COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2697-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN RYAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Kevin Ryan appeals from a judgment of conviction for one count of first-degree intentional homicide and one count of attempted first-degree intentional homicide, entered by the trial court after a

bifurcated trial pursuant to WIS. STAT. § 971.165.[1] Following an adverse evidentiary ruling by the trial court in the first phase of the trial, Ryan entered guilty pleas to both charges. The second phase was tried to a jury, which found that Ryan had a mental disease but that he did not lack the capacity to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law. Ryan raises three claims of error: (1) that in the first phase of the bifurcated trial, the trial court erred when it excluded expert and lay testimony regarding Ryan's ability to form the element of intent; (2) that in the second phase of the trial, the trial court erred by allowing Ryan's treating psychiatrist to testify without Ryan's consent, thus allegedly violating the patient-doctor privilege; and (3) that the evidence presented during the second phase of the trial was insufficient to support the jury's finding that Ryan was responsible for his actions. We disagree. We conclude that by pleading guilty in the first phase of the trial, Ryan waived the right to challenge the trial court's decision to exclude expert and lay testimony regarding his ability to form the element of intent. Further, WIS. STAT. § 905.04(4)(c), a statutory exception to the general rule of privilege, permitting doctors to testify to privileged information when a defendant relies on a mental condition as an element of his defense, applied in this case. Finally, we are

[1] WIS. STAT. § 971.165, in pertinent part provides:

> **(1)** If a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect:
>
> (a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.

Ryan originally pled not guilty and not guilty by reason of mental disease or defect, thus requiring a bifurcated trial under the statute.

satisfied that there was sufficient credible evidence to support the jury's finding that Ryan did not lack the substantial capacity to appreciate the wrongfulness of his action or to conform his conduct to law. Therefore, we affirm the trial court's judgment of conviction.

I. BACKGROUND.

¶2 On September 2, 1997, at 11:30 a.m., Kevin Ryan walked into the gas station where he had recently been fired, produced a revolver and shot two fellow employees, Marik Blimbergs and Felicia Farr, killing Blimbergs and wounding Farr. Prior to the shooting, Ryan had gone to the gas station and had been informed by Blimbergs that he was fired and that his final paycheck would be mailed to him. She then asked him to leave.

¶3 Ryan, who lived next-door to the gas station, walked home and called Blimbergs to express his displeasure at the way he was being treated. Blimbergs refused to change her mind and ended the conversation. After briefly reflecting on the conversation, Ryan took the revolver from his nightstand, loaded the gun, and walked back to the gas station. When Ryan walked into the gas station, Blimbergs asked him to leave and she refused to speak with him. Ryan then said, "[c]an't you have a word with my Smith & Wesson?" pulled out the gun and shot Blimbergs and Farr, who were standing behind the counter in the gas station.

¶4 The police apprehended Ryan in front of his apartment building shortly after the incident. When the police questioned him, Ryan told them that the revolver was upstairs in his apartment. Ryan gave the officers oral consent to search the apartment and then signed an officer's memo book with the name

"Julius Caesar II." During the search the officers found the revolver in a dresser drawer in Ryan's apartment.

¶5 Ryan was charged with one count of first-degree intentional homicide and one count of attempted first-degree intentional homicide. Ryan entered a plea of not guilty and not guilty by reason of mental disease or defect, thus creating the need for a bifurcated trial. In the first phase of the trial, Ryan filed a motion *in limine* seeking to introduce expert and lay testimony regarding his mental health and the effect it had on his ability to form the requisite intent to commit the charged crimes. The trial court denied his motion and excluded the testimony. Following the trial court's denial of his motion, Ryan changed his plea to guilty in the first phase of the trial. Ryan then proceeded to a jury trial on the second phase.

¶6 In the second phase of the bifurcated trial, Ryan attempted to establish that he was not guilty of the crimes charged because, at the time of the shooting, he lacked the mental capacity to appreciate the wrongfulness of his actions or to conform his conduct to law due to a mental disease. The jury rejected Ryan's defense, finding that Ryan had a mental disease, but that he did not lack the requisite mental capacity. Based on the jury's findings, the trial court convicted Ryan of first-degree intentional homicide and attempted first-degree intentional homicide. Ryan appeals.

II. ANALYSIS.

A. By pleading guilty, Ryan waived the right to challenge the trial court's exclusion of testimony.

¶7 In the first phase of the trial, Ryan filed a motion *in limine* requesting that the trial court admit expert and lay testimony regarding his mental

health and the effect it had on his ability to form the requisite intent to commit the crime. The trial court denied Ryan's motion and excluded both expert and lay testimony on this issue. After the trial court excluded the testimony, Ryan changed his plea to guilty in the first phase of the trial. Ryan now claims that the trial court erred when it excluded the testimony. Ryan waived the right to raise this claim of error by pleading guilty.

