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DISTRICT I

June 20, 2023

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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Jacob J. Wittwer
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Vicki Zick
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You are hereby notified that the Court has entered the following opinion and order:

2022AP809-CR State of Wisconsin v. Matthew Lee Wilks (L.C. # 2019CF3915)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Matthew Lee Wilks appeals from a judgment convicting him of first-degree intentional homicide and possession of a firearm by a felon. Wilks also appeals from an order denying his postconviction motion for a new trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] The judgment and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On August 30, 2019, Wilks, driving a van, collided with a car at an intersection, causing damage to the front passenger corner of the car. The car was driven by C.S. and his mother, T.S., was the front-seat passenger. T.S. got out to inspect the damage. Wilks opened his door and stood on the foot rail of the van. An upset T.S. was yelling at Wilks. C.S. heard Wilks say, "Bitch, I'll kill you." Wilks then pointed a gun and fired one shot, striking T.S. and killing her. Surveillance video allowed police to find the van's license plate, which was listed to Wilks. Police assembled a photo array, and C.S. identified Wilks as the man who killed his mother. Wilks was charged with first-degree intentional homicide and possession of a firearm by a felon.

At trial, trial counsel[2] told the jury in his opening statement that T.S.'s "tone, her language, her aggression, it put [him] on high alert. He feared for his life. Defended himself. And is not guilty of homicide." The State rested after calling fourteen witnesses, including a bystander who also heard Wilks say, "Bitch, I'll kill you." Wilks's attorneys then informed the trial court that Wilks had decided not to testify, despite previous indications that he would. The trial court engaged Wilks in a colloquy and accepted his decision not to testify, and the defense rested.

After the colloquy with Wilks, the discussion shifted to jury instructions. The trial court asked about the substantive instructions. The State noted that it had originally prepared the substantive portion of the instructions based on pretrial issues and Wilks's opening statement, "which had to do with self-defense." However, the State argued, without Wilks's testimony, "there's no basis to give a self-defense [instruction]." Trial counsel asked the trial court to give

[2] Wilks was represented by two attorneys, Colin McGinn and Bridget Krause.

the self-defense instruction anyway, because other witnesses had testified that T.S. "was anywhere from three feet to fifteen feet [from Wilks], that she had been swearing at Mr. Wilks, that she had been approaching the van, and that she was the one that was going back and forth between where the van was located and her passenger side door."

The trial court declined to give the self-defense instruction, explaining that "I don't think there's any basis to give the self-defense [instruction] either …. The fact that somebody is yelling and screaming who's about six or eight feet around, that's what the testimony was, it doesn't give rise to a self-defense instruction by any standard." The trial court did, however, give the jury instruction for the lesser-included offense of first-degree reckless homicide. The jury convicted Wilks of first-degree intentional homicide and possession of a firearm by a felon. The trial court sentenced Wilks to life imprisonment without eligibility for extended supervision.[3]

Wilks filed a postconviction motion for a new trial. He alleged that trial counsel were ineffective because they failed to properly advise him that he would lose the ability to argue self-defense if he did not testify. Wilks also alleged that the waiver colloquy about his right to testify was defective because no one explained to him the harsh consequences of not testifying when claiming self-defense.

The trial court set a briefing schedule. After briefing, it granted an evidentiary hearing on the ineffective assistance claim but rejected the deficient colloquy claim, finding that neither the court, nor the State had a duty to advise Wilks of the consequences of his choice not to testify.

[3] The firearm sentence is concurrent with the homicide sentence.

At the evidentiary hearing, Wilks testified that although initially he intended to take the stand, "once … all the evidence was out, I was assuming that it was plain to see that you know, that I wasn't the aggressor[.]" Wilks further testified that neither of his attorneys told him he would have to testify in order to claim self-defense, and the first time he learned of this consequence was when the trial court ruled that it would not give the self-defense instruction. Trial counsel also testified. One testified that he told Wilks his failure to testify "would be very damaging to his case" and that without his testimony, it was "very unlikely" they would get the self-defense instruction, but Wilks "just didn't feel like he needed to testify." His other counsel testified that she "explained to him that it was almost impossible to get a self-defense [instruction] … if the client didn't testify[.]" The trial court determined that trial counsels' testimony was credible and Wilks's testimony was not. The trial court concluded that Wilks had not received ineffective assistance and denied the remainder of the motion for a new trial.

Wilks appeals. He does not challenge the ruling that there was no ineffective assistance. Rather, the only issue raised on appeal "is whether the prosecutor and the court had a duty at Wilks'[s] waiver colloquy to confirm that Wilks was knowingly and intelligently waiving his right to testify."

