STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I I

Case No. 2010AP2516 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LESHURN HUNT,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Order Denying Post-Conviction Relief, Entered in Kenosha County Circuit Court, Honorable Bruce E. Schroeder, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES

1. Before and after Mr. Hunt told the court he intended to testify in his jury trial, the court and prosecutor informed him of a number of evidentiary responses his testifying might produce. Mr. Hunt eventually changed his position and did not testify. Did the circuit court compromise his right to make a knowing and voluntary decision?

The circuit court denied the post-conviction motion raising this claim. (78:1-29, App. 102-130).

2. Is Mr. Hunt entitled to a new trial because the pre-trial or during-trial rulings were not sufficiently clear as to what statements the circuit suppressed, and because he received ineffective assistance of counsel at the suppression hearing when his attorney failed to adduce evidence corroborating his claim that police beat him?

The trial court declined to hold an evidentiary hearing, but did not rule on this portion of the post-conviction motion.

ORAL ARGUMENT AND PUBLICATION

Publication may be warranted. ***State v. Weed***, 2003 WI 85, ¶41, 263 Wis. 2d 434, 464, 666 N.W.2d 485, requires "a simple and straightforward exchange" where the court verifies the defendant's decision whether to testify. ***Weed*** recognizes the exchange should not run afoul of "valid concerns" about interfering with "trial strategy and the integrity of the attorney-client relationship." ***Id***. This case raises those concerns, and whether Mr. Hunt's decision was knowing and voluntary. A published decision could enunciate a new rule of law or modify, clarify, or criticize an existing rule, Wis. Stat. § 809.23(1)(a)1, because Wisconsin's common law does not include an example of an exchange that violates ***Weed***. A published decision could apply ***Weed*** to "a factual situation significantly different from that in published opinions." Wis. Stat. § 809.23(1)(a)2.

If this court contemplates publication, oral argument might be of significant rather than "marginal value." *See*, Wis. Stat. § 809.22(2)(b).

STATEMENT OF THE CASE

The State filed a complaint alleging that, on June 26, 2006, Mr. Hunt robbed the Dollar Saver Store on Sheridan Road in Pleasant Prairie, Kenosha County. (1). On October 8, 2008, a jury returned verdicts finding Mr. Hunt guilty of the six offenses charged in the complaint and information: armed robbery, contrary to Wis. Stat. § 943.32(2)[1]; possession of a firearm by a felon, contrary to Wis. Stat. § 941.29(2)(a); two counts of false imprisonment (one count as to each of the store clerks), contrary to Wis. Stat. § 940.30;

[1] All references are to the 2005-06 edition of the statutes.

and two counts of making threats to injure, contrary to Wis. Stat. § 943.30(1). As to the false-imprisonments and threats-to-injure, the jury found Mr. Hunt used a dangerous weapon within the meaning of Wis. Stat. § 939.63(10(b). (33-38).

On November 14, 2008, Circuit Court Judge Bruce E. Schroeder imposed sentences totaling 62 years of initial confinement and 32 years of extended supervision, to be served consecutively to a 29 year prison sentence Mr. Hunt is serving in Illinois on his conviction for an armed robbery committed the same day in Waukegan. (77; 44, App. 131-132).

Mr. Hunt timely filed a notice of intent to pursue post-conviction relief, and a motion for post-conviction relief. (49, 59). After a non-evidentiary hearing, Judge Schroeder denied the motion. (78:1-29, App. 102-130; 65, App. 101). Mr. Hunt appeals the judgment and order. (66).

STATEMENT OF FACTS

Summary of Allegations and Evidence

The complaint alleged that police were called to the Dollar Saver Store at about 4:15 in the afternoon of June 26, 2006. They spoke with two store clerks, who reported they were robbed and threatened with "what looked like a homemade type shotgun with duct tape near the grip." They were forced into a back room after the robbery. (1).

Police officers also interviewed employees of the nearby State Line Citgo gas station. Gas station employees produced a video surveillance tape and a log showing the license plate numbers of people getting gas. License plate #9885751 was registered to Mr. Hunt, and police determined that a photo of Mr. Hunt matched the image in the video

surveillance tape. One of the clerks chose Mr. Hunt's photo from an array of six as the person who robbed her. (1).

The two clerks testified at trial, along with witnesses from the gas station, and a police officer who testified that Mr. Hunt admitted being at the gas station, and that he incriminated himself when confronted with the accusation that he committed the crimes. The State also presented the testimony of the owner of a store in Waukegan, who claimed Mr. Hunt robbed her there earlier on the day he was charged with the armed robbery of the Dollar Saver Store. The State adduced evidence that Mr. Hunt's fingerprint was recovered from the front doorknob of the Waukegan store.

Mr. Hunt's Decisions to Testify and to Not Testify

After the State rested, the defense had no witnesses to present, except possibly Mr. Hunt. (76:93, App. 155). Mr. Hunt said he would testify. (76:88, App. 150). He later said he would not testify. (76:94, App. 156). Before Mr. Hunt said he would testify, the court:

- Granted the prosecutor's request to confirm that, if Mr. Hunt testified and denied committing the Waukegan armed robbery (on which the State had presented other-acts evidence), the State would be able to also introduce the Illinois state court's judgment of conviction. (76:72-76, App. 134-138).

- Denied the prosecutor's request to declare what allegations Mr. Hunt could make that his police statements were produced by beatings. The court indicated it would have to hear the testimony and determine whether it was relevant. (76:76-82, App. 138-144).

- Told Mr. Hunt he was "well-advised to listen carefully to" his attorney's advice, but that the decision whether to testify was his alone. (76:82, App. 144).

- Told Mr. Hunt that if he testified, the prosecutor could question him "about anything which is relevant," including the Illinois armed robbery, as an example, and that he could not invoke the Fifth Amendment about it. This was true "[r]egardless" of whether he was still appealing his Illinois conviction, so long as the prosecutor's questions were relevant. (76:82-83, App. 144-145).

- Told Mr. Hunt the prosecutor could ask him about his "former convictions" and Mr. Hunt would have to answer truthfully how many he had, or risk questioning to establish their details. (76:83-84, App. 145-146).

- Told Mr. Hunt that "[s]eparately from that," the prosecutor might be permitted to question Mr. Hunt about "other acts which you have engaged in, some of which may be crimes which may tend to influence the jury's consideration of whether you're an honest person or not. And you'll have to answer those questions. So ... that's what goes with testifying. You can tell your story, but you're subject to being questioned by the district attorney or you can remain silent in which case and obviously, by not testifying and if you do that [you can decide whether the court should instruct the jury of your right to not testify]. (76:84, App. 146).

The court asked whether Mr. Hunt understood "all that," and Mr. Hunt said, "To some degree, yeah." The court asked what he did not understand. (*Id*.). Mr. Hunt asked how much of his testimony the prosecutor would be allowed to block as to being beaten by the police. The court repeated that the test would be relevance.

The court asked whether Mr. Hunt had enough time to discuss with his attorney his decision whether to testify, and defense counsel indicated they had not "been able to talk about this new issue," presumably the likely admission of the Illinois judgment. The court called a ten-minute break. (76:86, App. 148).

The court then confirmed that Mr. Hunt had had enough time to talk with his attorney and to think about what he was doing, that he had not been rushed, and that he thought his decision was "the best thing under the circumstances." (76:87, App. 149). Mr. Hunt had no questions for the court and had not been threatened, pressured or influenced by promises. (*Id*.) He had not had any alcohol or drugs, his mind was clear, and he was "feeling all right." (76:87-88, App. 149-150). The court then asked whether Mr. Hunt would testify and he responded, "Umm—Yes." (76:88, App. 150).

The court said it would not re-visit the issue absent Mr. Hunt's request. The prosecutor suggested the issue should be finalized "because I don't know of any other witnesses that are ready in here." (76:89, App. 151). The court agreed to request a "final decision," but the prosecutor said, "Let me ask a couple of preliminary things." The court approved. (*Id*.). The following developed before Mr. Hunt changed his position from testifying to not testifying:

- The first "preliminary thing" the prosecutor raised was how many convictions Mr. Hunt would admit, arguing he had five and should have to admit all of them. The court agreed. (76:89-90, App. 151-152).

- Next, although the State had rested, and had never sought to introduce this evidence before, the prosecutor asked the court to "weigh in" on whether Mr. Hunt could be asked whether Mr. Hunt had a gun in an incident resulting in his 1984 conviction (which, like the armed robbery in Waukegan Mr. Hunt allegedly committed on the day of these crimes, occurred in Illinois) for murder and armed robbery "in a scenario with a clerk..." (76:90-91, App. 152-153). The court said it would not "take the time to actually decide it now," but "I would tell the defense that there would be a substantial risk that I would allow testimony regarding that episode..." The court went on to say there was "some risk" Mr. Hunt's testimony would lead to cross-examination on the issue. (76:91, App. 153). The court said it was "not even considering" whether the evidence would be admitted as other-acts, just whether it would be a basis for cross-examination under Wis. Stat. § 906.08. (76:92, App. 154).[2]

- Defense counsel protested this was "a new issue" and he had no police reports. Counsel

[2] Wis. Stat. § 906.08(2) concerns "[s]pecific instances of conduct of a witness" that may not be proved by "extrinsic evidence" but may, in the right circumstances, "be inquired into on cross-examination."

noted the prosecutor based the claim of relevance on the prosecutor's having spoken to a prosecutor in Illinois about the 1984 case. The court said the defense should not "misunderstand, I'm not saying I would admit this, I'm saying there is a chance I would and if I thought there wasn't a chance in daylight that I would be letting this evidence in, I would tell you that." [3] (*Id*.).

- The court again undertook to elicit Mr. Hunt's "final decision," but the prosecutor said, "I want to give you one other link on the question of this murder and armed robbery. It, again, it's been represented to me by law enforcement that in that case in 1984 ... the defendant [as in this case] made an allegation that [the] officer ... had beat him." (76:93, App. 155). The prosecutor thought it "relevant" that Mr. Hunt had "been down this road before on a case where he is purported to have been involved with a clerk in a retail establishment, a gas station with a gun." (*Id*.). The court said it would not make a ruling unless necessary, and again sought Mr. Hunt's "final decision." (76:93-94, App. 155-156).

After defense counsel and Mr. Hunt spoke off the Record, this exchange ensued:

> MR. HENDERSON [defense counsel]: He's asking you about a final decision. You still want to testify?

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[3] As will be seen, when the court was challenged in the post-conviction motion, it ruled it was a "slam dunk" certainty it would have admitted the evidence.

MR. HUNT: I made my final decision. I'm ready to move forward, Judge. I'm going to remain right here.

THE COURT: You've made your final decision?

MR. HUNT: Yes.

THE COURT: That is that you do not wish to testify.

MR. HUNT: Yes. I testified yesterday.[4] I think that's clear enough, your Honor, I'm, okay.

MR. GRAVELY [prosecutor]: He testified yesterday. He thinks that's clear enough.

THE COURT: Well, the jury didn't hear it. Do you want to testify? You don't have to have a reason.

MR. HUNT: I said no.

THE COURT: You do not have to give me any reason at all. That's what we mean by it's being your choice.

MR. HUNT: I don't want to testify.

THE COURT: You do not want to testify?

MR. HUNT: No.

THE COURT: Then you don't have to.

MR. HUNT: Thank you, Judge.

THE COURT: And I'll ask your lawyer in a little bit ... how you want me to instruct the jury on the subject. [(76:94-95, App. 156-157).]

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[4] This refers to proceedings, interspersed in breaks from the trial, where Mr. Hunt and others testified in a suppression motion hearing. The suppression hearing did not conclude until the evidentiary portion of the trial was almost over. (83).

Post-Conviction Motion and Response

Mr. Hunt sought post-conviction relief. His motion alleged that judicial error, prosecutorial tactics, and his counsel's performance, combined, rendered his waiver of the right to testify unknowing and involuntary. (59). In addition to the facts discussed above and the arguments that follow, the post-conviction motion claimed that Mr. Hunt would testify as follows at an evidentiary hearing:

> Mr. Hunt wished to testify in his defense, but surrendered the right after he was threatened with the likelihood of the introduction of the Waukegan-related judgment, coupled with the "substantial risk" or "some chance" (he could not be sure which one the court threatened) that the State would be allowed to adduce evidence that he had committed an armed robbery of a clerk in a retail establishment 22 years before allegedly committing the charged offense; that that 1984 armed robbery had resulted in the death of a clerk and his conviction for murder; and that he had claimed, presumably falsely, that he was beaten by police in the 1984 case just as he claimed to have been beaten by police in this case.[5]
>
> Mr. Hunt's desire to testify was overborne as the prosecutor kept adding possible lines of attack that could flow from his testimony: first, the prosecutor would obstruct his ability to claim he was beaten; then the prosecutor would tell the jury that, in effect, the decision as to guilt in the Waukegan case had already been made

[5] The prosecutor did not expressly claim but implied, because that is the only reason the evidence would have been relevant, that Mr. Hunt lied about being beaten by police in the 1980's and therefore was more likely to have lied about claiming to have been beaten by police in this case.

for them; next, the prosecutor would tell the jury that Mr. Hunt had also robbed a clerk in a retail establishment in 1984; finally, he might even tell the jury that Mr. Hunt committed murder on that occasion, and he would certainly claim that Mr. Hunt falsely claimed in 1984 that he had been beaten, just as he was falsely making such a claim here. Once all that was laid before Mr. Hunt, he felt he had no real choice but to forego his testimony which, the court knew, was his entire defense.

The prosecutor's implication was false that Mr. Hunt had falsely claimed to have been beaten in 1984. In particular, Mr. Hunt alleges that, if the prosecutor had been required (for example, by a ruling prompted by defense counsel's request) to undertake his burden, as proponent of the evidence, and if the prosecutor had undertaken a reasonably prudent investigation of the events from 1984, the prosecutor would have to have conceded that Mr. Hunt's claims to have been beaten in 1984 were *substantiated*; his statements were not admitted against him because of the circumstances under which the police took them, and he recovered a civil judgment.

Mr. Hunt was not able to obtain his attorney's help in this regard: defense counsel had told Mr. Hunt that he had not even read all the trial transcripts from the Waukegan case, much less had he obtained any information (on his own or from the prosecution) about the 1984 charges. The court had forced the defense to conduct the suppression hearings concurrently with the jury trial proceedings, and defense counsel had lacked adequate information to challenge the prosecutor when he falsely informed the court that Mr. Hunt's sister and wife had testified in Illinois, or to challenge the prosecutor's false claims that the federal courts had adjudicated adversely to Mr. Hunt his lawsuit alleging police brutality regarding his statements in this and the Waukegan case. Given all these circumstances, Mr.

> Hunt believed it was very likely that, if he testified, the State would be permitted to tell the jury that he had committed an armed robbery and a murder in Illinois in 1984, and that he falsely claimed that police extracted statements in that case by beating him. Under the duress of these threats, Mr. Hunt changed his mind and decided against testifying.
>
> Defense counsel sought no additional time, and the court offered none, to decide whether to testify after the single ten-minute break the court provided. Subsequent to that break, as shown in the appended materials [also appended to this brief, App. 133-157], several threats were added. Mr. Hunt had to weigh those threats without the benefit of further advice from his attorney.
>
> Mr. Hunt was acutely surprised by the threat to reveal details of his 1984 crimes to the jury. He had been led to believe in pretrial proceedings that, by stipulating to the "felon" element of the charge of being a felon in possession of a firearm, he would avoid this situation. *See*, Tr. 10/06/08 at 36-37 [(74:36-37)]. When the threats were issued, Mr. Hunt came to believe he had been tricked, and this contributed to his decision to merely give up on his desire to testify. [(59:8-11) (Footnote 5 in this passage was also footnote 5 in the motion.)]

The State opposed the motion, including the request for an evidentiary hearing. (61, 64). However, the State noted the post-conviction motion was based on matters wholly documented in the transcript. (61:1). The State defended the process as "an exploration from all parties about what sorts of questions the State could ask in cross-examination,"[6] contending it was "extremely common" for "cautious prosecutors to preview these areas." (*Id.*).

[6] At trial, the prosecutor did refer to questions that "[t]he defense and I want to talk to the Court about," and defense counsel did not

Mr. Hunt's counsel filed a letter-reply countering that the proceedings comprised a series of "evidentiary threats" "presented to [the] defendant in the context of ascertaining whether the defendant intended to testify..." Mr. Hunt's counsel disagreed that the proceedings were "extremely common" and opined he had seen nothing like it in over 20 years of practice. (62:3). The prosecutor answered with a letter repeating a denial of coercive intent or impact, and that the issue could be resolved without an evidentiary hearing. (64).

