No. 14-555

In The

Supreme Court of the United States

ANGELICA C. NELSON,

Petitioner,

v.

WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

BRAD D. SCHIMEL
Attorney General of Wisconsin

AARON R. O'NEIL
Assistant Attorney General

DANIEL J. O'BRIEN
Counsel of Record
Assistant Attorney General

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

QUESTION PRESENTED

If the trial court erred by not allowing Petitioner to testify at trial after it concluded she was not knowingly, voluntarily, and intelligently waiving her right not to incriminate herself, was this a structural error not amenable to harmless-error analysis?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

Petitioner Angelica C. Nelson has asked this Court to grant her petition for a writ of certiorari to resolve whether a trial court's violation of a criminal defendant's right to testify is amenable to harmless-error analysis (Petition at i). The Court should deny the petition for several reasons.

First, contrary to Nelson's assertions, this case does not cleanly present the issue on which she seeks review. None of the courts below addressed in a significant way whether the trial court violated Nelson's right to testify. It is not obvious that the trial court erred. The unresolved issue of whether there was a constitutional violation in the first place makes this case less than ideal for resolving whether such violations can be harmless.

Second, Nelson overstates the conflict on this issue among state supreme courts and circuit courts of appeal that is the primary basis for her petition. Many of the cases she relies on are distinguishable, and the one that is most similar to Nelson's case does not present a conflict that this Court needs to resolve at this time.

Third, and finally, this Court should not grant Nelson's petition because the Wisconsin Supreme Court correctly determined that violations of a defendant's right to testify are subject to harmless-error analysis and that any error by the trial court in this case was harmless. The supreme court's decision

was entirely consistent with this Court's case law explaining whether errors are structural or trial errors, and there is no reason for this Court to review that decision.

STATEMENT OF THE CASE

While Wisconsin largely agrees with the statement of the case Nelson provides in her petition, it offers the following additional facts about the trial court's colloquy with Nelson regarding her waiver of her right not to incriminate herself and its finding that she was not knowingly, voluntarily, and intelligently waiving that right. Wisconsin also wishes to clarify Nelson's representation to this Court about the position it took in state court on whether the trial court erred when it did not allow Nelson to testify.

***

After defense counsel told the court that Nelson wanted to testify and confirming this with Nelson, the trial court asked her a series of questions "to make sure that you are waiving your right, that is, giving up your right, against self-incrimination voluntarily." (R-Ap. 105). Counsel told the court that Nelson "had a question about what self-incrimination was." (R-Ap. 105). The Court explained:

> THE COURT: Well, here, let me explain this. You know, if you want

> to testify, and you can do that, but the law says that you don't have to testify if you don't want to. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. In other words, the Constitution says, the U.S. Constitution says that you don't have to testify, and that if you don't want to testify, [the prosecutor] can't use that against you and the jury can't use that against you. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. But if you decide to testify, which you can do if you want, then what you're doing is you're giving up that constitutional right not to testify. Make sense?
>
> THE DEFENDANT: Yes.

(R-Ap. 106).

The court then asked Nelson if she understood that she had the right to testify and the right not to testify. Nelson said yes (R-Ap. 106). Next, the court asked Nelson if she had spoken with her lawyer about the advantages and disadvantages of

testifying and not testifying (R-Ap. 106). In response, Nelson turned toward her attorney, and the court then asked counsel if she had discussed these matters with Nelson (R-Ap. 107). Counsel said she had explained to Nelson "[t]hat if she testifies, [the prosecutor] would be able to ask her questions. It wouldn't just be me asking her questions. She would like to further explain the incident that occurred. And the only way that can happen, [is] if she testified. I've explained they cannot, the jury cannot use it against her if she does not testify." (R-Ap. 107). Nelson confirmed that she had talked to her attorney about these matters and that she had enough time to do so (R-Ap. 107).

After this, the court asked Nelson if she wanted to testify, and she said that she did (R-Ap. 107). The court then asked Nelson "what kinds of issues or subjects do you think need clarification? Or what has to be explained, if anything, to the jury?" (R-Ap. 107). Nelson responded "[t]he days and other things that were said." (R-Ap. 108). The court asked Nelson if she understood that if she testified, the prosecutor could ask her if she had sexual intercourse with the victim and that she would have to answer truthfully (R-Ap. 108). Nelson said she understood (R-Ap. 108).

Next, the court asked Nelson if she understood that the exact days she committed the crimes and other details did not really matter (R-Ap. 108). Nelson said she did, but that testifying "would make me feel better." (R-Ap. 108). She acknowledged that she knew the only things that the State needed to

prove were that she had sexual intercourse with the victim and that he was under the age of sixteen, and said she did not "really know how to answer" the court's question (R-Ap. 108). Nelson said that what she wanted to say did not have to do with the victim's age, but with what "actually happened." (R-Ap. 109). The court asked Nelson's attorney to clarify, and counsel responded:

> Specifically, [the victim] testified that Angelica was the one who unbuckled his pants. She wants to make it clear, because she thinks it looks bad, that that was not the case. And that there's no discussion about their age, although they did know how old each other were at the time. And that it did not happen three days in a row, as [the victim] testified to.
>
> …
>
> And, yes, I discussed with Ms. Nelson that has no bearing on the elements. However, she feels that she would like the jury to know that.

(R-Ap. 109).

In response to further questioning from the court, Nelson's attorney said that she did not recommend to Nelson that she testify and told her it was not a good idea, though she also told Nelson it was her decision to make (R-Ap. 110).

After both the prosecutor, defense counsel, and the court all admitted they were unaware of any case law governing the situation, the court held:

> But I do know this, that in order for me to permit the defendant, any defendant, including Ms. Nelson, to testify, I have to make a finding that she's waiving her right against self-incrimination freely, voluntarily and intelligently and knowingly and that she understands her right to either testify or not to testify.
>
> And it seems to me that based upon this limited colloquy that I've had with Ms. Nelson, I, and when I say limited, I think I've thoroughly explored the ins and outs of what she wants to testify to, but I can't find that Ms. Nelson is intelligently and knowingly waiving her right against self-incrimination because she wants to testify to things that are completely irrelevant to the two things that the state has to prove.
>
> I'm also finding that she's – that she's not intelligently and knowingly waiving her right against self-incrimination, because based upon the colloquy that I've had here with [defense counsel], Angelica Nelson is

> doing this against the advice of her lawyer, at least with her lawyer telling her that it's not a good idea.
>
> I do recognize that there are some instances in which a defendant could be inadvisably taking the witness stand. But it would be on elements, issues that are central to the case, that is, elements the state has to prove.
>
> In this particular case, as I've explained, Angelica Nelson wants to talk about all sorts of things that don't matter. And if she took the witness stand, under the circumstances, Ms. Larson could extract from Ms. Nelson the admissions that this occurred.
>
> So I just don't think I can make that finding. So I'm not going to let her testify.

(R-Ap. 111-12).

In response to the court's ruling, defense counsel reiterated that Nelson wanted to testify to tell her side of the story (R-Ap. 112). The court questioned both defense counsel and Nelson, who both again admitted that if Nelson testified, she would not deny having sexual intercourse with the victim or that he was under sixteen years old (R-Ap. 112-13).

***

In its decision, the Wisconsin Supreme Court said, "the State does not dispute that the circuit court erred." (Pet-Ap. 7a, 10a). Nelson relies on this statement to support her argument that if this Court were to hold that a denial of the right to testify is structural error, then its decision would be outcome determinative and entitle her to a new trial (Petition at 16).

The state supreme court's statement, while accurate, does not precisely explain Wisconsin's position whether the trial court violated Nelson's right to testify. In both the Wisconsin Court of Appeals and the Wisconsin Supreme Court, the Respondent argued that assuming the trial court violated Nelson's right to testify, any error was harmless (Pet-Ap. 41a) (R-Ap. 103). The supreme court made its decisions based on the same assumption (Pet-Ap. 10a). Wisconsin has never conceded that the trial court violated Nelson's right to testify.

REASONS FOR DENYING THE PETITION

I. This case is not ideal for determining whether violations of the right to testify are amenable to harmless-error review because there has never been a reasoned finding that the trial court violated Nelson's right to testify.

This Court should deny Nelson's petition, first, because it does not cleanly present the issue she wants resolved. Nelson asks this Court to determine if a violation of the right to testify is amenable to harmless error, but neither of the Wisconsin appellate courts made a reasoned determination that the trial court violated Nelson's right to testify. While the Wisconsin Court of Appeals stated that the trial court erred, it did so without any analysis (Pet-Ap. 44a). The Wisconsin Supreme Court assumed without deciding that the trial court erred (Pet-Ap. 10a). Contrary to Nelson's argument on this matter, it is not obvious that there was any error (Petition at 16-17). Granting Nelson's petition would likely require this Court to resolve the never-before-addressed issue of whether there was an error before it could address whether such an error can be harmless.

Nelson wants this court to hold that a violation of the right to testify can never be harmless error and find that she is entitled to a new trial. But in order to reach this conclusion, this Court would have to

first find that the trial court violated her right to testify. It would be inappropriate for the Court to conclude that Nelson was entitled to a new trial because a violation of her right to testify cannot be harmless error without first finding that the trial court actually violated that right.

Resolving whether the trial court improperly denied Nelson her right to testify would complicate this case. From a legal standpoint, it would require the Court to, as far as Wisconsin can tell, determine for the first time the standard governing the waiver of the privilege against self-incrimination for defendants who want to testify. *See Rock v. Arkansas*, 483 U.S. 44, 52-53 (1987) (the right to testify is the corollary of the Fifth Amendment's guarantee against compelled testimony and "the privilege against self-incrimination is fulfilled only when an accused is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will") (internal punctuation and quoted source omitted).

Possibly, the standard would be that of *Brady v. United States*, 397 U.S. 742, 748 (1970), and *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), which require that the waiver of important constitutional rights be knowing, voluntary, and intelligent, and that the waiver of fundamental constitutional rights, like the right to testify, *see Rock*, 483 U.S. at 53 n.10, be "an intentional relinquishment or abandonment" of the right. This is the standard Wisconsin recognizes, and which the trial court applied when it concluded that

Nelson was not knowingly, voluntarily, and intelligently waiving her privilege against self-incrimination. *See State v. Weed*, 2003 WI 85, ¶¶ 37-40, 263 Wis. 2d 434, 666 N.W.2d 485 (quotation marks and citation omitted) (R-Ap. 110-11).

In her petition, though, Nelson appears to suggest a different standard. She argues that the trial court erred because it had earlier found her competent to stand trial and she "unequivocally expressed her desire to testify." (Petition at 16). Nelson does not mention waiving her privilege against self-incrimination. Thus, it appears the Court would have to resolve a significant antecedent issue of constitutional law before it could reach whether violations of the right to testify are structural or trial error.

Further, it is not obvious that the Court would be able to reach the question Nelson presents if it granted certiorari because it is not clear that the trial court actually violated Nelson's right to testify. Admittedly, this case is unusual. Courts do not often completely prohibit a defendant from testifying. But a review of the trial court's colloquy with Nelson and her attorney reveals that the court had legitimate concerns about Nelson's ability to understand her right not to incriminate herself given her repeated statements that if she testified, she would admit that she committed the crimes, and that the remainder of her testimony would have little, if any, relevance to what the State needed to prove. As the concurring opinion in the Wisconsin Supreme Court

aptly noted, "[i]n this case, there was no easy answer" for the trial court (Pet-Ap. at 28a). This is likely why the majority opinion sidestepped the issue entirely.

While this Court could review the colloquy and assess whether the trial court violated Nelson's right to testify, it ordinarily does "'not decide in the first instance issues not decided below.'" *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001), quoting *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999). This Court should dismiss Nelson's petition and wait for a case where there is no dispute that a trial court completely violated a defendant's right to testify to determine if such errors can be harmless.[1]

II. Nelson overstates the conflict on which she bases her petition and any actual conflict does not warrant granting her petition.

Nelson's primary argument in support of her petition is that "courts are widely and intractably divided" over whether a violation of the right to testify is amenable to harmless-error analysis (Petition at 9). Many of the cases on which Nelson relies to show a conflict are distinguishable. At best,

---

[1] If this Court were to grant review and find there was no error, it likely would dismiss Nelson's petition as improvidently granted. *See Rogers v. United States*, 522 U.S. 252, 254-59 (1998) (dismissing writ as improvidently granted where Court granted certiorari to determine if error in jury instructions was harmless, but Court concluded there was no error).

only one of these cases conflicts with the Wisconsin Supreme Court's decision. Nelson has not demonstrated the existence of a significant conflict that this Court needs to resolve.

Nelson points to six cases, four from state supreme courts and two from federal district courts, holding that the denial of the right to testify is not subject to harmless-error analysis (Petition at 9-13). Most of these cases are distinguishable.

In *State v. Dauzart*, 769 So. 2d 1206, 1209-10 (La. 2000), the Louisiana Supreme Court held that a trial court had abused its discretion when it refused to reopen the evidentiary phase of trial to allow the defendant to testify after the defense had rested. In contrast, here, the trial court found that Nelson could not knowingly, voluntarily, and intelligently make the decision to testify.

Further, *Dauzert* does not meaningfully conflict with the Wisconsin Supreme Court's analysis of this Court's decisions addressing the difference between structural and trial errors. The Louisiana court's conclusion that a violation of a defendant's right to testify is not subject to harmless error is cursory. The court merely noted that the right to testify is more fundamental than the right of self-representation, and because a violation of the latter right cannot be harmless, neither can a violation of the former. *Id.* at 1210-11, citing *Rock*, 483 U.S. at 52 and *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). It never discussed this Court's jurisprudence,

beginning with *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), classifying errors as structural or trial and the standards for evaluating which category particular errors fall under. *Dauzert* did not apply the case law that would be central to resolving the question presented.

Nelson also relies on *State v. Rosillo*, 281 N.W.2d 877 (Minn. 1979) (Petition at 10). She acknowledges that, unlike this case, *Rosillo* involved a claim that the defendant's attorney, not the trial court, violated the defendant's right to testify. *Id.* at 879. Additionally, the *Rosillo* court found that no error occurred, so its conclusion that a violation of the right to testify is not subject to harmless error is dicta. *Id.* Finally, the court's conclusion that harmless error does not apply not only precedes *Fulminante*, it also came before *Rock*. While Nelson notes that *Rosillo* remains good law in Minnesota and is used in cases where the trial court, not counsel, violates the defendant's right to testify, she points to nothing to suggest that the Minnesota Supreme Court has reaffirmed its decision in light of these relevant, later-decided cases (Petition at 10). [2]

Boyd v. United States, 586 A.2d 670 (D.C. 1991), also does not directly conflict with *Nelson*. There, the

---

[2] For that matter, *Rosillo* precedes *Strickland v. Washington*, 466 U.S. 668 (1984), which, according to one analysis, every federal circuit court of appeals uses to assess claims that counsel's conduct prevented the defendant from testifying. Daniel J. Capra & Joseph Tartakovsky, *Why Strickland is the Wrong Test for Violations of the Right to Testify*, 70 Wash. & Lee L. Rev. 95, 112-13 (2013).

issue was whether the trial court erred by not conducting a colloquy to determine if the defendant had waived her right to testify. *Id.* at 674-80. The District of Columbia Court of Appeals held that the trial court had erred, and concluded that the failure to ask the defendant if she was waiving her right to testify could not be harmless error. *Id.* at 679. But the court did not grant the defendant a new trial. Instead, it remanded for further proceedings to allow the trial court to determine if the defendant had waived her right. *Id.* If she did not, the court held, then she was entitled to a new trial. *Id.* at 678.

Unlike here, there was no claim in *Boyd* that the trial court improperly prevented the defendant from testifying. Rather, the court was faulted for not asking the defendant if she wanted to testify. The trial court in this case conducted a colloquy with Nelson and held that she was unable to validly waive her privilege against self-incrimination. Further, while the court in *Boyd* did say that the nature of the right to testify makes it not amenable to harmless error review, it reached this decision before *Fulminante*, and thus, the court did not apply that case's structural/trial error analysis when making its decision.[3] Like *Dauzert* and *Rosillo*, *Boyd* does not apply much of the case law relevant to resolving the question Nelson wants this Court to address.

---

[3] The District of Columbia Court of Appeals decided *Boyd* on January 7, 1991. This Court decided *Fulminante* on March 26, 1991.

As for the district court cases Nelson points to, both involve claims that counsel, not the trial court, violated the defendant's right to testify. *See Paradise v. DuBois*, 188 F. Supp. 2d 4, 9 (D. Mass. 2001); *United States v. Butts*, 630 F. Supp. 1145, 1147 (D. Me. 1986). And they are arguably no longer good law because the First Circuit now analyzes claims that counsel violated the defendant's right to testify under *Strickland v. Washington*, 466 U.S. 668 (1984), and thus requires that the defendant show actual prejudice from counsel's actions. *See* footnote 2, *supra*; *Owens v. United States*, 483 F.3d 48, 57-59 (1st Cir. 2007).

That leaves the South Carolina Supreme Court's decision in *State v. Rivera*, 741 S.E.2d 694 (2013). Like this case, the trial court in *Rivera* conducted a colloquy with the defendant about his right to testify and ultimately did not allow him to take the stand. *Id.* at 696-701. The defendant told the court that he wanted to testify about the crimes he was on trial for, but the court concluded that this testimony would be prejudicial and not relevant. *Id.* at 699. The South Carolina Supreme Court determined this was in error and had the effect of denying the defendant his constitutional right to testify. *Id.* at 703-05. The court held this error was structural within the meaning of *Fulminante*. *Id.* at 705-07.

While *Rivera* has more in common with the Wisconsin Supreme Court's decision than the other cases Nelson points to, it still is distinguishable. The *Rivera* court found that, though the trial court erred,

defense counsel also "actively thwarted Appellant's desire to testify." *Id*. at 703. Defense counsel did not do so here. Instead, counsel told the trial court that, though she advised her not to testify, it was Nelson's decision whether she would (R-Ap. 110). Counsel also reiterated Nelson's desire to testify after the court ruled she was not validly waiving her right not to incriminate herself (R-Ap. 112). And, unlike in this case, the trial court in *Rivera* never found that the defendant was not making a knowing, intelligent, and voluntary waiver of this right.

Even assuming there is a square conflict between *Rivera* and this case, though, this Court should still decline review. Both cases were only recently decided. Other courts, particularly the federal circuit courts of appeals, should be allowed to address whether a trial court's preventing a defendant from testifying can be harmless under *Fulminante's* structural/trial error dichotomy before this Court ultimately resolves the issue.[4]

[4] Nelson points to three decisions of other state supreme courts and one published federal circuit court of appeals decision holding that a violation of a defendant's right to testify is amenable to harmless-error analysis (Petition at 11). Only one, *Quarels v. Commonwealth*, 142 S.W.3d 73, 80-82 (Ky. 2004), analyzes the issue using *Fulminante's* framework.

III. Review is not warranted because the Wisconsin Supreme Court correctly held that violations of a defendant's right to testify are trial errors and that any error in Nelson's case was harmless.

Finally, this Court should deny Nelson's petition because the Wisconsin Supreme Court's conclusion that any violation of her right to testify was subject to harmless error review was entirely consistent with this Court's decisions and its finding that any error was harmless was correct.

