**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

April 13, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**No. 98-3136-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MARK A. WALTERS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. Mark Walters appeals a judgment of conviction and sentence arising from his theft of two guns from his brother's house and their sale

to a gun shop.[1] The primary issue on appeal is whether the trial court denied Walters his right to counsel when it permitted him to proceed pro se with appointed standby counsel. Walters contends that he is entitled to a new trial because the trial court erred under ***State v. Klessig***, 211 Wis.2d 194, 206, 564 N.W.2d 716, 721 (1997), and ***Pickens v. State***, 96 Wis.2d 549, 556, 292 N.W.2d 601, 605 (1980), when it found him "competent to waive counsel," but not competent to represent himself. The State disputes Walters' characterization of the trial court's determination and argues that when read in context, the trial court used the phrase "not competent" as a comment on Walters' knowledge of legal procedure while explaining its reason for appointing standby counsel. Because the record supports the State's position, we affirm.

## I. BACKGROUND

Before his jury trial, Walters sought to discharge his attorney and proceed pro se. The trial court had a conference call with Walters, who appeared by telephone from the Dodge Correctional Institution. Both Walters' counsel and the district attorney personally appeared in court. Walters concedes that during the conference call, the trial court engaged in the mandatory colloquy required by ***Klessig*** when a defendant seeks to proceed pro se. ***Id***. at 206, 564 N.W.2d at 721. Based on this colloquy, the trial court allowed Walters to proceed pro se with the attorney he sought to discharge acting as standby counsel. After the jury returned

[1] A jury convicted Walters of one count of armed burglary, contrary to § 943.10(2)(b), STATS.; two counts of theft of a firearm, contrary to § 943.20(1)(a)(3)(d)5, STATS.; and one count of felon in possession of a firearm, contrary to § 941.29(2), STATS. Although Walters also appeals "all other orders decided adversely to the defendant," he fails to identify these additional orders; therefore, we will confine our discussion to the issues Walters raises in his brief. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not briefed deemed abandoned).

a guilty verdict on all four counts, the trial court asked Walters if he wanted his standby counsel to continue either as "standby counsel or counsel" at sentencing. Because Walters declined, the trial court discharged standby counsel, but pointed out that standby counsel had assisted Walters during trial, especially with jury instructions and exhibits.

Walters sent the court a letter requesting a new trial on grounds that his medication "messes with [his] thinking" and that he "never got to subpoena all [his] witnesses." At sentencing, the trial court denied his motion. Walters then declined the court's invitation to read his presentence investigation report, which recommended a lengthy prison term. In so refusing, Walters explained that he did not "want to take up the Court's time" because the court "actually got in your mind what you're going to give me." The court sentenced him to concurrent sentences of thirty years on the armed burglary count, five years on each firearm theft count, and two years on the felon in possession count. Walters then appealed.

## II. ANALYSIS

### 1. Waiver and Competency

As mentioned previously, Walters concedes that the trial court conducted the mandatory ***Klessig*** colloquy, which we fully describe below. His argument for a new trial is based solely on his characterization of the trial court's findings. Nevertheless, to analyze the basis for the trial court's ruling, we must put the trial court's conclusions in context. *See, e.g.*, ***In re Scott Y.***, 175 Wis.2d 222, 229-30, 499 N.W.2d 218, 221-22 (Ct. App. 1993). To put them in context, it is necessary to understand the law the trial court applied when it made the statements upon which Walters relies to support his characterization of the trial court's

conclusions. Accordingly, we will set forth the law, the trial court's analysis and conclusions, the parties' arguments, and finally our analysis.