"Courts engage in personal colloquies in order to protect defendants against violations of their fundamental constitutional rights." ***State v. Francis***, 2005 WI App 161, ¶1, 285 Wis. 2d 451, 701 N.W.2d 632. "[A] criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. "If a defendant waives the right to testify, the trial court 'should conduct a colloquy with the defendant in order to ensure that the defendant is knowingly and voluntarily waiving'" that right. *See* ***State v. Pirtle***, 2011 WI App 89, ¶28, 334 Wis. 2d 211, 799 N.W.2d 492 (citation

omitted). "The colloquy should consist of a basic inquiry to ensure that (1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel." ***Weed***, 263 Wis. 2d 434, ¶43.

The trial court's colloquy with Wilks was as follows:

> THE COURT: So it's my understanding, sir, that based upon what counsel has said, that you are not going to testify?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And that's a decision that you have made independently and voluntarily?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And it's your choice not to testify?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You discussed it with your lawyer?
>
> THE DEFENDANT: Yes, I did.
>
> THE COURT: And counsel, you believe he's – it's a voluntary decision on his part not to testify?
>
> THE DEFENDANT: Excuse me?
>
> [DEFENSE COUNSEL]: Yes, Judge.
>
> THE COURT: And you've discussed it thoroughly with him?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: And just so we understand each other, sir, you have a right to testify and a right not to testify. And you've chosen not to testify; is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay.

This colloquy sufficiently verifies that Wilks was aware of his right to testify and that he had discussed that right with counsel, the "basic inquiry" required by ***Weed***. Wilks contends,

however, "that the [trial] court did not go far enough to assure that he knowingly and intelligently waived his right to testify." Because the trial court knew Wilks was claiming self-defense, Wilks believed that the trial court "really needed to explore with Wilks the fact that he would not be able to argue self-defense or would not get the jury instruction unless he testified." Relying on ***Francis***, 285 Wis. 2d 451, ¶15, Wilks asserts that the trial court "must thoroughly canvass the matter with the accused to make sure he has a full understanding of his decision and its consequences." We disagree.

First, ***Francis*** does not support Wilks's argument. In that case, Jennifer Francis was charged in a twenty-four count information. ***Id.***, ¶5. She originally entered not guilty and not guilty by reason of mental disease or defect (NGI) pleas. ***Id.***, ¶6. An examining doctor concluded that Francis's mental disorders did not diminish her mental responsibility for her actions. *See* ***id.***, ¶8. Francis subsequently entered guilty and no contest pleas to seven offenses. ***Id.***, ¶¶10-11. After her conviction, Francis sought postconviction relief on multiple grounds, including a claim that "the circuit court erred when it accepted her pleas of guilty and no contest without ascertaining via a personal colloquy that Francis intended to abandon her earlier NGI plea." *See* ***id.***, ¶¶12, 14.

This court determined that no such colloquy was required because an NGI plea is a statutory right, not a constitutional one. *See* ***id.***, ¶¶19, 21. "[O]nly fundamental constitutional rights warrant this special protection" of a colloquy. *See* ***id.***, ¶22. Similarly, the privilege of self-defense is also statutory, not constitutional. *See* ***State v. Wenger***, 225 Wis. 2d 495, 501, 593 N.W.2d 467 (Ct. App. 1999). Francis's plea colloquy was valid even though the court did not further explore the impact of the plea on her statutory defense; likewise, Wilks's colloquy regarding testifying was valid even though the court did not explore the impact of his choice on

his statutory defense. That is, the trial court's colloquy with Wilks was not inadequate because a trial court is not required to explain the impact of the defendant's choice on the viability of possible defenses.

Wilks also claims that the State had a duty to establish that he understood the consequences of waiving his right to testify relative to his self-defense claim, arguing that although the State "may strike hard blows, [it] is not at liberty to strike foul ones." *See* ***Berger v. United States***, 295 U.S. 78, 88 (1935). ***Berger***, as a prosecutorial misconduct case, is inapplicable. *See* ***id.*** at 84-85, 89; *see also* ***Hoppe v. State***, 74 Wis. 2d 107, 120, 246 N.W.2d 122 (1976). There is no direct allegation of prosecutorial misconduct here, nor would we sustain such a complaint. The State has no obligation to advise defendants regarding whether to testify, nor should it attempt to influence a decision a defendant has made in consultation with his own attorneys.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals