her consent" after the sexual intercourse that had occurred in the bedroom. However, Bacallao does not cite to any legal authority to support the proposition that a person's initial consent persists until explicitly withdrawn under facts such as these where there were two distinct sexual

encounters.[2] *Cf.* ***Harrell v. State***, 88 Wis. 2d 546, 572, 277 N.W.2d 462 (Ct. App. 1979) (sexual encounters separated by nature of the act, time, place, and intent are separate and distinct offenses). Accordingly, we reject Bacallao's argument as unsupported by legal authority. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments." (citations omitted)).

¶8 The victim provided sufficient testimony to support Bacallao's conviction of third degree sexual assault. The conviction reflects the circuit court's finding that the victim was credible, and Bacallao provides no basis for us to disturb that finding on appeal. We reject Bacallao's argument that the State had to prove more.

II. Self-Representation

¶9 Bacallao argues that the circuit court erred in different ways when it allowed him to represent himself at three specific points in the proceedings: at a hearing held after Bacallao first asked to represent himself, at a bail hearing where Bacallao reiterated his request to represent himself, and at the start of trial. We first review the applicable law and then, for each specific point, we describe the court's alleged error and review and reject Bacallao's arguments as to that error.

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[2] Bacallao cites without explanation to ***United States v. Hardin***, 710 F.2d 1231, 1236 (7th Cir. 1983). We do not see how that case, which concerned the defendant's Fourth Amendment claim that he had rescinded his consent to a search, is relevant to the element of "without consent" in the WIS. STAT. § 940.225(3) definition of the crime of third degree sexual assault.

A. General Legal Principles

¶10 The Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant's constitutional right to proceed without counsel in a state criminal trial when there has been a clear and voluntary decision to do so. ***Faretta v. California***, 422 U.S. 806, 807, 835 (1975). However, "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial ... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." ***Indiana v. Edwards***, 554 U.S. 164, 178 (2008). In Wisconsin, "the competency determination should not prevent persons of average ability and intelligence from representing themselves unless 'a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist.'" ***State v. Klessig***, 211 Wis. 2d 194, 212, 564 N.W.2d 716 (1997) (quoting ***Pickens v. State***, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980)).

¶11 Before allowing a defendant to proceed without representation, the circuit court must examine the defendant to determine whether the defendant's waiver of counsel is knowing and voluntary and whether "the defendant possesse[s] … the minimal competence necessary to conduct his [or her] own defense." ***Klessig***, 211 Wis. 2d at 213 (quoting ***Pickens***, 96 Wis. 2d at 570). To establish that the waiver of counsel is knowing and voluntary,

> the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him [or her], and (4) was aware of the general range of penalties that could have been imposed on him [or her].

Klessig, 211 Wis. 2d at 206. To establish that a defendant is competent to represent himself or herself, "the circuit court should consider factors such as 'the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his [or her] ability to communicate a possible defense." ***Klessig***, 211 Wis. 2d at 212 (quoting ***Pickens***, 96 Wis. 2d at 569).

¶12 The circuit court's competency determination "must rest to a large extent upon the judgment and experience of the trial judge." ***Klessig***, 211 Wis. 2d at 212 (citing ***Pickens***, 96 Wis. 2d at 569). This determination is a factual finding, which we review under the clearly erroneous standard. ***State v. Smith***, 2016 WI 23, ¶26, 367 Wis. 2d 483, 878 N.W.2d 135. We will uphold the circuit court's determination that a defendant is competent to proceed without representation "unless it is totally unsupported by facts in the record." ***Id.***, ¶29.

B. September 2013 Hearing on First Request for Self-Representation

¶13 Bacallao argues that the circuit court did not apply the correct standard of law when it granted his first request to waive counsel and represent himself at a hearing in September 2013. Bacallao bases his challenge to the circuit court's findings solely on the court's statement that he may have "a misunderstanding as to his ability to represent himself, but there's little I can do about that beyond going over these rights with him." Bacallao argues that this statement indicates that the court believed it was required to allow him to waive his right to counsel even though he did not "fully understand the complexities of self-representation." As best we can understand it, Bacallao's argument is that the court did not apply the correct legal standard when it failed to consider the ***Klessig***

factors in determining whether Bacallao was competent to represent himself.[3] However, the colloquy and the entirety of the court's remarks show that the court did review the ***Klessig*** factors in finding that Bacallao was competent to represent himself.

¶14 The circuit court first considered the validity of Bacallao's waiver of counsel and his competency to proceed without representation at a hearing held a few months after the first complaint in these consolidated actions was filed, after Bacallao informed the court that he wanted to dismiss his appointed counsel and continue pro se. At the start of the hearing, Bacallao reiterated that he wanted his appointed counsel to withdraw, he did not want new counsel, and he wanted to represent himself. The court then gave Bacallao a waiver-of-attorney form and went through the form with him as he completed it.

¶15 The circuit court asked Bacallao about his age, education, fluency in English and ability to communicate, any use of alcohol or drugs, treatment for mental or emotional problems, medication, and physical or psychological disorders. Bacallao answered that he was twenty-eight years old, had gone to the twelfth grade but had not received a diploma, and could read, write, and understand English; he was not then being treated for any mental or emotional problems but had received treatment in the past; he had not consumed any drugs or alcohol in the preceding twenty-four hours; he was taking antibiotics and medication for migraine headaches and insomnia, but the drugs would not affect

[3] If Bacallao is arguing that there is a different legal standard that the circuit court mistakenly applied, or some exception to the correct legal standard that the court should have applied, Bacallao does not identify the different standard or the exception, and, therefore, we do not consider that argument.

his ability to understand the proceedings, to make decisions, or to communicate; and he had no physical or psychological difficulties that would affect his ability to understand and communicate with the court.

¶16 The circuit court then reviewed the charges against Bacallao and the maximum penalties he faced. The court expressed to Bacallao the risks of proceeding without representation and informed him of his right to counsel, either appointed or at his own expense, and that he could be appointed counsel later even though he was rejecting appointed counsel at that time. The court explained in detail what counsel would do in representing Bacallao and the difficulties and disadvantages of self-representation, including the challenges of understanding and following legal rules and procedures. Bacallao stated that he understood, that it was his right to represent himself, and that he was making the decision to do so knowingly and voluntarily. The court found, based on the colloquy and a competency evaluation,[4] that Bacallao was knowingly and voluntarily waiving his right to be represented by counsel at that stage of the proceedings and that he was competent to proceed pro se.

¶17 The circuit court stated:

> Well, based on the competency report that was presented to me here and the colloquy that I just went over with Mr. Bacallao concerning his waiver of right to an attorney, I do find that he is waiving his right to be represented by an attorney, at least at this stage in the proceeding—this is a pretty preliminary stage of the proceeding—and that he

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[4] The competency evaluation opined that Bacallao did not have a psychiatric disorder, denied any psychological symptoms, was able to demonstrate an understanding of court proceedings, and was competent to proceed to trial. During the competency evaluation, Bacallao also "voiced an intention to represent himself."

> does so freely, knowingly, voluntarily and with understanding and not the result of duress. I think it may be a result of a misunderstanding as to his ability to represent himself, but there's little I can do about that beyond going over these rights with him.

¶18 Bacallao does not argue that the circuit court's findings are clearly erroneous. Rather, he takes one statement by the circuit court out of context and, therefore, misinterprets it. The entirety of the court's remarks, which were made after the colloquy was completed, establish that the circuit court, in making the statement Bacallao has isolated, was saying that: (1) the facts established by the colloquy and the competency evaluation supported the finding that Bacallao was knowingly and voluntarily waiving his right to counsel and "possesse[s] ... the minimal competence necessary to conduct his [or her] own defense," ***Klessig***, 211 Wis. 2d at 213 (quoting ***Pickens***, 96 Wis. 2d at 570); and (2) the court could therefore not deprive him of the right to do so. The court's surmising that Bacallao may have been overestimating his ability to represent himself reflects the generally accepted proposition that "[d]efending *pro se* will almost always be foolish, but the defendant has the right to make that choice." ***Imani v. Pollard***, 826 F.3d 939, 944 (7th Cir. 2016); *see also* ***Faretta***, 422 U.S. at 834 ("It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."). Having been told by Bacallao that he desired to represent himself, and having found that Bacallao was sufficiently able to do so under the ***Pickens/Klessig*** standard, the court's statement about Bacallao's "misunderstanding" simply acknowledged that it could not deprive him of the right to proceed pro se, even though it questioned the wisdom of his choice. Bacallao's argument that the court did not apply the correct legal standard is negated by the record.

C. August 2014 Bail Hearing

¶19 Bacallao argues that the circuit court misused its discretion by relying on a mistake—Bacallao's "reluctance" to have standby counsel—when it declined to appoint standby counsel for Bacallao after he reiterated his intent to proceed pro se at a bail hearing in August 2014. Bacallao points to a moment two months later, on the third day of trial, where in the course of its review of the history of the proceedings, the court referred to Bacallao's "apparent reluctance at least to have standby counsel" at the bail hearing. Bacallao asserts that the court's assumption of "reluctance" on Bacallao's part constitutes reliance on an incorrect fact. However, the record establishes both that the court's assumption of "reluctance" was not incorrect and that the court did not in any event rely on that assumption in deciding not to appoint standby counsel.

¶20 "[T]he chief purpose of the appointment of [standby] counsel ... is to serve the interests of the [circuit] court"—to ensure that "the trial proceed[s] in an orderly fashion"—therefore, the decision to appoint standby counsel lies within the circuit court's discretion. ***Douglas County v. Edwards***, 137 Wis. 2d 65, 77-78, 403 N.W.2d 438 (1987).

¶21 The August 2014 bail hearing began with the circuit court conducting a ***Klessig*** colloquy in response to Bacallao's continued assertion, in support of his appointed counsel's motion to withdraw, that he wanted to represent himself.[5] Following the colloquy, the court asked Bacallao, "Are you asking me

[5] The parties were uncertain how counsel came to be appointed in light of the fact that, as the circuit court noted, it had had "these [***Klessig***] colloquies multiple times now."

to have a lawyer appointed to assist you in a fashion which we sometime[s] call standby counsel[?]" Bacallao responded, "No, Your Honor, no thank you." After further discussion, the court advised Bacallao that, "whatever decision we make today about right to counsel, I expect that that will be the final decision, do you understand?" Bacallao responded, "Yes, Your Honor. Like I said before I recommend [sic] pro se and represent myself, but if I want a standby trial for an attorney to represent me on my side, I mean, it will be fine with me. He'll standby. But I'm ready."

¶22 The circuit court then ruled as follows:

> So standby counsel is for the convenience of the [circuit] court, not for convenience of the defendant.... There is a US Supreme Court case that clarifies that when there's some doubt that the defendant has the ability to represent himself, that an attorney can be appointed to familiarize the defendant with the case and standby as consultant on matters of questioning, objections and argument. Also standby counsel protects the defendant's rights if the defendant's removed from the courtroom for misconduct. Some of those issues and concerns are addressed by, have already been accomplished by the fact that Mr. Bacallao has made a voluntary, knowing waiver of his right to a jury trial. I don't feel like misconduct is going to have the same [e]ffect on m[e] that it could potentially have on [] lay juror members. And the basis for [appointed counsel's] motions in part includes not just Mr. Bacallao's request, but that there's genuine, substantial disagreement between himself and Mr. Bacallao about strategies, tactics, and various decisions that are normally within the realm of an attorney. I'm not sure that [appointed counsel] would do anything other than perhaps frustrate Mr. Bacallao at times as much as [appointed counsel] would try to be serving his role to assist for the convenience of a [circuit] court. I think under all the circumstances actually standby counsel is not necessary here.

¶23 Bacallao does not take issue with any part of the circuit court's analysis made at the time of the hearing. Rather, again taking an isolated

statement by the court out of context, Bacallao argues that the court's later reference at trial to his "apparent reluctance [at the bail hearing] at least to have standby counsel" indicates that the court had relied on an incorrect fact—his reluctance—in declining to appoint standby counsel.

¶24 There are at least two problems with Bacallao's argument. First, the circuit court's reference to Bacallao's "apparent reluctance" to have standby counsel was not factually mistaken. It accurately reflected the fact that, at the bail hearing, Bacallao had unambiguously refused standby counsel, and then, somewhat equivocally, allowed that standby counsel would be fine if *he* "want[ed]" it. Bacallao did not then say he wanted standby counsel, and he had already made clear that he did not.

