



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

August 5, 2019

To:

Hon. Nicholas McNamara
Circuit Court Judge
Branch 5
215 S. Hamilton St.
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Robert J. Kaiser Jr.
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John P. Morgan
P.O. Box 44506
Madison, WI 53744-4506

Sara Lynn Shaeffer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2017AP2487-CR

State of Wisconsin v. Vickie M. Grover (L.C. # 2012CF1592)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, JJ.

Summary disposition orders 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).

Vickie Grover appeals her judgment of conviction and an order denying her postconviction motion. On appeal, Grover argues that her waiver of the right to testify was not knowing, intelligent, and voluntary, such that the circuit court erred in denying her motion for postconviction relief. Grover also argues that she is entitled to discretionary reversal because the real controversy was not fully tried. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2017-18).¹

Background

Grover was charged with one count of stalking. At Grover's trial, the State elicited testimony from the victim, who was a state patrol officer, as well as from two Sun Prairie police officers. Grover did not testify or call any witnesses. The circuit court held a colloquy at trial regarding Grover's waiver of her right to testify, and accepted her waiver. The jury returned a guilty verdict.

Grover filed a postconviction motion alleging, among other claims, that she did not knowingly, voluntarily, and intelligently waive her right to testify at trial, and that her trial counsel was ineffective for failing to advise her properly on the issue. The circuit court denied the motion without a hearing, and Grover appealed. On appeal, we reversed the circuit court order denying Grover's postconviction motion and remanded the case for an evidentiary hearing under *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Grover testified at the evidentiary hearing that her trial counsel, Adam Walsh, told her that if she testified at trial she would lose. According to Grover, Walsh said he would not represent her if she decided to testify. The court questioned Grover as follows about the colloquy it had conducted with her during trial:

THE COURT: So you thought that even though I said, "You can accept advice from your attorney, you can accept advice from

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

other people you trust, but in the end it's a decision that you alone make," you didn't understand those words?

THE DEFENDANT: Well, Attorney Walsh talked me out of getting on the stand.

When asked how Walsh talked her out of testifying, Grover answered that Walsh "basically threatened" her at the counsel table.

Walsh also testified at the evidentiary hearing. Although he could not recall any specific conversations with Grover about whether to testify or not, Walsh testified that he typically tells the client "it is always one hundred percent their choice whether or not they want to testify and that I can give them advice, but my advice is in no way, shape or form binding[.]" Walsh also testified that he never would have told Grover he would stop representing her if she chose to testify. Walsh stated, "I would never have said that because Judge McNamara would not have allowed me to withdraw in the middle of the trial. I'm well aware of that. So it would make no sense to tell someone something that isn't even realistic."

The circuit court denied Grover's postconviction motion, and Grover now appeals.

Discussion

The constitutional right of a criminal defendant to testify on his or her own behalf is a fundamental right that must be waived knowingly, voluntarily and intelligently. *State v. Denson*, 2011 WI 70, ¶8, 335 Wis. 2d 681, 799 N.W.2d 831. Waiver of the right to testify requires that a circuit court conduct an on-the-record colloquy. *Id.*, ¶57 (citing *State v. Weed*, 2003 WI 85, ¶48, 263 Wis. 2d 434, 666 N.W.2d 485). Whether a defendant waived his or her right to testify is a question of constitutional fact that presents a two-step process of review. *Weed*, 263 Wis. 2d 434, ¶13. We review "the circuit court's findings of historical fact using a

deferential standard of review and will uphold the circuit court's findings unless they are clearly erroneous," while the court's determination of constitutional fact is reviewed de novo. *Id.*

The record reflects that the circuit court conducted an in-person colloquy with Grover regarding her waiver of the right to testify. In denying Grover's postconviction motion, the court found that Grover's "waiver of her right to testify was knowing, intelligent, and voluntary and not the result of any threats or intimidation by trial counsel." In making this finding, the court relied on credibility determinations and cited the specific portions of the record that it relied upon in making those determinations. The court explicitly found Walsh's testimony to be credible and Grover's testimony not to be credible. The court found, "in regards to the Defendant's decision not to testify, that Mr. Walsh never told the Defendant that she had to do what he said and that she had no choice." The court further found "that Mr. Walsh never told the Defendant that if she chose to testify when this Court asked her if she wanted to that he would immediately stop representing her in the middle of the trial." The court stated in its written findings of fact and conclusions of law that "[n]o basis exists in this record for this Court to ignore the 'solemn answers' this Defendant made to the Court's questions during the colloquy regarding testifying and so the Court considers those 'solemn answers' to have been the truth," relying on *State v. Jenkins*, 2007 WI 96, ¶62, 303 Wis. 2d 157, 736 N.W.2d 24.

The circuit court was in the unique position to observe Walsh and Grover both at trial and during their testimony at the postconviction motion hearing. The circuit court stated that it had "an opportunity to view their conduct and demeanor on the witness stand" and made its credibility determinations accordingly. "When required to make a finding of fact, the trial court determines the credibility of the witnesses and the weight to be given to their testimony and its determination will not be disturbed by this court on appeal where more than one inference may

be drawn from the evidence.” *State v. Turner*, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983). Grover provides us with no basis to second-guess the circuit court’s credibility findings. Therefore, we uphold the court’s decision to deny Grover’s postconviction motion on the basis that her waiver of the right to testify was valid.

Finally, we turn to Grover’s argument that this court should exercise its discretionary power of reversal pursuant to WIS. STAT. § 752.35 on the basis that the real controversy has not been fully tried. In order to establish that the real controversy has not been fully tried, Grover must convince us “that the jury was precluded from considering ‘important testimony that bore on an important issue’ or that certain evidence which was improperly received ‘clouded a crucial issue’ in the case.” *State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). Here, Grover argues that the jury was denied access to her own testimony and to “additional information corroborating” her belief that she was being stalked by the victim, and not the other way around. However, as discussed above, Grover knowingly, intelligently, and voluntarily waived her right to testify. She now argues in general terms that a power disparity between her and the state patrol officer should be considered by a jury in light of the recent #MeToo movement. However, Grover fails to develop the argument beyond generalities, and we reject it on that basis. We are not persuaded by Grover’s suggestion that a male state patrol officer cannot be stalked by a woman simply because a general power differential exists between a male law enforcement officer and a female citizen.

Based upon the foregoing, we are satisfied that the real controversy has been fully tried, and we conclude that there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to reverse the judgment.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals