COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1334-CR **Cir. Ct. No. 2005CF211**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN L. COLLINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Steven Collins appeals a judgment of conviction for false imprisonment, battery, and second-degree sexual assault, and an order denying his postconviction motion. Collins argues he is entitled to a new trial because he did not personally waive his right to testify. We conclude the State

met its burden to demonstrate Collins made a knowing and intelligent waiver. Accordingly, we affirm.

BACKGROUND

¶2 Collins had a two-day bench trial in May 2005. Near the end of the first day, his attorney informed the court Collins intended to testify. The court then advised Collins of his rights both to testify and to not testify. Prefacing its advisement, the court indicated, "Your decision to testify is an important personal decision and I just want to remind you of that." The court's uninterrupted comments covered approximately two pages of transcript. Concluding its advisement, after informing Collins he would be subject to cross-examination if he testified, the court stated: "So that's an important part of that strategic decision about whether or not you'd like to testify and I would encourage you to talk to [your attorney] about that some more."

¶3 The next morning, the court stated:

> We are here today for what I would anticipate to be the balance of testimony in this case, and we were—the State has already rested and we had gotten to a point where, [Collins's attorney], you had indicated that there's a possibility that your client would like to testify. We spoke briefly on the record about that yesterday. Just a reminder, Mr. Collins, that that's a very important option that you have and that I urge you to consider it carefully with the assistance of counsel. Either way it's an important strategic decision, and of course, you have an absolute constitutional right not to testify and I would not hold that against you in any way if you chose not to.

Collins's attorney responded, "I talked to him, he indicated he wasn't going to testify. I anticipate calling [another person] as my next witness." Collins was not personally asked about his decision, and he did not comment following his attorney's response. At the close of the defense case, Collins's attorney indicated,

"No further witnesses, Your Honor. Let me just confirm. (Discussion between [trial counsel] and the defendant off the record.) … Nothing else. Defense would rest, Your Honor."

¶4 Collins did not testify and was ultimately convicted. In July 2008, we rejected a no-merit report because Collins had not personally waived his right to testify on the record. Following the appointment of successor postconviction counsel, Collins's trial counsel testified at an evidentiary hearing in October 2009. Counsel testified, "I think my recommendation wasn't that he testify at that point because, obviously, it opens up the cross-examination …." That hearing was continued to another date, but was cancelled because Collins and the State reached an agreement. The agreement was later terminated. A second evidentiary hearing was held in May 2013, at which Collins testified. When asked why he did not speak up when his trial attorney stated Collins would not testify, he responded:

> Well, unfortunately, when he called me to testify at day one trial, the court went into a long colloquy telling me I don't got to testify, it's the [S]tate['s] burden to prove that I committed the crimes, so they adjourned to the next day, and when he visited me at the county jail, his exact words was, the judge don't want you to take the stand. So I was very confused due to the fact that he called me to take the stand and it seemed like everyone was persuading me not to take the stand, so the record would show me and [trial counsel's] communications wasn't that good, and he wasn't calling other witnesses, so I thought it was his right to do the case how he would like to do the case, so I just was quiet, but I was speaking on other issues. It was so many other things going on that he wasn't presenting, so looking back now, I understand how the record could look, but I was there, the D.A. was there, and judge was there. I just was confused. I didn't know whether my right, [be]cause he wasn't calling witnesses who was under subpoena, and it just seemed like they don't want me to testify, so I just let it be.

The circuit court found Collins understood his right to testify and voluntarily chose not to do so. Collins now appeals.

DISCUSSION

¶5 The constitutional right of a criminal defendant to testify on his or her behalf is a fundamental right. ***State v. Weed***, 2003 WI 85, ¶¶2, 39, 263 Wis. 2d 434, 666 N.W.2d 485. "Accordingly, … a circuit court should conduct an on-the-record colloquy to ensure that the defendant is knowingly, intelligently, and voluntarily waiving his or her right to testify." ***Id.***, ¶¶2, 40. The "waiver must be 'an intentional relinquishment or abandonment of a known right or privilege.'" ***Id.***, ¶40 (citations omitted). The colloquy "should be a simple and straightforward exchange between the court and the defendant …." ***Id.***, ¶41. It "should consist of a basic inquiry to ensure that (1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel." ***Id.***, ¶43.

