COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP1639-CR **Cir. Ct. No. 2007CF44**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERICK O. MAGETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Erick O. Magett appeals a judgment of conviction on the ground that the circuit court denied him the right to present a defense of not guilty by reason of mental disease or defect (NGI). Magett pled not guilty and NGI to a battery by a prisoner charge. An NGI trial is a bifurcated

proceeding, consisting of a guilt phase followed by a mental responsibility phase. After the first phase of the trial, the jury found Magett guilty of battery by a prisoner. The court inquired into what additional evidence Magett would present in the second phase of the trial, and Magett made an offer of proof. After Magett made his offer of proof, the court refused to proceed to the mental responsibility phase on the ground that no reasonable jury could find in Magett's favor based on the evidence that Magett would have presented during the second phase of the trial. We do not reach the issue of whether the court erred in refusing to hold the second phase of the trial because we conclude that any error was harmless. Therefore, we affirm.

BACKGROUND

¶2 On March 9, 2007, Magett, a prisoner confined in the Wisconsin Secure Program Facility in Boscobel, Wisconsin, was charged with battery by a prisoner in violation of WIS. STAT. § 940.20(1) (2009-10).[1] Magett pled not guilty and NGI. A trial was held before a jury.

¶3 The events giving rise to the battery charge against Magett are taken from the trial transcript. On January 20, 2007, Magett covered the camera in his prison cell and refused to leave the cell after Lieutenant Craig Tom ordered him to do so. Lieutenant Tom assembled a "use of force" team, consisting primarily of corrections officers, to extract Magett from his cell. After Magett refused to comply with further orders to come out of the cell, the officers entered. Upon opening the door, the officers noticed a wet, soapy substance on the floor, later

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

discovered to be hand cream, which contributed to at least two officers slipping and falling.

¶4 A confrontation ensued in the cell. Lieutenant Tom testified that Magett was standing on a mattress with his shirt off and fists clenched in the air. Officers Thomas Taylor and Jeremy Caya testified that, as soon as they entered the cell, Magett punched them several times in the head. Although the officers wore protective equipment including face shields, Officer Caya was cut under his chin. Within a short time, the officers restrained Magett and removed him from the cell. To corroborate the officers' testimony, the State showed the jury a videotape of the confrontation.

¶5 Magett testified about the incident. He stated that he covered the camera in his cell to draw attention to the fact that he was being denied meals. He contended that he was refused meals because he did not assume what he claimed was the required position at meal time, that is, to sit cross-legged with his hands behind his head. Magett contended that he could not sit cross-legged because of back pain and a fractured pelvis.

¶6 Magett testified that once it was discovered that he had covered the camera in his cell, he was directed to put his hands through the cell door to be handcuffed. He refused, took off his shirt and waited for the officers to enter his cell. According to Magett, as soon as the officers entered his cell, they began to punch him and, in turn, he punched the officers to defend himself. Magett testified that an officer punched him in his groin area while another attempted to break his wrist and a third tried to choke him. However, Magett also testified that he could not recall part of the confrontation because he "blacked out." According to Magett's testimony:

Q: And how long do you think you were swinging [punches]?

A: I don't know. I pretty much blacked out.

Q: And what do you mean by blacked out?

A: It was like I'm just gone.

Q: And did you – you were aware that [the officers] came in [to the cell], correct?

A: Yes.

Q: And then what happened in your mind?

A: We all are locked up. That's all I remember.

Q: All right. And did you hear your name being yelled, Magett, Magett?

A: No.

Q: No? But at some point you stopped resisting; is that correct?

A: Yeah, as soon as they put hands on me, that's when I stopped.

Q: What do you mean, put –

A: Soon as they like got a hold on to me.

Q: Okay.

A: That's when I, like, put my hands up and stopped.

Q: Did you put your hands up like this and did you tell them that you're not resisting?

A: Yes.

Q: And why did that seem to – why did that stop you?

A: Because I seen they weren't trying to hurt me no more, so there was no use for me to keep struggling with them.

Magett asserted that he could not remember what happened after the officers entered the cell because he was "blacked out" and "just gone" and yet he claimed to recall that he stopped resisting the officers. Magett does not explain how he could recall that the officers punched him and that he stopped resisting the officers as soon as they "got a hold on to [him]" but could not recall how long he punched the officers.

¶7 On cross-examination, Magett admitted that, even before being denied meals, he was frustrated that the prison doctor and staff ignored his complaints and refused to provide medical treatment for his fractured pelvis. Magett acknowledged that, prior to the confrontation with the officers, he told the prison psychiatrist that it would be wrong for him to take out his frustrations on the officers. He further acknowledged that, prior to the confrontation, he wrote a letter to the prison warden explaining that if he continued to be denied medical treatment, somebody would "end up getting hurt." After Magett testified, the defense rested.

