COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1018-CR **Cir. Ct. No. 2003CF246**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL G. BEHNKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Randall Behnke appeals a judgment of conviction on multiple charges and an order denying his motion for postconviction relief. Behnke contends the court's failure to conduct a personal, on-the-record colloquy with him regarding waiver of his right to testify mandates a new trial. We

conclude the record adequately shows Behnke's waiver was knowing, intelligent, and voluntary and, alternatively, that failure to conduct a colloquy was harmless. Accordingly, we reject Behnke's argument and affirm.

Background

¶2 In December 2003, Behnke was charged with one count each of disorderly conduct, second-degree recklessly endangering safety, intentionally pointing a firearm at another, and going armed with a firearm while under the influence of an intoxicant, all stemming from an incident involving Behnke's ex-wife. A jury trial was held at which the State called five witnesses, including the ex-wife. The State rested its case just before lunch. Behnke's attorney asked for a five-minute recess. When back on the record, the attorney informed the court, "We won't be calling any witnesses. Mr. Behnke did not want to testify."

¶3 Court resumed following a lunch break of approximately ninety minutes. The jury was sent to deliberate at approximately 2:30 p.m., returning with guilty verdicts on all counts after less than thirty minutes of deliberation. The court sentenced Behnke to five years' initial confinement and five years' extended supervision on the reckless endangerment charge. The sentences on the other counts were each less than a year and ordered to be served concurrently to the main sentence.

¶4 A no-merit report was filed with this court. We rejected the report because we concluded the court's failure to conduct the colloquy regarding the right to testify warranted a postconviction hearing. We remanded the case for such a hearing, consistent with ***State v. Weed***, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485. *See* ***State v. Behnke***, No. 2005AP2877-CRNM, unpublished slip op. (WI App Aug. 15, 2006).

¶5 Behnke's attorney filed the appropriate motion and the postconviction hearing was held March 27, 2007. Only Behnke testified. He said his trial attorney was dismissive and did not discuss his right to testify. He claimed he would have asserted his right to testify at trial, stating he wanted to testify that his gun was not loaded. Behnke also admitted to some memory problems because "alcoholism killed a lot of my brain cells and stuff."

¶6 The court concluded Behnke has "made a sincere effort to tell me what he remembered, but he's forgotten an awful lot." It noted that, prior to trial and in chambers, the court itself had indicated to Behnke that he had a right to choose whether to testify. It observed that Behnke's attorney had indicated the waiver of the right and the court then recessed for lunch, meaning that Behnke was given an unusual window of opportunity to reflect and protest the waiver had his attorney truly been in error. It was not a situation where the right was waived and the court proceeded immediately to closing argument.

¶7 The court further noted discrepancies in communication Behnke had sent to this court. In one letter, handwritten and dated July 28, 2006, Behnke told us, "I know I had the right to testify at my trial. I am not claiming that I was not informed of my right to testify. I can't remember talking to my trial attorney about my right to testify, so I'm not claiming we never talked about it." In a subsequent, typed letter to this court, Behnke stated, "I did not at any time discuss my right to testify at trial with my trial attorney."

¶8 The circuit court concluded Behnke was aware of the right to testify and implicitly concluded Behnke had knowingly waived the right. The court further concluded that, in any event, any error was harmless because there was no

reasonable probability of a different result following a new trial. Accordingly, the court denied the motion for postconviction relief. Behnke appeals.

Discussion

¶9 A criminal defendant has a constitutional right to testify under the due process protections of the Fourteenth Amendment. ***Weed***, 263 Wis. 2d 434, ¶37. Every criminal defendant is thus privileged to testify in his or her own defense or to refuse to do so. ***Id.*** A defendant waiving the right to testify must do so knowingly and voluntarily. ***State v. Arredondo***, 2004 WI App 7, ¶11, 269 Wis. 2d 369, 674 N.W.2d 647.

¶10 In ***Weed***, our supreme court deemed the right to testify a "fundamental" right and mandated that circuit courts "conduct a colloquy with the defendant in order to ensure that the defendant is knowingly and voluntarily waiving" that right. ***Weed***, 263 Wis. 2d 434, ¶40. But the obligation to conduct a colloquy is only a court-created rule, and it has never been held that failure to conduct the colloquy warrants automatic reversal of a conviction. Instead, we look to the record to determine whether, despite the lack of a colloquy, the defendant nevertheless knowingly, intelligently, and voluntarily waived the right to testify. *See* ***id.***, ¶44; *see also* ***Arredondo***, 269 Wis. 2d 369, ¶13.[1]

[1] *See also* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). ***Bangert*** addressed flaws in the colloquy required when a defendant enters a guilty or no contest plea. If a defendant makes a prima facie showing that the court violated the colloquy requirements of WIS. STAT. § 971.08 or other duties, and if the defendant alleges he did not know or understand the information the colloquy would have provided, the burden shifts to the State to show the plea was nevertheless knowing, intelligent, and voluntary. ***Bangert***, 131 Wis. 2d at 274-75. In other words, the State has to show the defendant possessed knowledge the colloquy allegedly failed to provide. ***Id.*** at 275. Reversal is not automatic.

¶11 Whether a waiver of a right is knowing, intelligent, and voluntary presents a mixed question of fact and law. ***Arredondo***, 269 Wis. 2d 369, ¶12. We uphold the circuit court's factual findings unless clearly erroneous. ***Id.*** Applying those facts to the constitutional principles is a question of law we review de novo. ***Id.***

¶12 The colloquy is intended to determine that the defendant is aware of the right to testify and has discussed the right with counsel. ***Weed***, 263 Wis. 2d 434, ¶43. The circuit court here found "there were certainly discussions about his right to testify or not testify" and implicitly concluded the waiver was knowing, intelligent, and voluntary. The record adequately supports such a conclusion.

¶13 First, the court indicated it had personally referenced, during proceedings in chambers, the possibility Behnke might choose to testify. Second, during postconviction proceedings, Behnke testified that he had asked his attorney about the possibility of testifying.[2]

¶14 Third, Behnke's attorney had asked for a brief recess after the State rested, then indicated that the defense would not be calling witnesses and Behnke did not wish to testify. Although Behnke claims he protested, no such comment appears in the transcript. The case was then adjourned for lunch. The court considered it significant that when the trial resumed after the ninety-minute break,

[2] Although Behnke claims he was dissatisfied with his attorney's responses to questions, Behnke has not at any stage raised an ineffective assistance of counsel claim.

Behnke did not attempt to alert the court that he wished to testify or otherwise protest proceeding to closing arguments.[3]

¶15 Finally, there is the matter of letters sent to this court. The first of these was in Behnke's handwriting and stated he was not claiming he failed to discuss the possibility of testifying with his attorney, only that he could not remember if he had. Indeed, the letter expressly states he knew he had the right to testify. While a second typed letter contradicts this initial assertion, its origins are less clear than the letter penned by Behnke personally.

¶16 We conclude these facts of record more than adequately support a conclusion that Behnke knew he had a right to testify, discussed it with his attorney, and then knowingly, intelligently, and voluntarily waived the right. That Behnke cannot recall what transpired does not invalidate the waiver.[4]

¶17 In addition, any possible error would have been harmless. An error is harmless if there is no reasonable possibility it contributed to the outcome. *See* ***State v. Fencl***, 109 Wis. 2d 224, 238, 325 N.W.2d 703 (1982).

¶18 First, Behnke conceded the State had a strong case against him. To counteract this, Behnke had wanted to testify that the gun was unloaded, with no

[3] We cannot help but note Behnke's failure to call trial counsel for the postconviction hearing. While Behnke asserts he was not *required* to call the attorney, we cannot fathom why he would forgo calling such a valuable witness, unless the attorney's recollection undercuts Behnke's memory.

[4] Despite Behnke's frequent mention of memory problems, he does not directly assert such problems undermined any waiver. Indeed, we cannot help but notice Behnke's memory problems affect only facts he perceives to be damaging to his case, such as whether he discussed testifying with counsel. Potentially exculpatory facts, such as the "complexities" of loading a bullet into the chamber of the gun, which Behnke wanted to use as part of his defense, are easily recalled.

bullets in the "clip." A sheriff's deputy testified, however, that there was a bullet in the chamber that could have been discharged, meaning the gun was, in fact, loaded, even if it was with only a single bullet. Behnke also stated that had he testified, he would not have contradicted the sequence of events related by his ex-wife, the victim in this case.[5]

¶19 Moreover, Behnke does not even claim he would have testified. His postconviction motion for relief states:

> Had the Court conducted a colloquy of me regarding my decision not to testify, I certainly would have reconsidered that issue. … I therefore believe that there would have been a good possibility of testifying under the circumstances. Given the evidence that had already been put against me in the case, it is entirely likely that I would have decided to testify….

Because it is not clear Behnke would have testified, it is not clear what harm came from the lack of a colloquy.

¶20 Finally, appellate counsel asserts that a colloquy should have, and would have, informed Behnke that juries like to hear from defendants. Counsel further claims that Behnke's "likeable and sympathetic personality would have softened the bad impression" the jury likely had of him. But even Behnke does not believe this assertion; he testified at the postconviction hearing that he did not believe he would get sympathy from the jury, particularly because he had been drinking prior to the incident.

[5] We pause to note Behnke's curious assertion that he wanted to call his ex-wife and her sister as witnesses, but was frustrated by his attorney's failure to do so. There would have been no reason to call either woman; both were called as witnesses by the State and were available for questioning on cross-examination.

¶21 There is no reasonable possibility that Behnke's testimony, had he been given the proper colloquy and exercised his right to testify, would have changed the outcome of this case. The failure to conduct the colloquy was therefore harmless.

By the Court.—Judgment and order affirmed.

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