A. Applicable law.

While "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," not all constitutional violations automatically require reversal. *Chapman v. California*, 386 U.S. 18, 23 (1967). "[M]ost constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306.

This Court has classified constitutional errors occurring in criminal proceedings into two categories, trial errors and structural errors. *See id.* at 307-09. The former are subject to harmless error analysis and the latter are not. *See id.*

A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. "Such errors 'infect the entire trial process'

. . . and 'necessarily render a trial fundamentally unfair.'" *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993) and *Rose v. Clark*, 478 U.S. 570, 577 (1986)). The conclusion that an error is structural flows from the difficulty of assessing the effect of the error on the trial's outcome. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006).

This Court has found structural error in a "'very limited class of cases.'" *Neder*, 527 U.S. at 8, (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). These are the complete denial of counsel, a biased trial judge, racial discrimination in grand jury selection, the denial of the right to self-representation at trial, the denial of a public trial, and a defect in the reasonable doubt jury instruction. *Neder*, 527 U.S. at 8.

"'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" *Neder*, 527 U.S. at 8 (quoting *Clark*, 478 U.S. at 579). Such errors are considered "trial error[s]" because they "occurred during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Gonzalez*-Lopez, 548 U.S. at 148-49 (quoting *Fulminante*, 499 U.S. at 307-08) (internal quotation

marks omitted)). "[M]ost constitutional errors" are trial errors. *Gonzalez-Lopez*, 548 U.S. at 148-49.

B. The Wisconsin Supreme Court correctly held that violations of the right to testify are trial errors and that any error here was harmless.

The Wisconsin Supreme Court's conclusion that the denial of a defendant's right to testify is a trial error is a correct application of the foregoing principles. The court addressed this Court's structural/trial error dichotomy and concluded that a violation of the right to testify "bears the hallmark of a trial error." (Pet-Ap. 11a-12a). Specifically, the court noted that the effect of the defendant's missing testimony can be assessed in the context of the other evidence to determine if its omission was, in fact, harmless (Pet-Ap. 12a-13a). As this Court stated in *Gonzalez-Lopez*, the ability to assess an error for harmlessness is what makes it a trial error. *See Gonzalez-Lopez*, 548 U.S. at 149 n.4.

Additionally, the supreme court concluded that any error was a trial error because "the denial of a defendant's right to testify occurs at a discrete point in the trial," unlike structural errors that "permeate the entire process." (Pet-Ap. 13a). This conclusion is entirely consistent with this Court's decisions, which hold that trial errors occur during the presentation of evidence to the jury and thus can be examined for harmlessness, while structural errors cannot

because they "'infect the entire trial process.'" *Neder*, 527 U.S. at 8; *Gonzalez*-Lopez, 548 U.S. at 148-49.

Further, Nelson's argument that a violation of her right to testify cannot be harmless because of its relationship to the right of self-representation finds only superficial support in this Court's precedent (Petition at 18-21). It is true that this Court has explained the right to testify is "[e]ven more fundamental" than the right of self-representation, and that the latter right is a source of the former. *Rock*, 483 U.S. at 52. But simply because the rights are related does not mean violations of both are structural errors. Denying a defendant's right to self-representation affects the entire framework of the trial, while not letting the defendant testify only prevents the jury from hearing particular evidence. This distinction makes the former error structural and the latter a trial error under *Fulminante*.

In addition, this Court identified other constitutional sources of the right to testify besides the right of self-representation, including the privilege against self-incrimination and the rights to compulsory process and to present witnesses. *Id.* at 52-53. Violations of these rights are subject to harmless-error review. *See Fulminante*, 499 U.S. at 295; *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986).

Nelson also argues that a violation of the right to testify cannot be harmless because the right protects her dignity and personal autonomy (Petition at 18-19). But the same is true for many constitutional

rights, such as the prohibition on the use of a defendant's coerced confession. This Court has held a violation of that right can be harmless. *See Fulminante*, 499 U.S. at 295. This Court's cases make it clear that whether an error is trial or structural depends on whether it can be assessed for harmlessness, and the Wisconsin Supreme Court correctly applied the law.

Alternatively, Nelson argues that if the supreme court was right to apply *Fulminante*, violations of the right to testify are nonetheless structural because they are incapable of being assessed for harmlessness (Petition at 21-24). Specifically, she maintains it is just too difficult for a court to meaningfully assess the exact influence the defendant's missing testimony had on a trial's outcome (Petition at 21-24).

Admittedly, in many cases, it might be difficult for a court to determine whether the defendant's missing testimony affected the trial's outcome. If that is the case, the court would simply find the error not harmless and give the defendant a new trial. Perhaps this would happen in many, if not most, cases where the defendant is not allowed to testify.

