

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 2014

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 No. 2014AP565-CR

Cir. Ct. No. 2011CF1389

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEOFFREY A. HERLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: NICHOLAS J. MCNAMARA, Judge. *Affirmed.*

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Geoffrey Herling appeals a judgment of conviction and an order denying postconviction relief. Herling claims that he was denied a fair trial because his amnesia during trial prevented him from mounting an adequate defense. Herling argues that the circuit court erred in requiring him to

prove his amnesia by clear and convincing evidence.¹ For the reasons set forth below, we conclude that the circuit court did not err. Therefore, we affirm.

BACKGROUND

¶2 Herling was convicted by a jury of two counts of attempted first-degree intentional homicide. The convictions were based on a shootout between Herling and several Dane County deputies on July 12, 2011. Herling filed a postconviction motion more than sixteen months after his conviction seeking a new trial on the basis that he was denied due process of law when he was tried while suffering from “amnesia regarding the events occurring in the days before and the day of the incident, which formed the basis of his conviction.”

¶3 At the postconviction motion hearing, Herling presented testimony from and a report by Dr. Kent Berney, a licensed psychologist. Dr. Berney’s report summarized Herling’s results from various psychological tests and Dr. Berney’s review of Herling’s medical records. Dr. Berney concluded in his report, “I believe, to a reasonable degree of psychological certainty, that Mr. Herling’s significant level of intoxication with alcohol and Xanax resulted in a substantial probability of ... amnesia for the criminal behaviors occurring on July 12, 2011.”

¹ The circuit court used “clear preponderance of the evidence” terminology. The parties acknowledge that this standard is equivalent to the more common phrase, “clear and convincing evidence.” We follow the lead of the parties and, assuming without deciding that these phrases mean the same degree of certitude, use the term “clear and convincing evidence” in this opinion when we refer to the burden of proof imposed by the circuit court. *See generally, Kuehn v. Kuehn*, 11 Wis. 2d 15, 26, 104 N.W.2d 138 (1960) (noting that in fraud cases, “it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude” and that “[s]uch degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence”).

¶4 The parties disputed whether Herling’s burden of proving the existence of his amnesia was by a “preponderance of the evidence” or, instead, the higher “clear and convincing evidence” burden. The circuit court held Herling to the higher burden.

¶5 The circuit court found that Herling did not meet the “clear and convincing” burden. The court explained that Dr. Berney’s report only demonstrated that Dr. Berney believed Herling was credible, not that Herling in fact suffered from amnesia:

[Dr. Berney’s] bottom-line conclusion is that I should conclude that Mr. Herling had amnesia, or has amnesia, for these incidents because Dr. Bern[ey] says he does. Because he thinks that Mr. Herling is credible. That’s not enough. That doesn’t provide [clear and convincing evidence] that Mr. Herling in fact suffers amnesia for these events. Dr. Bern[ey]’s probably not the right witness to help Mr. Herling in the final steps to get to that point.

The circuit court also found that Dr. Berney was not qualified to provide the necessary medical testimony to support Herling’s claim of amnesia:

This issue about the prescribed Xanax or benzodiazepines having a possible psychotic effect on Mr. Herling is evidence that’s beyond Dr. Bern[ey]’s expertise. Dr. Bern[ey] is not qualified and did not give me information really about how those drugs work and why there might be a psychotic effect. It’s also, I’ll use the word Dr. Bern[ey] did, paradoxical that these medications would have a psychotic effect not only because that’s what they’re designed to limit, but the Xanax was prescribed for Mr. Herling.... If [Herling] had a long history of hallucinating or having blackout episodes while taking Xanax, or combining Xanax with alcohol, I should have heard that testimony. I should have heard the medical testimony about how his combination of his alcohol intoxication and possible drug ingestion would work to actually create an anterograde amnesia. I don’t have that. Dr. Bern[ey] jumped to that conclusion. I don’t think [Dr. Berney] was qualified to actually give me the medical steps that would give me at least a bridge to believing the

subjective complaints of Mr. Herling because as Dr. Bern[ey] says, there is no objective test. We're going to have to believe him. That's simply believing Mr. Herling, and simply accepting Dr. Bern[ey]'s report because he says so is not enough.

The circuit court accordingly denied Herling's postconviction motion for a new trial.