Hearing on Post-Conviction Motion

Judge Schroeder convened a hearing, joined in the courtroom by the prosecutor and over the telephone by Mr. Hunt from one location and his counsel from another. (78:2, App. 103).[7] The court indicated that "before determining about the appropriateness of an evidentiary hearing, I thought it best to discuss some of the aspects of what's being claimed by the defense in the motion." (*Id*.).

The entire transcript is appended because the court's rationale and ruling are developed throughout. (78:1-29, App. 102-130). The court essentially concluded it had properly educated Mr. Hunt in advance as to "the pitfalls that might be in his path if he testified." (78:2, App. 103). The court said Mr. Hunt got "more than most defendants get,"[8]

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contradict him, but the prosecutor and the court did most of the talking. (76:71, App. 133).

[7] This page of the transcript shows that Mr. Hunt and his lawyer each appeared by telephone; the sentencing transcript corroborates Mr. Hunt would still have been in Illinois, serving a 29 year sentence, when this hearing occurred. (77).

[8] As noted, the prosecutor suggested the proceedings were "extremely common." (61:1).

and suggested that what Mr. Hunt got was better than if the court and the prosecutor had said "nothing." (*Id*.).

Mr. Hunt's counsel responded that, when the court told Mr. Hunt there was a "substantial risk" his testimony would trigger damaging evidence, the court became obliged to resolve the risks to ensure Mr. Hunt's decision was knowing and voluntary. Counsel argued that the evidentiary predictions were threats, and that, while threats were not "pejorative" in and of themselves, they became improperly coercive when they were left "inchoate." (78:7, 3, App. 108, 104).

The court noted no case required it to rule in advance on the propriety of "questions that haven't even been asked yet," and counsel responded that, "when you have undertaken to partially advise, you can't just disclose the element of that that constitutes a threat without then resolving it." (78:4-5, App. 105-106).

The court asked whether the correct thing "would have been to let the defendant go onto the stand without having the vaguest idea of what the district attorney might ask him."[9] 78:5, App. 106). Counsel responded that would be correct because the defendant's testimony would then have helped establish whether evidence proffered afterwards was admissible. (*Id*.).

The court noted that a competent defense attorney would have advised Mr. Hunt what a prosecutor was "likely to ask." (*Id*.) Counsel responded it might not necessarily be error to tell a defendant what evidence might come in, but it

[9] Later, the court admitted Mr. Hunt should have gotten information about these matters from his counsel. (78:18, App. 119, 78:28, App. 129).

would have been appropriate for the court not to do so. (78:6, App. 107). Instead, "under the guise of supposedly giving the defendant fair notice," the court only gave him "the downside risks and [told] him at one point that it's a substantial risk without ever having required the State to marshal the basis for the threats that [were] being made." (78:6-7, App. 107-108).

The court went on to rule that the judgment of conviction from the Waukegan robbery was admissible if Mr. Hunt testified, so there was nothing wrong with telling him so. (78:8-9, App. 109-110). The court asked "What's next," and counsel responded the grounds were laid out at pp. 4-10 of the post-conviction motion. (78:9-10, App. 110-111). Counsel relied on all the grounds, but highlighted a few of them. (78:10-11, App. 111-112).

The court suggested that evidence of the 1984 murder and armed robbery was less damning, and "public records" about it need not have been provided by the State, if it only planned to use the information in cross-examination. Counsel responded that he did not "accept that premise" because it appeared from the transcript the court was advising Mr. Hunt it might admit the evidence "as other acts" if he testified. (78:12, App. 113).

The court responded, "Let's say that did happen," and asked whether counsel knew any case requiring the prosecutor to disclose the evidence prior to offering it in rebuttal. Counsel cited "Sullivan,"[10] and other cases requiring careful screening, and argued that the relevant evidence "should have been put in the record before this would have been regarded as a legitimate basis on which to advise the defendant what he should think about before he

[10] ***See, State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 39 (1998), cited in the post-conviction motion, R59:16.

testifies." (78:13-14, App. 114-115). Counsel added that even § 906.08 might require documentation for a threshold showing of reliability. (78:14, App. 115).

The court concluded the law does not require trial courts "to do a ***Sullivan*** analysis on everything that might get asked of the defendant before it's even asked or before there's even a request by a party who is seeking to ask it... (78:15, App. 116). The court then said that, if it had conducted ***Sullivan*** analysis on the 1984 murder and armed robbery case, "it would have been, shall we say, a *slam dunk*." (78:16, App. 117) (italics in transcript). Although the record contains no criminal complaint or other documentation of the 1984 offense, the court concluded the 1984 case would contain "evidence [that was] directly relevant to his modus operandi, [which] would, of course, be relevant on the issue of identification, which was in dispute..." (*Id*.).

Counsel noted the record contained no details, only the prosecutor's reference to a conversation with an Illinois State's attorney. (78:17, App. 118). The court said there was "no place to do that in that particular situation," and repeated that it would have been no big deal to drive down to Waukegan. (*Id*.).[11]

At this point, the court for the first time invited the prosecutor's input. The prosecutor[12] argued there was "no need for an evidentiary hearing because I think what counsel

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[11] The Record does not support the assumption that the 1984 Illinois conviction was from Waukegan. Nor did the court explain how a trip to any part of Illinois would have been practicable in the end-stages of the jury trial.

[12] The transcript attributes to defense counsel remarks whose context plainly shows they were made by the prosecutor. (78:18, App. 119).

has alleged is apparent and plain within the transcript." (78:18, App. 119).

The court ultimately ruled it had provided Mr. Hunt with "informed consent." (78:25, App. 126). The court noted it would not have been fair to the defendant to give a comprehensive ruling, hear his testimony and all the relevant testimony, and then change its ruling. So the court concluded it had to reserve ruling on the other-acts and other evidence, but that it was still proper to advise the defendant of some of the potential pitfalls testifying might entail. (78:25-28, App. 126-129).

ARGUMENT

I. The Circuit Court Compromised Mr. Hunt's Right to Knowingly and Voluntarily Decide Whether to Testify.

A. Standard of review.

Whether Mr. Hunt's waiver of the right to testify was unknowing and involuntary is a question of constitutional fact. ***State v. Weed***, 2003 WI 85, ¶13, 263 Wis. 2d 434, 447-48, 666 N.W.2d 485. An appellate court reviews findings of historical fact to determine whether they are clearly erroneous, but it applies legal/constitutional principles independently. ***Id***.

Whether a defendant's express and personal statement is necessary to effect a valid waiver of the right to testify was the main question of law at issue in ***Weed***. ***Id***. at ¶12. The court held it was, so circuit courts must "conduct an on-the-record colloquy." ***Id***. at ¶48. Although the validity of a waiver and the means of ensuring it are also questions of law, ***Weed*** held that the retrospective determination made at the post-conviction evidentiary hearing in that case was an appropriate remedy for failing to conduct a colloquy, and held that the post-conviction proceedings established the validity of Ms. Weed's waiver of the right to testify. ***Id***. at ¶47.

Recognizing both possible remedies, Mr. Hunt seeks either a new trial based on the legal determination that his waiver was invalid or an evidentiary hearing at which to determine its validity. ***See also***, ***State v. Basley***, 2006 WI App 253, ¶15, 298 Wis. 2d 232, 726 N.W.2d 671 (evidentiary hearing appropriate to determine whether "something not apparent from the plea colloquy might have rendered a guilty or no contest plea infirm").

B. The circuit court exceeded ***Weed's*** mandate: a "simple" exchange to confirm the defendant understands the right to testify.

The circuit court's lengthy exchange must be judged against ***Weed*** and the context in which the court announced the rule requiring a colloquy. Earlier, in ***State v. Albright***, 96 Wis. 2d 122, 134, 291 N.W.2d 487 (1980), the court had declined to recommend the procedure, on grounds that still cause most jurisdictions to eschew it:

> We do not believe that either this court, or trial courts, are in a position to determine whether the criminal defendant accepted counsel's advice, or was deprived of the right to testify when the trial record is silent on the question.
>
> We decline to recommend that a trial judge, sua sponte advise, a defendant of the right to testify. Such admonition is subject to abuse in interpretation and may provoke substantial judicial participation that could frustrate a thoughtfully considered decision by the defendant and counsel who are designing trial strategy.

Albright found the right to testify was "important" but declined to consider it "fundamental." ***Id***. at 130. ***Weed*** found that the fundamental nature of the right was confirmed in ***Rock v. Arkansas***, 483 U.S. 44, 53, n. 10 (1987). ***Weed***, 263 Wis. 2d at ¶¶37-38. That prompted the change.