¶8 As a general rule, by voluntarily and understandingly pleading guilty, a defendant waives the right to raise nonjurisdictional defects and defenses. *See, e.g.,* ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12, 34 (1986). This court has applied the guilty plea waiver rule to a defendant's appeal challenging the trial court's ruling on the admissibility of testimony. *See* ***State v. Nelson***, 108 Wis. 2d 698, 702-03, 324 N.W.2d 292, 295 (Ct. App. 1982) (holding that the defendant waived the right to challenge the admissibility of testimony regarding other crimes evidence by pleading guilty). Ryan does not claim that his plea was not made voluntarily and understandingly. Therefore, when he pled guilty, Ryan waived the right to challenge the trial court's decision to exclude testimony regarding his mental health.[2]

[2] We note that even if we were to address this issue, it is unlikely that the testimony Ryan sought to introduce was admissible. In ***Steele v. State***, 97 Wis. 2d 72, 294 N.W.2d 2 (1980), the Wisconsin Supreme Court held that testimony regarding a defendant's mental capacity to form the requisite criminal intent is inadmissible in the first phase of a bifurcated trial. *See* ***id.*** at 97-99, 294 N.W.2d 13-14 (concluding that such testimony in the first phase of the trial jeopardizes safeguards protecting the defendant and society, creates problems of duplicative evidence which confuses the jury, and the evidence itself is not probative or relevant and, for these reasons, is properly excluded).

B. The trial court did not err by allowing Dr. Robert Rawski, Ryan's treating psychiatrist, to testify.

¶9 Ryan contends that the trial court erred when it allowed Dr. Rawski to testify. He argues that when the trial court permitted Dr. Rawski to testify about matters that he communicated to Dr. Rawski during the course of his treatment, his testimony violated the patient-doctor privilege embodied in WIS. STAT. § 905.04(2).[3] A trial court's ruling admitting evidence is discretionary, and this court will uphold the ruling if there is a reasonable basis for it. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 591, 493 N.W.2d 367, 371 (1992). We are satisfied that the trial court properly exercised its discretion by allowing Dr. Rawski to testify because his testimony fell within the exception to § 905.04(2) found in § 905.04(4)(c).[4]

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[3] WIS. STAT. § 905.04(2), provides:

> GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

[4] WIS. STAT. § 905.04(4)(c), provides:

> *Condition an element of claim or defense.* There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

¶10 We note that generally the confidential communications between Ryan and Dr. Rawski would be protected under the general rule of privilege contained in WIS. STAT. § 905.04(2). However, "[t]he Wisconsin Supreme Court has determined that sec. 905.04(4)(c) may remove the physician-client privilege when a defendant relies upon a mental condition as an element of his defense." ***State v. Taylor***, 142 Wis. 2d 36, 40, 417 N.W.2d 192, 194 (Ct. App. 1987) (citing ***State v. Johnson***, 133 Wis. 2d 207, 226, 395 N.W.2d 176, 185 (1986)). By entering a plea of not guilty by reason of mental disease or defect, Ryan eliminated the privilege attendant to his communications with Dr. Rawski. This is so because Ryan "relied upon a mental condition as an element of his defense" when he pled not guilty by reason of mental disease or defect. *See* ***id.*** By entering his plea, under § 905.04(4)(c), Ryan could no longer invoke the privilege surrounding his communications with Dr. Rawski.

¶11 Ryan also argues that the WIS. STAT. § 905.04(4)(c), exception to the general rule of privilege only applies if the person to whom the privilege belongs actually waives the privilege, or harbors no expectation or understanding that the communication will be kept confidential. Ryan relies on ***State v. Locke***, 177 Wis. 2d 590, 502 N.W.2d 891 (Ct. App. 1993), to support this proposition. Ryan concludes that, here, the exception is inapplicable and the communications remained privileged because he never actually waived the privilege, and "[h]is objective, reasonable perception was … that the privilege continued." We conclude that Ryan has misinterpreted both the § 905.04(4)(c) exception and this court's decision in ***Locke***.

¶12 First, the exception to the general rule of privilege contained in WIS. STAT. § 905.04(4)(c), eliminates the privilege by operation of law, not actual waiver or objective perceptions. The plain and unambiguous language of

§ 905.04(4)(c) eliminates the privilege from patient-doctor communications regarding the patient's mental health when the patient subsequently relies on that mental condition as an element of his defense to a criminal charge. Elimination of the privilege under the statute is not predicated upon actual waiver of the privilege or the objective perceptions of the individual holding the privilege. Such requirements would obviate the need for a statutorily created exception to the general rule. We will not interpret the statute to incorporate the patient's objective perceptions or to require actual waiver as such an interpretation would swallow the exception and render § 905.04(4)(c) meaningless. *See, e.g.,* ***City of Milwaukee v. Kilgore***, 185 Wis. 2d 499, 516, 517 N.W.2d 689, 696 (Ct. App. 1994) ("Courts must look to the common sense meaning of a statute to avoid unreasonable and absurd results.").