DISCUSSION

¶6 Herling claims that his amnesia deprived him of a fair trial and argues that the circuit court erred in requiring Herling to prove the fact that he suffered from amnesia by clear and convincing evidence.² While it is possible for a defendant to claim that he was denied a fair trial because his “amnesia deprived him of the ability to take the stand and offer his own description of the events leading up to the accident,” the defendant must first establish that he in fact suffered from amnesia. *See State v. McIntosh*, 137 Wis. 2d 339, 347-49, 404 N.W.2d 557 (Ct. App. 1987). Herling argues on appeal that the appropriate burden of proof for establishing his amnesia was the lower “preponderance of the evidence” standard, and that had the circuit court applied this lower standard, “the

² Herling also argues that his Fifth and Sixth Amendment rights were violated when he was denied counsel at his presentence investigation interview. This court's decision in *State v. Knapp*, 111 Wis. 2d 380, 385, 330 N.W.2d 242 (Ct. App. 1983) (holding that “there is no constitutional right to have counsel present at the [presentence] interview”), is controlling. *See Cook v. Cook*, 208 Wis. 2d 166, 185-190, 560 N.W.2d 246 (1997) (the court of appeals is bound by published decisions of the court of appeals). Recognizing that his argument directly contradicts *Knapp*, Herling makes his argument here to preserve the issue for review before the Wisconsin Supreme Court.

court likely would have found that Herling had amnesia” and that “his amnesia deprived him of a trial that was fundamentally fair.”³

¶7 This court “give[s] great deference to a [circuit] court’s decision on a motion for a new trial ... because the decision itself is discretionary, and the [circuit] court is in the best position to observe and evaluate whether such relief is appropriate. Thus, the [circuit] court’s decision will not be disturbed unless the [circuit] court clearly misused its discretion.” *Goff v. Seldera*, 202 Wis. 2d 600, 614, 550 N.W.2d 144 (Ct. App. 1996) (citation omitted). “We affirm a discretionary decision if the court applied the correct law to the facts of record and reached a reasonable result. Failing to apply the correct legal standard constitutes an erroneous exercise of discretion. Whether the circuit court applied a correct legal standard constitutes a question of law, and our review on this issue is de novo.” *State v. Sugden*, 2010 WI App 166, ¶16, 330 Wis. 2d 628, 795 N.W.2d 456 (citations omitted).

¶8 Herling’s argument erroneously assumes that there is no Wisconsin case law deciding the proper burden of proof for establishing amnesia.⁴ In a case

³ Herling asserted for the first time after trial that, before and during the trial, amnesia prevented him from recalling the events during and before the shootout. The State argues that Herling forfeited this claim by proceeding with his trial without raising amnesia as an issue. We need not address the State’s forfeiture argument because, regardless whether Herling forfeited the issue, his failure to meet his burden of proof is sufficient reason to affirm the circuit court.

⁴ Herling assumes that Wisconsin courts have not decided the proper burden of proof and asks this court to analogize amnesia to incompetency and to adopt the “preponderance of the evidence” burden of proof typically required for a claim of incompetency. As we discuss, there is Wisconsin case law deciding the issue of the proper burden for proving amnesia, and therefore, we reject Herling’s arguments based on this analogy.

(continued)

identified by the circuit court, *Muench v. State*, the defendant claimed, as Herling does here, that “he was deprived of his constitutional rights to a fair trial and effective assistance of counsel while being tried when suffering from amnesia.” 60 Wis. 2d 386, 392, 210 N.W.2d 716 (1973) (*overruled on other grounds by Schimmel v. State*, 84 Wis. 2d 287, 267 N.W.2d 271 (1978)). Noting that “[t]he claim of amnesia is one easily fabricated after the event by one seeking to avoid responsibility for his acts,” our supreme court held that “[f]or this reason alone [amnesia] is an affirmative defense that must be established by the defendant by a clear preponderance of the credible evidence.” *Muench*, 60 Wis. 2d at 392-93. As noted above, the parties in this case agree that “clear preponderance” means the higher burden “clear and convincing.”

¶9 Requiring the higher burden of proof for establishing the existence of amnesia is appropriate because, as the *Muench* court noted, “[t]he claim of amnesia is one easily fabricated after the event by one seeking to avoid responsibility for his acts.” *Id.* at 392-93; *see also State v. West*, 2011 WI 83, ¶76, 336 Wis. 2d 578, 800 N.W.2d 929 (“The clear and convincing standard applies in cases where public policy requires a higher standard of proof than in the ordinary civil action.”) (quoted source omitted)). Accordingly, we conclude that the circuit

We further note that Herling did not claim in the circuit court and does not claim here that his amnesia rendered him incompetent to stand trial. Thus, case law specifically addressing competency is not governing authority here, where the only claim is that Herling was denied due process because he was tried while suffering from amnesia that rendered him unable to recall important events.

court applied the correct legal standard when it required Herling to prove by clear and convincing evidence that he suffered from amnesia at the time of trial.⁵

¶10 The circuit court found that Herling did not meet that burden, and Herling does not challenge that finding. Accordingly, we affirm.

CONCLUSION

¶11 Because the circuit court properly required Herling to prove by clear and convincing evidence that he suffered from amnesia at trial, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

⁵ Herling argues that holding him to the “clear and convincing evidence” burden of proof violates his right to due process. However, Herling does not develop this argument, and, therefore, we do not address it. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court need not address undeveloped arguments).