¶25 Second, the circuit court's decision at the bail hearing was not based on Bacallao's desire with respect to standby counsel. Rather, the court based its decision on two other considerations—that the potential for bias against Bacallao due to any misconduct during the trial was diminished because he was to have a bench trial, and that his attorney's assistance would likely only frustrate Bacallao due to their "substantial disagreement … about strategies"—neither of which is challenged by Bacallao on appeal. The entirety of the court's remarks at trial establish that the court accurately recalled that it had declined to order standby counsel because, in light of Bacallao's "adamant" waiver of his right to a jury trial and "when for so long and so clearly he had always demanded that he wanted to represent himself," the court had concluded "that it did not justify the expense or even the confusion or distraction to the defendant of having standby counsel in the courtroom." Bacallao does not challenge that reasoning.

¶26 In sum, the record refutes Bacallao's argument that the circuit court misused its discretion when it declined to appoint standby counsel based on a mistake of fact.

D. October 2014 Start of Trial

¶27 Bacallao argues that the circuit court erred when, despite Bacallao's reiteration that he intended to represent himself, the court did not "stop[] the barely-begun bench trial and order[] Bacallao to be represented by counsel at a new trial," because "it was immediately apparent" at the start of the trial "that Bacallao had no ability to represent himself." Again, the record refutes Bacallao's argument.

¶28 At the start of the bench trial, the circuit court questioned Bacallao as follows:

> THE COURT: And Mr. Bacallao is unrepresented. He's here in person in court. In the past Mr. Bacallao has repeatedly made it clear that he wanted to proceed in these matters without an attorney assisting him and that remains the case, correct, Mr. Bacallao[?]
>
> THE DEFENDANT: Yes. Yes, Your Honor.
>
> THE COURT: I've been over multiple colloquies with Mr. Bacallao about his rights to have a lawyer represent him. Do you have any questions about those rights?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: And you do understand that the State would pay for a lawyer if you can't afford one?
>
> THE DEFENDANT: No, I'm fine, Your Honor.
>
> THE COURT: And you continue to understand that there are advantages to having a lawyer represent you?
>
> THE DEFENDANT: Yes, Your Honor.

> THE COURT: And you do understand that you're at a disadvantage to represent yourself against the State's attorney?
>
> THE DEFENDANT: Yes, Your Honor, correct.

¶29 Nothing in the above colloquy provides a basis for denying Bacallao the right to represent himself, and Bacallao does not argue otherwise. Rather, he points to difficulties he had as trial progressed with various aspects of criminal procedure, and to his "mental health problems." However, Bacallao does not point to any legal authority for the proposition that Bacallao's difficulties *during* trial required the court to find him incompetent to represent himself at the start of trial or to stop the trial and appoint counsel.[6] Nor does he point to any evidence in the record before the circuit court at the start of trial that established that he suffered from a mental illness that rendered him incompetent to represent himself.[7]

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[6] Bacallao cites to a North Dakota case, ***State v. Dahl***, 2009 ND 204, ¶26, 776 N.W.2d 37, in which the North Dakota Supreme Court stated, "To ensure the defendant is afforded a fair trial, a district court can appoint counsel for the defendant during trial if the court determines the defendant is no longer competent to present his or her own defense." Bacallao does not develop any argument based on this citation, and, in any event, it does not bind us. *See* ***State v. Muckerheide***, 2007 WI 5, ¶7, 298 Wis. 2d 553, 725 N.W.2d 930 ("Although a Wisconsin court may consider case law from … other jurisdictions, obviously such case law is not binding precedent in Wisconsin, and a Wisconsin court is not required to follow it.").

[7] Bacallao appears to refer to medical reports prepared after his trial and before sentencing which opined that he was mentally ill, but Bacallao does not explain how the circuit court could have known of those reports at the start of trial. Similarly, he points to the circuit court's statement that Bacallao had "serious mental illness," but that statement was made at sentencing after the medical reports were prepared. In addition, Bacallao does not explain how the mental illness with which he was diagnosed rendered him unable to understand the proceedings or to represent himself. *See* ***Imani v. Pollard***, 826 F.3d 939, 946 (7th Cir. 2016) ("A state may therefore deny defendants the right to represent themselves where they suffer from 'severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'") (quoting ***Indiana v. Edwards***, 554 U.S. 164, 178 (2008)).

¶30 In sum, the record refutes Bacallao's argument that the circuit court erred in not appointing counsel at the start of trial despite Bacallao's continued invoking of his right to represent himself.

III. Denial of Postconviction Motion Without a Hearing

¶31 Bacallao argues that the circuit court erred when it denied his postconviction motion without a hearing, because his motion alleged facts that, if true, would entitle him to relief. We reject his argument because his motion turns on the record, not on any new facts that might be presented at a hearing. For that matter, as we explain, Bacallao does not point to any factual dispute that required an evidentiary hearing to resolve.

¶32 A defendant's postconviction motion entitles the defendant to an evidentiary hearing if the motion "alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. A defendant is not entitled to an evidentiary hearing if the defendant fails to allege such facts or "if the record conclusively demonstrates that the defendant is not entitled to relief." ***Id.***

¶33 Bacallao argues that he is entitled to an evidentiary hearing for three reasons. First, he argues that he is entitled to an evidentiary hearing because his motion establishes that the evidence presented at trial was insufficient to convict him of third degree sexual assault. This argument makes no sense because an insufficiency of the evidence claim is decided based on the trial record. *See* ***Poellinger***, 153 Wis. 2d at 507 (stating the test for adjudicating an insufficiency of evidence claim as based on a review of the evidence presented at trial). We

review the trial record to determine whether the evidence presented was sufficient, and nothing that could take place at a postconviction hearing could affect the content of the existing trial record. Accordingly, we conclude that the circuit court properly decided Bacallao's insufficiency of the evidence claim without an evidentiary hearing.

¶34 Second, Bacallao argues that he is entitled to an evidentiary hearing because his motion establishes that the circuit court followed an incorrect legal standard when it stated that he may have "a misunderstanding as to his ability to represent himself, but there's little I can do about that beyond going over these rights with him" and allowed him to represent himself. This argument also makes no sense, as reflected by Bacallao's own development of this argument. Bacallao goes on to argue that a hearing is required because it was the court's error of law, as revealed by the record, that entitles him to relief. However, Bacallao does not need a hearing to prove what is in the record, and he does not explain what evidence he could present at an evidentiary hearing that would affect the analysis of this asserted error of law. Bacallao seems to suggest that the basis for an evidentiary hearing is only that his allegations show he is entitled to relief, but as stated above, a circuit court may deny a motion without an evidentiary hearing if "the record conclusively demonstrates that the defendant is not entitled to relief." ***Allen***, 274 Wis. 2d 568, ¶9. As we discussed in Part II.B. of this opinion, Bacallao has taken the circuit court's statement out of context. The entirety of the circuit court's remarks, and the record of the many colloquies undertaken by the circuit court to ensure Bacallao's competency to represent himself, make clear that it did not apply an incorrect legal standard in allowing Bacallao to proceed pro se.

¶35 A similar defect sinks Bacallao's third argument, which is that he is entitled to an evidentiary hearing because his motion establishes that the circuit court should have appointed counsel at the start of trial, "when it became apparent that Bacallao was not able to represent himself." On its face, this argument requires review of the record at the start of trial, and Bacallao fails to identify what could take place at an evidentiary hearing that would affect the content of the existing trial record. As with his second argument, the issue is whether the record shows that the circuit court erred with respect to self-representation, and Bacallao fails to explain why he needs a hearing as to that issue.

IV. Reversal in Interest of Justice

¶36 WISCONSIN STAT. § 752.35 permits this court to order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Bacallao asks that we order a new trial, arguing that the real controversy was not tried here because he "should never have been allowed to represent himself." However, we have concluded that Bacallao was not improperly denied his right to represent himself and, therefore, he fails to show that this is an "exceptional case" warranting discretionary reversal. *See* ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469 ("We exercise our authority to reverse in the interest of justice under WIS. STAT. § 752.35 sparingly and only in the most exceptional cases.").

By the Court.—Judgments and order affirmed.

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