To be sure, honoring the right is crucial to protecting core due process rights:

> A primary element of the defendant's opportunity to be heard is the right to offer testimony, including the defendant's own story. ***In re Oliver***, 333 U.S. 257, 273 (1948); ***Chambers v. Mississippi***, 410 U.S. 284, 294 (1973); Dawson, *Due Process v. Defense Counsel's*

> *Unilateral Waiver of Defendant's Right to Testify*, 3 Hastings Const. L.Q. 517, 525-529 (1976). [***Albright***, 263 Wis. 2d at 136-137 (Abrahamson, J., *dissenting*).]

Even as ***Weed*** confronted the fundamental nature of the right, and the importance of assuring its protection, the court was sensitive to concerns that cause the majority of jurisdictions,[13] like ***Albright***, to not mandate judicial involvement:

> We recognize that only a minority of jurisdictions impose an affirmative duty on circuit courts to conduct an on-the-record colloquy to ensure that a criminal defendant is knowingly, intelligently, and voluntarily waiving his right to testify. Many jurisdictions do not require circuit courts to engage in a colloquy based on concerns regarding trial strategy and the integrity of the attorney-client relationship. Although these are valid concerns, they might be somewhat alleviated by the method employed by the circuit court in conducting the colloquy. For example, the colloquy should be a simple and straightforward exchange between the court and the defendant... [***Weed***, 263 Wis. 2d at ¶41, citing, in footnotes, Michele C. Kaminski, Annotation, *Requirement that Court Advise Accused of, and Make Inquiry with Respect to, Waiver of Right to Testify*, 72 A.L.R. 5th 403, 418 (1999).]

The circuit court's 24 page discussion (76:21-95, App. 133-157) with Mr. Hunt, where Mr. Hunt confirmed he knew it was his decision to testify, and in which he indicated he chose to do so, only to face an onslaught of evidentiary "risk" warnings before changing position, is plainly not the "simple and straightforward exchange" contemplated in ***Weed***.

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[13] ***E.g., Ortega v. O'Leary***, 843 F.2d 258, 261 (7th Cir.), *cert. denied*, 488 U.S. 841 (1988). ***United States v. Campione***, 942 F.2d 429 (7th Cir. 1991).

As a result, the record contains the diametrical opposite of what ***Weed*** intended to ensure: Instead of showing that Mr. Hunt knew his rights and had discussed them with his attorney, the Record shows the trial court influenced, and allowed the prosecutor to influence, the decision itself. This impropriety requires a new trial.

C. The court and the prosecutor compromised Mr. Hunt's right to knowingly and voluntarily decide whether to testify.

1. Once the court indicated Mr. Hunt should make his decision knowing about identified potential evidence, a knowing decision by Mr. Hunt required the court to evenhandedly determine and explain the risk.

As summarized above, the post-conviction court concluded it was unfair to expect it to resolve all the issues it was nevertheless fully justified in raising when it asked Mr. Hunt whether he intended to testify. Complex by definition, the various issues of other-acts evidence and impeachment evidence were thrown up to Mr. Hunt as presenting either a "substantial risk" or "some risk" of harm to his position if he chose to testify. Even though, the State had already had its full and fair opportunity to present its whole case, the colloquy with Mr. Hunt effectively laid out a whole new supplemental case that might come in against him if he testified. Even assuming it was not unduly coercive to threaten such an extensive evidentiary response, a knowing decision required the threats to be resolved.

The odds are impossibly long that a circuit court's colloquy would be an adequate, non-coercive substitute for the calculus a defendant should make strategically with counsel.

The circuit court protested it was not fair or reasonable to expect it to resolve the issues it raised and allowed the prosecutor to raise. Yet, the court, post-conviction, concluded it had been fully justified in presenting the issues, on the theory that Mr. Hunt needed to have, or at least was assisted by having, knowledge of the risks.

The circuit court's duties in determining the permissible scope of a ***Weed*** colloquy are analogous to those of a court providing a defendant with information relevant to the decision whether to plead guilty. Collateral matters, in general, need not be explained. But when a court elects to explain a matter central to the decision to plead, fairness requires that the matter, even if collateral, be explained correctly. *See*, ***State v. Brown***, 2004 WI App 179, ¶ 8, 276 Wis.2d 559, 565, 687 N.W.2d 543. In this case, to the extent the court was correct that it was impossible, impracticable, or unwise to fully vet the evidentiary issues, that just underscores how unwise and ultimately unfair it was to go part-way down the road.