¶8 As the jury deliberated, the court turned its focus to the potential mental responsibility phase in the event of a guilty verdict in the first phase of the trial. The court asked defense counsel what additional evidence would be presented to meet Magett's burden of proof in the second phase. Defense counsel informed the court that she would not be calling a court-appointed medical expert, Dr. Jonathan Lewis. Defense counsel also indicated that she would not call the defense's own medical expert to testify. However, defense counsel stated that Magett would testify that he "blacked out" and that "he was out of it" for part of the confrontation. In addition, defense counsel seemed to indicate she would reshow the jury the same videotape of the confrontation. Following this discussion, the jury returned a guilty verdict.

¶9 Based on defense counsel's representation of the evidence that would be presented in the mental responsibility phase of the trial, the court refused to proceed to the second phase. The court reasoned that, without medical expert testimony and based only on the evidence that Magett proffered, no reasonable jury could find that Magett suffered from a mental disease or defect that resulted in him lacking the substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law pursuant to WIS. STAT. § 971.15(1). On the basis that Magett would not be able to meet his burden of proof by the greater weight of the credible evidence, the court entered a judgment of conviction against Magett. Magett appeals.

DISCUSSION

¶10 Magett raises two issues on appeal: (1) whether a court may refuse to hold the mental responsibility phase of the trial on the basis that the defendant will not be able to meet the burden of proof; and (2) if the mental responsibility phase must be held, whether refusing to hold it in this case was harmless error.

¶11 On the first issue, Magett contends that the court erred in refusing to hold the second phase of the trial. Magett contends that there is no Wisconsin authority under which a circuit court may direct a verdict after the guilt phase of an NGI trial but before the mental responsibility phase. For that reason, Magett argues that the court erred by requiring him to bring forth credible evidence that he suffered from a mental disease or defect before holding the mental responsibility phase of the trial. The State responds that Wisconsin authority does not expressly prohibit a court from dismissing an NGI plea before the mental responsibility phase of the trial when there is no credible evidence in support of the defense. We do not reach this issue because we conclude that, assuming without deciding that

the court erred in refusing to hold the second phase of the trial, the error was harmless under the unusual circumstances of this case.

¶12 Wisconsin's harmless error rule is codified in WIS. STAT. § 805.18 and applies to criminal proceedings pursuant to WIS. STAT. § 972.11(1). *See* ***State v. Sherman***, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500. To decide whether an error is harmless, we must determine whether the error affected the substantial rights of a party. ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698; *see also* WIS. STAT. § 805.18(2). An error affects the substantial rights of a party when there is "a reasonable possibility that the error contributed to the outcome of the action." ***Weborg v. Jenny***, 2012 WI 67, ¶68, 341 Wis. 2d 668, 816 N.W.2d 191 (citation omitted). "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." ***Martindale***, 246 Wis. 2d 67, ¶32 (citation omitted). We review the entire record to determine whether an error contributed to the outcome of the action. ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶13 In Wisconsin, there are two formulations of the harmless error test. ***State v. Lobermeier***, 2012 WI App 77, ¶14, ___ Wis. 2d ___, ___ N.W.2d ___; *see also* ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115. Under the first formulation, an error is harmless when it is clear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Chapman v. California***, 386 U.S. 18, 24 (1967). Under the second formulation, an error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[.]" ***Neder v. United States***, 527 U.S. 1, 18 (1999). Under either formulation, the burden is on the State to prove beyond a reasonable doubt that the error was harmless. ***State v. Jorgensen***, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77. A court may

consider a variety of factors in determining whether an error is harmless, including the nature of the defense and the nature and overall strength of the State's case. ***Id.*** We are satisfied that regardless which formulation is applied, the error in this case was harmless.

¶14 On the issue of harmless error, the State argues that had the court held the second phase of the trial, the court would have directed a verdict against Magett after hearing again the same evidence as presented in the first phase of the trial. Magett responds that, viewing the evidence in the light most favorable to him, a reasonable jury could have found him not guilty by reason of mental disease or defect based on his testimony that he "blacked out." Magett concedes that there are inferences that *could* be drawn against him based on his testimony. However, he contends that it is for the jury to determine the weight and sufficiency of the evidence. Accordingly, Magett argues that "[t]he state's marshalling of contrary evidence and inference, along with its attack on his credibility" are irrelevant to whether there is any credible evidence that supports the NGI plea. We conclude that any error was harmless because Magett informed the court what evidence he would present in the second phase of the trial and no reasonable jury could find that those facts establish that Magett suffered from a mental disease or defect that prevented him from appreciating the wrongfulness of his conduct or conforming his conduct to the requirements of the law.

