COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 29, 1996

No. 95-3108-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KAYE D. ROBERTS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Lincoln County: MICHAEL J. NOLAN, Judge. *Affirmed.*

LaROCQUE, J. Kaye Roberts appeals a conviction following a jury trial on a charge of operating a motor vehicle after her operating privileges were revoked (fourth offense-criminal), and an order denying postconviction relief. She contends that the trial court failed to establish a voluntary and knowing waiver of her right to testify. This court affirms.

The parties agree that the trial record is silent whether Roberts knowingly and voluntarily waived her right to testify. At the postconviction hearing, however, Roberts declined the opportunity to testify regarding whether she knowingly and voluntarily declined to testify at trial. This court recently decided ***State v. Klessig***, 199 Wis.2d 397, 544 N.W.2d 605 (Ct. App.

1996), *petition for review granted*. In ***Klessig***, the defendant contended that the absence of a colloquy between the court and defendant regarding defendant's request to represent himself violated his constitutional rights. ***Id***. at 401, 544 N.W.2d at 607. This court agreed that the trial court is obligated to inquire whether the waiver of defendant's right to counsel was voluntarily made. ***Id.*** at 401-02, 544 N.W.2d at 607. We ruled the error harmless, however, based upon the following rationale:

> We first note that the defendant does not assert that he was unaware of the implications of his waiver of counsel or that the waiver was not entirely voluntary. The defendant's position is that the absence of the inquiry standing alone and with nothing more compels reversal. We disagree. When a court fails to comply with mandated procedure, the defendant is obligated to make a prima facia showing that he has been prejudiced by the omission. ***State v. Bangert***, 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986). If a prima facia showing is made, the burden shifts to the State to prove by clear and convincing evidence that the waiver of counsel was knowingly and voluntarily made. ***Id***. at 274-75, 389 N.W.2d at 26. Without a prima facia showing or even a contention that he did not have the knowledge and understanding necessary for him to voluntarily and intelligently waive [the constitutional right], [defendant's] rights have not been prejudiced and the court's omission is nothing more than harmless error.

Id. at 402-03, 544 N.W.2d at 607-08 (footnote omitted). This court concludes that the same analysis applies here.

Roberts points out that this case differs from the circumstances in ***State v. Wilson***, 179 Wis.2d 660, 508 N.W.2d 44 (Ct. App. 1993), where the court held that the right to testify was waived by counsel without a colloquy with the defendant personally. Here there was no waiver on the record by defendant or counsel. Although this court agrees with Roberts that a personal colloquy is

always preferable, in light of the absence of a showing of prejudice, it is unnecessary to determine the proper method to establish the waiver.

By the Court. – Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.