¶6 However, if a court fails to conduct a proper colloquy, a defendant is not necessarily entitled to a new trial. Rather, "there may be a retrospective 'evidentiary hearing to determine whether [a defendant] … waived the right to testify.'" ***State v. Lobermeier***, 2012 WI App 77, ¶19, 343 Wis. 2d 456, 821 N.W.2d 400 (quoting ***State v. Garcia***, 2010 WI App 26, ¶4, 323 Wis. 2d 531, 779 N.W.2d 718). Whether a defendant knowingly, voluntarily and intelligently waived the right to testify is a question of constitutional fact. ***Weed***, 263 Wis. 2d 434, ¶13. This presents a mixed question of fact and law that is reviewed using a two-step process. ***Id.*** First, we uphold a circuit court's findings of historical fact unless they are clearly erroneous. ***Id.*** Second, we independently apply constitutional standards to the historical facts. ***Id.*** The State has the burden of proof by clear and convincing evidence. ***Garcia***, 323 Wis. 2d 531, ¶14.

¶7 Collins first argues his silence in the face of his attorney's declaration that he would not testify is insufficient to demonstrate a conscious waiver of his right to testify. He does not, however, argue the court's colloquy was deficient aside from failing to obtain Collins's personal waiver. Accordingly, Collins does not dispute that he was made aware of his right to testify or that he discussed this right with his trial attorney. *See* ***Weed***, 263 Wis. 2d 434, ¶43.

¶8 Instead, consistent with his postconviction hearing testimony, Collins argues he had always intended to testify at trial, but did not because his attorney told him the judge did not want him to testify. Additionally, because the State failed to call trial counsel to testify at the second postconviction hearing, Collins emphasizes his own testimony regarding what his attorney told him is uncontroverted, and he argues it "cannot be disputed." Further, he asserts his confusion was "plausible."

¶9 Collins's argument ignores the standard of review. Because we must uphold the circuit court's factual findings unless clearly erroneous, we are not concerned with whether Collins's testimony was explicitly rebutted or plausible. Questions of plausibility or credibility are matters reserved to the circuit court. ***State v. Ayala***, 2011 WI App 6, ¶10, 331 Wis. 2d 171, 793 N.W.2d 511. After reviewing the record and hearing Collins's testimony and counsels' arguments, the court found that, notwithstanding Collins's lack of an affirmative response during the colloquy, Collins had unquestionably demonstrated his intention not to testify at trial, after having been fully informed of his rights.

¶10 The court relied on its observations of Collins during trial, noting his active role in litigating the case. The court found Collins was continuously aware of what his attorney was doing and had no reservations about raising his concerns

with the court, or even openly disagreeing with counsel at any given point during the proceedings. The court stated that everything it observed throughout the proceedings suggested that if Collins had disagreed with his attorney, he would have reacted assertively and directly. The court further found that when trial counsel stated in open court that Collins did not intend to testify, Collins's behavior confirmed his agreement. Thus, Collins's postconviction testimony notwithstanding, the court found his actions during trial were more reliable indicators of his intentions at that time, and his actions clearly indicated that by the second day of trial he had changed his mind and no longer intended to testify.

¶11 The circuit court's findings are amply supported by the record and therefore are not clearly erroneous. *See* ***id.*** Indeed, as one example, Collins interjected about defense matters immediately following the court's advisement of his rights to testify and to not testify. Just before the court's advisement, trial counsel indicated Collins wished to address the court. When the court concluded it comments, it inquired whether Collins had something to say. Collins replied:

> Yes, your Honor. I'm trying my best here to understand what the procedures are, and I think I'm doing a good job with my attorney, but one thing I have advised of, whatever the [State] was going to introduce, we was going to be aware of it, as far as our witnesses and things like that, and I felt as if when [the State] called the first officer to testify regarding to the photos, this was something that we wasn't made aware of, and even though the witness sheet that officer who testified, her name ain't never provided with us. We didn't have no time to prepare for if we wanted to cross-examine her and I just feel like that's—that should not go without being noticed.

The Court responded that if Collins and his attorney spoke overnight and decided they would like to have the police witness recalled for additional cross-examination, the court would allow them to do so. This exchange demonstrates not only that Collins was exceptionally involved in the presentation of his case,

but that he was able and willing to address the court with any concerns, and that the Court was willing to accommodate Collins's involvement. It is also noteworthy that Collins did not express any concerns about his right to testify at that time.

¶12 Additionally, Collins failed to file a reply brief. He therefore concedes the State's argument that the circuit court's findings regarding Collins's knowledge and intentions were not clearly erroneous. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶13 Finally, Collins argues his silence concerning his right to testify could constitute only a forfeiture, as opposed to an intentional waiver of the right. However, as Collins's own brief concedes, a knowing and intelligent waiver of the right to testify can be demonstrated at a postconviction evidentiary hearing. Indeed, that was precisely the situation existing in ***Weed***, ***Garcia***, and ***Lobermeier***. In each case, following a postconviction evidentiary hearing, the conviction was upheld despite the lack of any colloquy or personal waiver. ***Weed***, 263 Wis. 2d 434, ¶36; ***Garcia***, 323 Wis. 2d 531, ¶3; ***Lobermeier***, 343 Wis. 2d 456, ¶18.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).