But it is not true that such violations categorically cannot be assessed for harmlessness, as Nelson's case shows. There is no dispute that Nelson was going to confess on the stand. Her other testimony would have addressed things that would

have not mattered to what the jury needed to decide in resolving whether she was guilty (Pet-Ap. 22a). The State's proof was overwhelming (Pet-Ap. 23a). The Wisconsin Supreme Court was able to meaningfully assess the effect of Nelson's missing testimony, and it properly found that any violation of her right to testify was harmless.

CONCLUSION

Upon the foregoing, Wisconsin respectfully requests that this Court deny Nelson's petition for a writ of certiorari.

Dated at Madison, Wisconsin this 3rd day of February, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

AARON R. O'NEIL
Assistant Attorney General

DANIEL J. O'BRIEN
Counsel of Record

Assistant Attorney General
Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

APPENDIX

Angelica C. Nelson v. Wisconsin

INDEX TO APPENDIX

R-Ap. 101

EXCERPT OF BRIEF OF PLAINTIFF-RESPONDENT

STATE OF WISCONSIN

IN SUPREME COURT

--

No. 2012AP2140-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANGELICA C. NELSON,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR EAU CLAIRE COUNTY, THE HONORABLE WILLIAM M. GABLER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES

PRESENTED FOR REVIEW

1. Is a violation of a criminal defendant's right to testify subject to harmless-error review?

The circuit court did not answer this question.

The court of appeals answered yes.

2. Assuming the trial court violated Nelson's right to testify, was the error harmless?

The circuit court did not answer this question.

The court of appeals answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This court has already set this case for oral argument. As with any case this court has accepted for review, publication is warranted.

STATEMENT OF THE CASE AND FACTS

As Respondent, the State exercises its option not to include separate statements of the case and facts. *See* Wis. Stat. (Rule) § 809.19(3)(a)2. Any necessary information will be included where appropriate in the State's argument.

SUMMARY OF ARGUMENT

Defendant-Appellant-Petitioner Angelica C. Nelson challenges her convictions for three counts of second-degree sexual assault of a child on the grounds that the circuit court erred when it did not allow her to testify on her own behalf and this automatically entitles her to a new trial (Nelson's brief at 16-32).

Specifically, Nelson argues that the circuit court conducted an improper colloquy with her about her right to testify and erroneously concluded that she was not knowingly, voluntarily, and intelligently waiving her privilege against self-incrimination (Nelson's brief at 16-25). She further contends that, contrary to the court of appeals' decision in this case, this error is structural and requires automatic reversal (Nelson's brief at 25-29). *See State v. Nelson,* No. 2012AP2140-CR, ¶¶ 4-7 (Wis. Ct. App., Dist. III, Sept. 4, 2013). Finally, Nelson maintains that if the error is not structural, the court of appeals erroneously concluded it was harmless (Nelson's brief at 29-32). *Nelson,* No. 2012AP2140-CR, ¶¶ 8-12.

This court should affirm the court of appeals. Even assuming that the circuit court violated Nelson's right to testify, she is not entitled to a new trial. A violation of a defendant's right to testify is a trial error subject to harmless error review. Further, any error in this case was harmless because the evidence against Nelson was overwhelming and her testimony would have done little or nothing to undercut it.

EXCERPT OF TRANSCRIPT

STATE OF WISCONSIN CIRCUIT COURT
EAU CLAIRE COUNTY
BRANCH 3

STATE OF WISCONSIN,

Plaintiff,

-vs-

JURY TRIAL
Case No. 11CF523

ANGELICA C. NELSON,

Defendant.

The above-entitled matter coming onto be hard before the Honorable William M. Gabler, judge of the above-named court, on the 14th day of February, 2012, commencing at approximately 8:35 a.m., in the courthouse in the City of Eau Claire, County of Eau Claire, State of Wisconsin.

APPEARANCES

MERI C. LARSON, Assistant District Attorney, Eau Claire County Courthouse, 721 Oxford Avenue, Eau Claire, Wisconsin 54703, appeared representing the plaintiff.

ERICA BAHNSON, Attorney at Law, 1241 Menomonie Street, Suite G, Eau Claire,

Wisconsin 54703, appeared representing the defendant.

ANGELICA C. NELSON, Defendant, appeared in person.

[Page 119] not?

MS. BAHNSON: Yes.

THE COURT: Okay. Thank you. We'll see you then.

MS. BAHNSON: Thank you.(Recess.)

THE COURT: All right. We're back in the courtoom. The jury is still out. And we're ready to begin our afternoon session. Since the state has rested, Ms. Bahnson, what has Angelica Nelson decided to do with respect to testifying or not?

MS. BAHNSON: She would like to testify, Your Honor.

THE COURT: Okay. Is that true, Ms. Nelson?

THE DEFENDANT: Yes.

THE COURT: Okay. I have a few questions that I have to ask you in that regard. (Pause.)

THE COURT: Okay. Before that happens, Ms. Nelson, I have to ask you a few questions to make sure that you are waiving your right, that is, giving up your right, against self-incrimination voluntarily. So that's the reason why I'm asking [End of Page 119]

[Page 120] these questions. So my first question to you is this. In the past 24 hours –

MS. BAHNSON: Your Honor, she just had a question about what self-incrimination was, so.

THE COURT: Well, here, let me explain this. You know, if you want to testify, and you can do that, but the law says that you don't have to testify if you don't want to. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. In other words, the Constitution says, the U.S. Constitution says that you don't have to testify, and that if you don't want to testify, Ms. Larson can't use that against you and the jury can't use that against you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. But if you decide to testify, which you can do if you want, then what you're doing is you're giving up that constitutional right not to testify. Make sense?

THE DEFENDANT: Yes.

THE COURT: Okay. Well, let's proceed further to see if you have any other questions. [End of Page 120]

[Page 121]So in that regard, in the past 24 hours, in the past day, have you consumed any drugs, alcohol or medication of any kind?

THE DEFENDANT: No.

THE COURT: Do you understand that you have the right to testify and you'd have the right not to testify. Make sense?

THE DEFENDANT: Yes.

THE COURT: All right. Have you talked with Attorney Bahnson about the advantages and/or disadvantages of testifying and not testifying? Have you discussed those kinds of things with her? Let the record reflect that Ms.

Nelson is turning toward Erika Bahnson. Let me ask you this, Ms. Bahnson. Have you talked about the pros and cons, that is, the advantages and disadvantages, of her testifying?

MS. BAHNSON: Yes, Your Honor.

THE COURT: Give me a representative sample of the types of things that you've talked to her and with her about.

MS. BAHNSON: That if she testifies, Ms. Larson would be able to ask her questions. It wouldn't just be me asking her questions. She would like to further explain the incident that occurred. [End of Page 121]

[Page 122] And the only way that can happen, if she testified. I've explained they cannot, the jury cannot use it against her if she does not testify.

THE COURT: Okay. Well, so, Ms. Nelson, have you talked about those things that your lawyer just mentioned?

THE DEFENDANT: Yes.

THE COURT: Okay. Have you had enough time to talk this over with Ms. Bahnson?

THE DEFENDANT: Yes.

THE COURT: And what is your decision? Do you want to testify or not testify?

THE DEFENDANT: I want to testify.

THE COURT: Okay. And -- And just so that I have an understanding of things, what kinds of issues or subjects do you think need clarification? Or what has to be explained, if anything, to the jury?

MS. BAHNSON: You can tell him.

THE DEFENDANT: The days and other things that were said.

THE COURT: Okay. Well, you understand that if you testify, then Ms. Larson can ask you questions about whether you had sexual intercourse with [the victim]. You understand that? [End of Page 122]

[Page 123]THE DEFENDANT: Yes.

THE COURT: And you understand that you have to answer truthfully? You understand that?

THE DEFENDANT: Yes.

THE COURT: And do you understand that --that a lot of these things about the exact days or some of these details really don't make any difference? Do you understand that?

THE DEFENDANT: Yes, but it would make me feel better.

THE COURT: Well, the only thing the state has to prove is that you had sexual intercourse with [the victim] and at the time he was under the age of 16. You understand that?

THE DEFENDANT: Yes, that's what Erika said.

THE COURT: Okay. So what --what testimony, what information do you want the jury to hear that has a bearing on those two points? Do you understand my question?

THE DEFENDANT: I don't really know how to answer it.

THE COURT: Okay.

THE DEFENDANT: It -- It doesn't have to do with how old he is, but it does have to do with what [End of Page 123]

[Page 124] happened.

THE COURT: Okay. What is it that happened that you want to bring out or that you want to have your lawyer bring out?

THE DEFENDANT: I want to tell what actually happened.

THE COURT: Ms. Bahnson, maybe you can help me or maybe you can help, not only me, but also Angelica Nelson. I'm -- I'm certainly not going to let her sit on the witness stand and narrate. So you must have some sort of an idea as to the subjects that she wants to cover.

MS. BAHNSON: Uh-huh.

THE COURT: Can you tell us about those, please.

MS. BAHNSON: Sure. Specifically [the victim] testified that Angelica was the one who unbuckled his pants. She wants to make it clear, because she thinks it looks bad, that that was not the case. And that there's no discussion about their age, although they did know how old each other were at the time. And that it did not happen three days in a row, as [the victim] testified to.

THE COURT: Okay.

MS. BAHNSON: And, yes, I discussed with [End of Page 124]

[Page 125] Ms. Nelson that has no bearing on the elements. However, she feels that she would like the jury to know that.

THE COURT: And you -- you -- you've explained to her that -- that that doesn't have a bearing on what the state has to prove.

MS. BAHNSON: Correct.

THE COURT: Let's go off the record for a second. I need to check something. So everybody just be patient and stay here. I'd appreciate that. (Off the record.)

THE COURT: Back on the record. Ms. Bahnson, have you -- have you recommended that she testify?

MS. BAHNSON: No.

THE COURT: Have you encouraged her not to testify?

MS. BAHNSON: I said it would be her decision. I've explained the pros and cons. But ultimately it's her decision. But it's not my recommendation that she testify, no.

THE COURT: Okay. Have you tried to say that it wouldn't be a good idea?

MS. BAHNSON: Yes.

THE COURT: I guess I've never quite faced

[End of Page 125]

[Page 126] a situation like this. And that's why we took abreak. I was trying to ascertain just the breadth and scope of a person's desire to testify and the findings that I have to make. Do you have any case law, Ms. Bahnson?

MS. BAHNSON: Not off the top of my head, no, Your Honor.

THE COURT: What about you, Ms. Larson. Have you ever -- Do you know of any type of case law that might relate to this type of a situation?

MS. LARSON: I'm sorry. It's never come up in 21 years.

THE COURT: Well, we're back on the record. I've -- As Ms. Larson observed, she's

never seen or heard of this in 21 years of being a prosecutor. I've never run across this kind of a situation either. I've tried to do some quick legal research. I can't find anything about what a judicial officer is to do under these types of circumstances. But I do know this, that in order for me to permit the defendant, any defendant, including Ms. Nelson, to testify, I have make a finding that she's waiving her right against self-incrimination freely, voluntarily and intelligently and knowingly [End of Page 126]

[Page 127] and that she understands her right to either testify or not testify. And it seems to me that based upon this limited colloquy that I've had with Ms. Nelson, I , and when I say limited, I think I've thoroughly explored the ins and outs of what she wants to testify to, but I can't find that Ms. Nelson is intelligently and knowingly waiving her right against self-incrimination because she wants to testify to things that are completely irrelevant to the two things that the state has to prove I'm also finding that she's -- that she's not intelligently and knowingly waiving her right against self-incrimination, because based upon the colloquy that I've had here with Ms. Bahnson, Angelica Nelson is doing this against the advice of her lawyer, at least with her lawyer telling her that it's not a good idea. I do recognize that there are some instances in which a defendant could be inadvisably taking the witness stand. But it would be on elements, issues that are central to the case, that is, elements the state has to prove. In this particular case, as I've explained,

Angelica Nelson wants to talk about all sorts of [End of Page 127]

[Page 128] things that don't matter. And if she took the witness stand, under the circumstances, Ms. Larson could extract from Ms. Nelson the admissions that this occurred. So I just don't think I can make that finding. So I'm not going to let her testify. Does the state have anything to say in response to that?

MS. LARSON: No.

THE COURT: Ms. Bahnson?

MS. BAHNSON: Just that, Your Honor, you know, Ms. Nelson does have the opportunity to tell her side of the story. And one of the issues is that or one of the things regarding the charges is that it happened in three consecutive days in a row. And Ms. Nelson's testimony would be that it was not three consecutive days in a row.

THE COURT: Okay.

MS. BAHNSON: But I just want to say that Ms. Nelson does want to testify on her own behalf and tell her side in this case.

THE COURT: Okay. Well, if she's not going to deny -- Apparently she's -- she's not going to deny that she had sexual intercourse with [the victim]. Is that right? [End of Page 128]

[Page 129] MS. BAHNSON: Correct.

THE COURT: And she would not deny that he's not 16? Correct?

MS. BAHNSON: Correct.

THE COURT: Angelica Nelson, is that true, if you took the witness stand, Ms. Nelson, is

that true, if you took the witness stand and if Assistant District Attorney Meri Larson asked you did you have sexual intercourse with --

THE DEFENDANT: I'm not going to deny it?

THE COURT: Pardon me? You would not deny it?

THE DEFENDANT: No, I'm not going to deny it.

THE COURT: Okay. And --

THE DEFENDANT: I just want my side to be heard.

THE COURT: And you would not deny that he –

THE DEFENDANT: Can't deny that because --

THE COURT: -- that he was beneath the age of 16. Right?

THE DEFENDANT: I can't deny that he's not 16 because his birth certificate would tell otherwise. [End of Page 129]

[Page 130] THE COURT: Okay. Well, then for those reasons, I'm reaffirming my decision and belief that Ms. Nelson is not freely -- she's not voluntarily and intelligently and knowingly waiving her right against self-incrimination, so I'm not going to permit her to testify. Ok. Counsel, you've got new sets of jury instructions that I put on your desk over the noon hour. Let me tell you which ones have changed. I would propose to give the following instructions in the following order: 100. 115. 2104 and 2101B, which I have tailored to fit this case. 140. 145. 103. 180. 170. 195. 157. 160. 148. 190. And then

you have two editions of 300 credibility of the witnesses. I'm just going to give single-page one where it doesn't make any reference to the defendant testifying or not. Then 484 verdicts submitted for one defendant. And then 521 instructions on jury deliberations. Ms. Larson, have you had a chance to read these instructions and to see if they're okay?

MS. LARSON: I -- I looked at the other version and I -- they -- they look okay to me.

THE COURT: Okay. Ms. Bahnson, have you had a chance to look at these and to read these and [End of Page 129]