

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2035-CR

Cir. Ct. No. 2013CF365

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL S. UPTHEGROVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Reversed and cause remanded with directions.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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. Samuel Upthegrove was convicted after a jury trial of armed robbery, second-degree recklessly endangering safety, and two counts of felony bail jumping, all as a repeater. He now appeals the judgment of conviction and the order denying his motion for postconviction relief. As we agree that he was denied his constitutional and statutory right to be present throughout the guilt phase of his trial, we reverse and remand for a new trial.

¶2 On a Sunday afternoon in May 2013, Upthegrove decided he wanted to die and settled on committing “suicide by cop.” He used a fake gun to rob a convenience store, walked outside where he could be easily seen, then pointed the fake gun at police officers who responded to the clerk’s 911 call. He was charged as set forth above. On July 26, 2013, the department of corrections (DOC) completed a prompt disposition request pursuant to the Intrastate Detainer Act, WIS. STAT. § 971.11 (2015-16).¹

¶3 At first pro se, Upthegrove later was represented by a state public defender (SPD) attorney; he balked and was granted non-SPD counsel. Upthegrove entered a plea of not guilty by reason of mental disease or defect (NGI). Counsel withdrew about nine months later, as he had decided to leave the practice of law. Upthegrove expressed the desire to represent himself so as to curtail further delay. Noting that at times during court appearances Upthegrove “seemed very ... introspective or almost somewhere else,” the court denied his request. Upthegrove periodically renewed his request to appear pro se, to no avail.

¹ Upthegrove was under commitment at Dodge Correctional Institute for throwing or expelling bodily fluids and two counts of battery to hospital personnel.

All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

¶4 Upthegrove's NGI trial was held over two days. After the close of evidence in phase one, the guilt phase, the jury was out and the attorneys and court were in chambers for a jury instruction conference. When the judge and lawyers returned, the bailiff told the court he had removed Upthegrove from the courtroom. The bailiff explained under oath that he had noticed that Upthegrove appeared "very confused," was talking to himself, looking at pages torn from his legal pad, and growing increasingly agitated. Upthegrove asked deputies to take the papers away, saying they were covered with blood and had the word "kill" on them, and then "looked up in the corner of the courtroom pointing, saying that there were bats coming out of the wall and bats were trying to kill him." The bailiff said he did not observe anything Upthegrove described. When Upthegrove did not respond to efforts to calm him, the bailiff made the decision to remove him from the courtroom. The bailiff told the court that Upthegrove continued talking to himself in the holding cell and was shaking and crying, "clearly upset," and "very agitated." The bailiff also described an incident after the prior court appearance in which Upthegrove freed one hand from its handcuff, slid the restraint belt off his waist, smashed a hole in a window with the cuff and belt buckle lock, and used the glass to cut his arm.

¶5 The court asked the parties how they wished to proceed. The State advocated going ahead with closing arguments without Upthegrove there, arguing that, by his conduct, Upthegrove forfeited his right to be present. The prosecutor further reasoned that Upthegrove's claim of seeing blood and the word "kill," coupled with the prior incident of escaping safety restraints, suggested a possible threat of harm to court personnel or the jury. Defense counsel advised that Upthegrove's recent conduct was atypical of his usual "coherent and logical" communications and that he sought to speak to Upthegrove after his removal from

the courtroom but was denied access. As it was 4:15 p.m., counsel proposed adjourning until morning, as the case already was scheduled as a two-day trial.

¶6 The court first noted that Upthegrove's conduct "luckily" occurred outside the presence of the jury, finding it "so disruptive that the trial cannot proceed in an orderly manner unless he is removed from it." Noting that Upthegrove "was here for all the opportunity to confront his accusers" and for admission of all the evidence, the court ordered that Upthegrove's behavior "require[d] that he be out of the courtroom at this point," and that the matter would proceed.

¶7 On the jurors' return, the court advised them only that Upthegrove was not present but did not say he had been removed or allude to security concerns. Without re-evaluating his conduct and demeanor, giving him an opportunity to reclaim his right to be present, or advising him that, if he did not modify his behavior, phase one would proceed to completion without him, the court instructed the jury as to the law, and the parties delivered their closing arguments. Guilty verdicts were returned on all counts, and the court polled the jurors and accepted the verdict. All of this took place in Upthegrove's absence.

¶8 On day two, before phase two commenced, Upthegrove repeatedly refused to exit his cell. The court found that he "voluntarily absented himself" from the trial and thus waived his right to be present. Denying defense counsel's request for an adjournment, the court proceeded to the responsibility phase with Upthegrove in absentia.

¶9 Two psychologists who evaluated Upthegrove testified on behalf of the State. The court disallowed the testimony of Dr. Tasha Farrar, Upthegrove's treating psychiatrist, on grounds that she was not qualified to render an opinion as

to whether he appreciated the wrongfulness of his actions and was able to conform his conduct to the requirements of the law, *see* WIS. STAT. § 971.15(1), as those questions were not the focus of her clinical treatment of him. Upthegrove presented no other evidence and thus failed to meet his burden that he lacked responsibility due to mental disease or defect. *See* § 971.15(3). The court granted the State’s motion for a directed verdict.

¶10 Postconviction, Upthegrove moved to vacate the judgment of conviction, alleging a violation of his WIS. STAT. § 971.11 right to prompt disposition,² the denial of his constitutional and statutory rights to self-representation, the denial of his constitutional right to be present at his trial, and ineffective assistance of counsel to the extent trial counsel did not make timely or complete objections.

¶11 After a hearing, the court denied his claims.³ It concluded that dismissal was not an available remedy for a violation of his prompt disposition right because he partly waived it through his lack of cooperation with the SPD lawyer and because the delay that followed the next attorney’s decision to leave the profession could not be helped; that Upthegrove was not competent to represent himself; and that his right to be present at trial was not violated either in phase one because of his disruptive behavior—regardless whether his “decompensation” was true or feigned, as its abrupt onset might suggest—or in phase two when he flatly refused to leave his cell. Upthegrove appeals.

² Upthegrove’s trial began 593 days after the DOC completed the request for prompt disposition. *See* WIS. STAT. § 971.11(2).

³ Upthegrove also requested vacation of a DNA surcharge. The court granted that relief.

¶12 Upthegrove renews his postconviction claims here and also challenges the exclusion of Farrar’s testimony and the direction of the verdict in favor of the State. We begin with Upthegrove’s claim that he was denied the right to be present at trial.

¶13 A defendant has a constitutional and statutory right to be personally present at all stages of his or her trial, that is, “when anything is done affecting him [or her], or, as it is sometimes put, whenever any substantive step is taken by the court in his [or her] case.” *Williams v. State*, 40 Wis. 2d 154, 160, 161 N.W.2d 218 (1968) (citation omitted); *see also* U.S. CONST. amends. VI, XIV; WIS. CONST. art. 1, § 7; WIS. STAT. § 971.04.

¶14 A defendant can lose that right through misconduct or consent. *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970); *State v. Divanovic*, 200 Wis. 2d 210, 220, 546 N.W.2d 501 (Ct. App. 1996). But before being deemed to have waived or forfeited that right due to misconduct, the judge must warn the defendant that removal will ensue if he or she persists in behaving “in a manner so disorderly, disruptive, and disrespectful of the court that his [or her] trial cannot be carried on with him [or her] in the courtroom.” *Allen*, 397 U.S. at 343. Even once the right is lost, a defendant should be given the chance to reclaim it by expressing a willingness to behave “consistent[] with the decorum and respect inherent in the concept of courts and judicial proceedings.” *Id.*

¶15 Here, the court correctly noted that Upthegrove had full opportunity to confront his accusers and was present during the admission of all the evidence. It also was aware, however, that Upthegrove’s counsel was denied access to his client and, despite not having directly witnessed Upthegrove’s behavior itself, and while voicing some doubt as to its authenticity, the court did no follow-up for the

remainder of phase one. It made no attempt to reassess him, to caution him, to give him a chance to return to the courtroom, or, given the hour, to adjourn until morning. The court did not make a finding that Upthegrove's absence was voluntary. *See* WIS. STAT. § 971.04(1)(f), (3) (unless a defendant "voluntarily absents himself ... from the presence of the court without leave of the court," he or she "shall be present ... [w]hen the jury returns its verdict"). The court did not establish that Upthegrove knew that the trial could, or did, proceed in his absence. The efforts the next morning to get him to court were too little too late for phase one. We therefore reverse and remand for a new trial.

¶16 Given our disposition on the constitutional issue, we need not pass on the other matters Upthegrove raises. The claim of ineffective assistance of counsel is moot. On remand, the court may consider whether Upthegrove's right to prompt disposition was abridged or whether good cause was shown for not bringing the case on for trial within the statutory time frame. *See* WIS. STAT. § 971.11(2). It also may revisit, if appropriate, whether to allow the admission of Farrar's testimony. Finally, if Upthegrove still desires to represent himself, the court can evaluate the propriety of his doing so at that time.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