¶15 This case presents an unusual circumstance. While in most cases the defendant presents evidence in the mental responsibility phase that was not introduced in the guilt phase, defense counsel indicated in this case that no additional evidence would be presented in the second phase. Defense counsel indicated to the court that in the second phase of the trial she would replay the same videotape of the confrontation. Magett does not explain why the court could

not have entered a directed verdict after hearing the same videotape evidence a second time. *See* ***State v. Leach***, 124 Wis. 2d 648, 663, 370 N.W.2d 240 (1985) (concluding that a circuit court may enter a directed verdict at the close of the mental responsibility phase "when there is no evidence presented or there is insufficient evidence to present a jury question on the defense"). The court had already viewed the videotape during the guilt phase of the trial and was in a position to evaluate whether the videotape evidence supported Magett's NGI plea. We see no reason why the court could not have directed a verdict at the close of the mental responsibility phase based on the same videotape evidence. Thus, the court's refusal to replay the same videotape evidence in a second phase of the trial does not undermine our confidence in the outcome. *See* ***Martindale***, 246 Wis. 2d 67, ¶32.

¶16 In addition, defense counsel indicated that Magett would testify during the second phase of the trial that "he was out of it" for part of the confrontation. Although defense counsel stated her belief that Magett could proceed to the second phase of the trial because Magett "presented his testimony that he was out of it during that period of time," she did not explain what she meant by that statement. Based on defense counsel's representations to the court, we understand defense counsel to mean that Magett would in effect repeat the same testimony that he presented during the guilt phase, namely, that he was "blacked out" and "just gone" after the officers entered his cell. Indeed, Magett points to no additional evidence that he would have offered in support of his NGI plea.

¶17 Magett contends that a rational jury could have interpreted his testimony that he "blacked out" to mean that for part of the confrontation he was in an "altered state of consciousness." According to Magett, an "altered state of

consciousness" could constitute a mental disease or defect that prevented him from appreciating the wrongfulness of his conduct or conforming his conduct to the requirements of the law. Magett acknowledges that, at trial, defense counsel argued to the court that Magett could prevail on his NGI defense because "at the time of the incident he said he blacked out. He does [not] have any remembrance of what happened." Magett further acknowledges that defense counsel's interpretation of his testimony does not support an NGI plea. *See* ***Leach***, 124 Wis. 2d at 667 ("Episodic amnesia, the inability to remember committing a crime, is not evidence of mental disease or mental defect."). Nonetheless, Magett contends that a reasonable jury could find that he met his burden of proof based on his testimony that he "blacked out." We disagree.

¶18 As stated above, to prevail on an NGI defense, Magett must prove by the greater weight of the credible evidence that: (1) he suffered from a mental disease or defect at the time of the incident; and (2) the mental disease or defect caused him to lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform that conduct to the requirements of the law. *See* WIS. STAT. § 971.15. A mental disease or defect is defined as "an abnormal condition of the mind which substantially affects mental or emotional processes." WIS JI—CRIMINAL 605. A defendant is not required to present a favorable expert opinion in order to show that he or she was affected by an abnormal condition of the mind. *See* ***Leach***, 124 Wis. 2d at 666. However, the defendant must present some evidence which would "enable[] the jury to make the affirmative determination of mental disease or defect." ***Id.***; *see also* ***State v. Werlein***, 136 Wis. 2d 445, 453, 401 N.W.2d 848 (Ct. App. 1987) (concluding that whether a disorder rises to the level of a mental disease or defect depends on a case-by-case determination). Moreover, not only must a defendant prove he or she suffered from a mental

disease or defect, the defendant must also show that the mental disease or defect had the required effect on the defendant's behavior. WIS JI—CRIMINAL 605. Unless both elements are met, a defendant cannot prevail on an NGI defense.

¶19 We conclude that, viewing the evidence in the light most favorable to Magett, no reasonable jury could rely on Magett's testimony that he "blacked out" as evidence that he suffered from a mental disease or defect that prevented him from appreciating the wrongfulness of his conduct or conforming his conduct to the law. The following undisputed facts from the record support our conclusion: (1) Magett told prison staff that someone would get hurt if his complaints were ignored; (2) Magett covered the camera in his cell so that the corrections officers would take notice of him; (3) Magett put hand cream onto the cell floor resulting in the officers' slipping and falling; (4) Magett refused the officers' directives with the knowledge that, if he refused, the police officers would physically extract him from his cell; and (5) Magett took off his shirt and waited for the officers to enter his cell.

¶20 These undisputed facts from the record are inconsistent with Magett's contention that he was in an altered state which prevented him from appreciating the wrongfulness of his conduct or conforming it to the requirements of the law. Simply stated, no reasonable jury could find after rehearing the same testimony that Magett presented "credible probative evidence toward meeting the burden of establishing the defense of not guilty by reason of mental disease or defect by a preponderance of the evidence after giving the evidence the most favorable interpretation in favor of [Magett]." ***Leach***, 124 Wis. 2d at 663. Because no reasonable jury could have found in Magett's favor based on the videotape evidence and Magett's testimony that he "blacked out," we conclude that any error in refusing to hold the second phase of the trial was harmless and

did not affect Magett's substantial rights. *See* ***Martindale***, 246 Wis. 2d 67, ¶30; WIS. STAT. § 805.18(2).

By the Court.—Judgment affirmed.

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