In Wisconsin, a criminal defendant is guaranteed the fundamental right to assistance of counsel for his defense under art. I, § 7, of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution[2] as made applicable to the states through the Fourteenth Amendment. ***Klessig***, 211 Wis.2d at 201-02, 564 N.W.2d at 719-20. Thus, the scope, extent and interpretation of the right to assistance of counsel under the Wisconsin Constitution and the United States Constitution are identical. *See* ***id***. at 202-03, 564 N.W.2d at 720. Additionally, the Sixth Amendment and art. I, § 7, grant a defendant the right to conduct his own defense. *See* ***id***.

When a defendant seeks to proceed pro se, the circuit court must engage in a colloquy with the defendant to ensure that the defendant: (1) has knowingly, intelligently, and voluntarily waived the right to counsel (waiver); and (2) is competent to proceed pro se (competency). ***Id***. at 203, 564 N.W.2d at 720. If both parts of the two-part inquiry are not satisfied, the circuit court must prevent the defendant from representing himself or deprive him the constitutional right to assistance of counsel. ***Id***. at 203-04, 564 N.W.2d at 720. On the other hand, if the defendant knowingly, intelligently and voluntarily waives his right to assistance of counsel and is competent to proceed pro se, the court must allow the defendant to do so or deprive him of his right of self-representation. ***Id***.

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[2] Article I, § 7, of the Wisconsin Constitution provides, in part: "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel …." The Sixth Amendment provides, in part, that: "In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

To ascertain whether a defendant has knowingly, intelligently and voluntarily waived his right to counsel, the circuit court's colloquy must probe whether the defendant: (1) deliberately chose 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; and (4) was aware of the general range of penalties that a sentencing court could impose on him. ***Id.***; *see also* ***Pickens***, 96 Wis.2d at 563-64, 292 N.W.2d at 609, *overruled on other grounds by* ***Klessig***, 211 Wis.2d at 206, 564 N.W.2d at 721;[3] WIS J I—CRIMINAL SM 30. Whether a defendant has knowingly, intelligently and voluntarily waived his right to counsel is a question of constitutional fact we review de novo. ***State v. Cummings***, 199 Wis.2d 721, 748, 546 N.W.2d 406, 416 (1996).

Then, to determine whether a defendant has the competency to represent himself,[4] or put another way, has the capacity for self-representation, a

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[3] Under ***Pickens v. State***, 96 Wis.2d 549, 562-63, 292 N.W.2d 601, 608 (1980), this colloquy was recommended, but not required. In ***State v. Klessig***, 211 Wis.2d 194, 206, 564 N.W.2d 716, 721 (1997), our supreme court overruled ***Pickens*** "to the extent that we mandate the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel."

[4] Competence or capacity for self-representation is not the same as "competency to stand trial." *See* WIS J I—CRIMINAL SM 30 III.B. In Wisconsin, there is a higher standard for determining if a defendant is competent to represent himself than for determining if a defendant is competent to stand trial. *See* ***Klessig***, 211 Wis.2d at 212, 564 N.W.2d at 724. Section 971.13(1), STATS., is the codification of the two-part test from ***Dusky v. United States***, 362 U.S. 402 (1960) (per curiam). *See* ***State v. Garfoot***, 207 Wis.2d 214, 222-23, 558 N.W.2d 626, 630 (1997).

"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." Section 971.13, STATS. Under § 971.13(1), a person cannot stand trial unless he or she has the capacity to understand the nature and object of the proceedings against him or her, to consult with counsel, and to assist in preparing his or her own defense. *See* ***Garfoot***, 207 Wis.2d at 225-26, 558 N.W.2d at 631. Thus, a defendant may be deemed competent to stand trial, but may nevertheless lack the capacity to represent himself. *See* ***Pickens***, 96 Wis.2d at 568, 292 N.W.2d at 611.

circuit court considers the defendant's: (1) education; (2) literacy; (3) fluency in English; and (4) "any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." ***Klessig***, 211 Wis.2d at 212, 564 N.W.2d at 724 (quoting ***Pickens***, 96 Wis.2d at 569, 292 N.W.2d at 611). In considering these factors, a circuit court is guided by the principle that a competency determination should not prevent persons of average ability and intelligence from self-representation unless the court can identify a specific problem or disability that might prevent a meaningful defense from being offered, if one indeed exists. *See* ***id***. Technical legal knowledge is irrelevant "to an assessment of a knowing exercise of the right to defend oneself." WIS J I—CRIMINAL SM30A (citing ***Faretta v. California***, 422 U.S. 806, 836 (1975)). A competency determination rests to a large extent on the trial court's judgment and experience. *See* ***id***.

Here, the trial court also appointed standby counsel. Our supreme court has explained the nature of standby counsel's role:

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion.

***State v. Lehman***, 137 Wis.2d 65, 79, 403 N.W.2d 438, 445 (1987). The appointment of standby counsel is for the trial court's convenience, not the defendant's. *See* ***Cummings***, 199 Wis.2d at 754-56 n.17, 546 N.W.2d at 419 n.17; ***Lehman***, 137 Wis.2d at 77, 403 N.W.2d at 444. The trial court should base its decision on its needs, not the defendant's, and also on whether standby counsel would help the trial proceed in an orderly fashion. ***Cummings***, 199 Wis.2d at 754-

55, 546 N.W.2d at 419. The decision to appoint standby counsel lies within the trial court's discretion. *See* ***id***. at 754, 546 N.W.2d at 419.

Significantly, the appointment of standby counsel does not impede a defendant's right to self-representation, s*ee* ***Cummings***, 199 Wis.2d at 754-56 n.17, 546 N.W.2d at 419 n.17 (discussing ***McKaskle v. Wiggins***, 465 U.S. 168, 183 (1984)), and the trial court's decision to appoint standby counsel "is not tied to any constitutional right that the [defendant] may have to counsel." ***Lehman***, 137 Wis.2d at 76, 403 N.W.2d at 444. This language from ***Lehman*** "could not be clearer: the decision to appoint standby counsel is distinct from any constitutional discussion of whether a defendant was denied his right to counsel." ***Cummings***, 199 Wis.2d at 754-56 n.17, 546 N.W.2d at 419 n.17. Rather, the trial court's discretionary decision to appoint standby counsel is not a factor to consider regarding whether the defendant's constitutional right to counsel has been violated. ***Id***. Even if a court determines that the two-part ***Klessig*** test is satisfied, it may still appoint standby counsel in its discretion, and that decision has no bearing on a defendant's right to self-representation.

With these standards in mind, we turn to the trial court's analysis and conclusions. Walters told the trial court that he wanted to discharge his court-appointed attorney and "be [his] own lawyer." The court explained, and Walters acknowledged, that there are difficulties and disadvantages to self-representation, such as that an attorney might be able to help him obtain a more favorable sentence, put forth a better defense, and negotiate a "better deal." It stressed that if Walters failed to ask questions "in a right way," the court might strike the questions or that he might not receive the "answers you're entitled to get." Regarding competency, the court learned that Walters had an eighth-grade

education, was literate, and had some knowledge of the trial process. At that point, the trial court stated:

> Here's what I'm going to do: You're competent to waive counsel, but I don't believe, based upon your education level and your lack of experience and understanding of the process of a felony jury trial, and considering the potential penalty here is pretty serious ….

The court stopped mid-sentence to discuss the seriousness of Walters' offenses and to explain the penalties he was facing if convicted. The court then continued:

> I think this is too serious a matter for you to proceed entirely on your own. I'm going to direct that [the attorney he sought to discharge] continue to represent you, at least as a standby counsel; in other words, to be with you, present in court, to address inquires to you or help address your inquiries to witnesses you wish to cross-examine, to assist you in preparation of your opening statement, closing argument.

Walters objected, stating that he did not "want [his attorney] for a lawyer. I don't even want him by me." In response, the court explained that it was not Walters' decision, but the court's and stated:

> You're not competent to do this on your own. If you were to try this on your own, there would be a good chance you would blow it, to put it bluntly, and not present the things that should be presented.

Again, Walters objected to the court's appointment of standby counsel, and the court indicated that standby counsel would be present to give him advice and answer questions. Walters emphasized that he was as smart as standby counsel and that he did not want standby counsel to "be on [his] side" because counsel had indicated that he had no defense. To that, the court replied that Walters' standby counsel

> can sit in the back row and he's going to be required by this Court to be present during recesses, when the jury isn't present. You're not going to blow your case, so to speak. You might think you're as smart as he is, but you don't have the experience he's had and the education he's had …. That's your problem if you don't want him around.
>
> [Y]ou're going to be trying this, apparently on your own if you don't change your mind—but you may need some tips and advice once in awhile, and if you think that you can do that without help, you're sadly mistaken. It wouldn't be fair to you.

Focusing on the court's use of the word "competent," Walters maintains that although "the trial court found him competent to waive counsel," it found him "not competent to represent himself." Therefore, he reasons, appointing standby counsel was "not enough." Instead, Walters insists, the court had no choice but to assign adversarial counsel to try the case. The State replies that we must view the court's statements in context, which is that references to competency were part of an extended discussion with Walters regarding why it was appointing standby counsel. The State is correct.

Based on our review of the record, we conclude that the trial court considered the necessary factors under ***Klessig*** for both waiver and competency and then appointed standby counsel to assist Walters and to call matters favorable to Walters to the court's attention. *See* ***Lehman***, 137 Wis.2d at 79, 403 N.W.2d at 445. The court's references to competency (those after the court stopped mid-sentence to discuss the seriousness of his crimes) were made in the context of explaining why it was appointing standby counsel and in response to Walters' repeated objections to such appointment. These references related to Walters' ignorance of trial procedure and evidentiary rules. The court specifically noted that Walters would be trying the case on his own unless he changed his mind, but that standby counsel could provide him with occasional "tips and advice." Thus,

the court determined, in its discretion, that standby counsel would help the trial proceed in an orderly fashion. *See* ***Cummings***, 199 Wis.2d at 754-55, 546 N.W.2d at 419. Given this context, the trial court was not indicating that Walters was incompetent to represent himself when discussing the appointment of standby counsel.

**2. Sentencing**

It is unclear whether Walters is contending that the trial court erred when sentencing him. If Walters intends to make this argument, we disagree. Our review of a sentence is limited to whether the circuit court erroneously exercised its discretion, ***State v. Macemon***, 113 Wis.2d 662, 667, 335 N.W.2d 402, 405 (1983), and there is a strong public policy against interfering with the trial court's sentencing discretion. *See* ***State v. Littrup***, 164 Wis.2d 120, 126, 473 N.W.2d 164, 166 (Ct. App. 1991). The three primary factors a sentencing court should consider in sentencing are the gravity of the offense, the defendant's character and rehabilitative needs, and the need to protect the public. ***State v. Echols***, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640 (1993). Elements of these factors include a record of criminal offenses; history of undesirable behavior patterns; the results of a presentence investigation; and the defendant's remorse and repentance. ***State v. Jones***, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989).

Here, the trial court properly exercised its discretion when it considered Walters' extensive criminal record, the seriousness of his offenses, the danger he presents to the community, his lack of remorse and refusal to accept responsibility for his crimes, his deteriorating pattern of conduct, and the presentence investigation report. *See* ***id***.; *see also* ***Echols***, 175 Wis.2d at 682, 499 N.W.2d at 640. Our review of the sentencing transcript reflects no unreasonable

or unjustifiable basis for Walters' sentence. *See* ***Elias v. State***, 93 Wis.2d 278, 281-82, 286 N.W.2d 559, 560 (1980). Rather, it reflects a proper consideration of the relevant sentencing factors and a proper exercise of discretion. As such, we will not disturb it on appeal.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.