¶13 Second, ***Locke*** does not support Ryan's position that additional factors are necessary to trigger the operation of the exception to the general waiver rule contained in WIS. STAT. § 905.04(4)(c). In ***Locke***, this court determined that the scope of the general rule of privilege included communications between a patient and his social worker.[5] In deciding this issue, this court asserted that "[t]he patient's objectively reasonable perceptions and expectations of the medical provider are the proper gauge of the scope of the sec. 905.04 privilege. The patient's intent to disclose confidential information is crucial in determining whether a valid privilege exists." ***Locke***, 177 Wis. 2d at 604, 502 N.W.2d at 897 (citation omitted). However, these assertions pertained only to the scope and applicability of the privilege and not to the operation of the exception contained in

[5] The version of WIS. STAT. § 905.04(2), addressed in ***State v. Locke***, 177 Wis. 2d 590, 502 N.W.2d 891 (Ct. App. 1993), did not expressly refer to communications between a patient and his social worker.

§ 905.04(4)(c). Ryan takes the above quoted assertions out of context in his attempt to apply them here to support his position regarding the exception. ***Locke*** explained that the general rule of patient-doctor privilege included certain communications made to social workers. The applicability of the exception was never at issue in ***Locke***; consequently, ***Locke*** does not support Ryan's argument that additional factors are necessary before § 905.04(4)(c) is triggered.

¶14 Thus, we are satisfied that the privilege attendant to Ryan's communications with Dr. Rawski was eliminated by the operation of WIS. STAT. § 905.04(4)(c), when Ryan pled not guilty by reason of mental disease or defect, and, therefore, the trial court did not err when it allowed Dr. Rawski to testify.

C. Ryan failed to establish that he was not responsible for the crime charged.

¶15 In the second phase of the trial, Ryan had the burden of proof. In order for Ryan to be legally excused for his conduct, he had to establish that he suffered from a mental disease that caused him to lack the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. *See* WIS. STAT. § 971.15. Following the second phase of the trial, the jury concluded that Ryan did have a mental disease, but that the disease did not cause him to lack the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. On appeal, Ryan

argues that the evidence presented to the jury was insufficient to support the conclusion that he was responsible for his actions.[6]

¶16 As noted, in the second phase of trial, Ryan bore the burden of proving that, as a result of a mental disease, he lacked the substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. *See* WIS. STAT. § 971.15. Whether Ryan met this burden is a question of fact, not a question of law for this court on appeal. *See* ***State v. Sarinske***, 91 Wis. 2d 14, 48, 280 N.W.2d 725, 740 (1979). In an effort to satisfy his burden, Ryan introduced evidence that he had been hearing voices, specifically the voice of Clint Eastwood, and that he had a history of mental illness. Four doctors testified during the trial as expert witnesses. All four doctors agreed that Ryan suffered from some form of mental illness. Two of the four doctors also testified that because of his mental illness, Ryan lacked the requisite mental capacity under § 971.15. However, the remaining two doctors disagreed and testified that he did not lack the requisite mental capacity under the statute. Specifically, Dr. Rawski testified that Ryan

> was not psychotic at the time of the offense, he was not experiencing increasingly paranoid delusions, he was not manic at that point in time, and thus there is no mental illness there that is impairing his ability to appreciate the wrongfulness of his actions, nor impairing his ability to conform his behavior to the requirements of law.

[6] We note that Ryan's characterization of the jury's finding is inartfully worded. The jury did not find that Ryan was responsible for his actions; rather, it found that Ryan did not lack the requisite mental capacity under WIS. STAT. § 971.15. Therefore, the jury concluded that Ryan had not met his burden of proof and it rejected his defense of not guilty by reason of mental disease or defect. Although this section of Ryan's argument is somewhat confusing, we assume that Ryan is arguing that he presented compelling evidence demonstrating that he lacked the requisite mental capacity, and that the jury's finding was contrary to the greater weight of the credible evidence.

Dr. Palermo testified that Ryan possessed "substantial mental capacity to discern right from wrong, appreciate the quality and consequences of his action, and conform with the requirements of the law if so want to do [sic]." Further, Dr. Palermo testified that in his expert medical opinion, Ryan was very angry at being fired, felt deeply rejected, and was motivated by "intense feelings of rejection and rage and vengeance," but that he was not hallucinating, nor did he lack the requisite mental capacity.

¶17 Ultimately, it is "the responsibility of the trier of fact to determine the weight and credibility of the testimony on the issue of insanity and to determine whether the accused has met the burden of proving he was insane." ***Id.*** The jury is entirely free to discount the testimony of either side's witnesses. *See* ***id.*** Resolving factual conflicts is the exclusive province of the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752, 757 (1990). Here, the jury resolved the apparent conflict between the experts' testimony against Ryan. The jury weighed the evidence on the issue of insanity and found that Ryan did not lack the requisite degree of mental capacity to appreciate the wrongfulness of his conduct or to conform his conduct to law. In light of the testimony presented by Dr. Rawski and Dr. Palermo, we will not upset that finding on appeal.

¶18 For all of the foregoing reasons, we reject Ryan's three claims of error and affirm the trial court's judgment of conviction.

By the Court.—Judgment affirmed.

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