Mr. Hunt was told that the prosecutor wanted to attack his testimony with evidence that, in 1984, he committed an armed robbery and a murder, of a clerk in a retail establishment, and that he falsely claimed the police beat him into confessing to those crimes. The court's first reaction was that there was a "substantial risk" at least some such evidence would come in if Mr. Hunt testified. When defense counsel emphasized that the prosecutor did not (*he still has not*) produced any documentation of these claims, the court

backed away to indicate there was only "some risk" and the court was by no means saying admission was certain. And yet, by the time of the post-conviction motion hearing, the court claimed admission would have been a "slam dunk" certainty.[14]

The circuit court held Mr. Hunt needed to know about this when deciding whether to testify, but the court conveyed no meaningful information. Mr. Hunt's waiver was thus rendered unknowing.

2. By dwelling on the downside risks of testifying and ratifying the prosecutor's position, and by allowing the prosecutor to participate as he did, the court coerced Mr. Hunt's waiver.

While the circumstances of this case are too unusual to have analogs in the common law, there is ample case law dealing with the coerced waiver of other fundamental rights. Generally, waiver is considered involuntary if it is made under the duress of improperly coercive tactics. *See,* ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986).

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[14] The State had rested. It had put other-acts evidence in as to the same-day Waukegan offense, but it had never sought to introduce murder/armed robbery evidence from the 1984 incident. It was patently unfair to permit the prosecutor to raise this specter in direct response to Mr. Hunt's stated intention to testify. If the risk was to be entertained, the court should have been able to tell Mr. Hunt definitively whether the risk was "some" "substantial" or "slam dunk." The post-conviction court changed its assessment yet again at the end of its analysis, admitting that "slam dunk" was probably a slight overstatement. (78:28, App 129). The issue was far too poorly developed to be presented by the court to Mr. Hunt in the context of the decision Mr. Hunt faced.

A reviewing court will independently determine whether a waiver is "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the state exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶ 36, 261 Wis.2d 294, 309, 661 N.W.2d 123, ***citing State v. Clappes***, 136 Wis.2d 222, 236, 401 N.W.2d 759 (1987). The combined weight of the court's and prosecutor's threats, which was not meaningfully countered by defense counsel, was conspicuously unequal to Mr. Hunt's powers to freely decide how to exercise his rights.

Quite aside from whatever their intentions were, the prosecutor and the court acted improperly. The 1984 evidence should not have been ventured at all after the State had rested. It should certainly not have been threatened in the context of Mr. Hunt's deciding whether to testify, and it certainly should not have been threatened (with the threat made credible by the court) solely on the strength of what the prosecutor claimed he learned from an out-of-state prosecutor. The prosecutor did not even say he spoke to the Illinois prosecutor who had handled the case, some 24 years earlier.

The post-conviction court said Mr. Hunt should not have been surprised by suggestions from the prosecutor, legitimated by the court, that evidence from the 1984 case might come in if he testified. According to the court, Mr Hunt's trial counsel would have, or should have, advised Mr. Hunt previously that this was possible (78:18, App. 119). Mr. Hunt agrees that, procedurally, the evidentiary risks should have been discussed between himself and his trial counsel: the court should not have involved itself, and certainly should not have permitted the prosecutor to inject evidentiary threats. Factually, however, the post-conviction court was incorrect:

trial counsel noted that the threat of evidence from 1984 was a "new issue", and trial counsel, like Mr. Hunt on appeal, objected to threatening this evidence without having provided any notice or documentation. (76:92, App. 154). Because trial counsel was surprised by the threatened 1984 evidence, counsel could not have advised Mr. Hunt about it.

The 1984 evidence is but one example, and Mr. Hunt relies on all the examples detailed in the facts, but it shows the perniciousness of the coercion he faced: The court was telling him it did not even need paperwork to find a substantial risk (later, some risk) of permitting the State to attack him with this ancient evidence.

The Waukegan-judgment of conviction evidence is another example of evidence threatened in an unnecessarily coercive manner. The State's and court's apparent theory was that the judgment would be an efficient "rebuttal" to any testimony Mr. Hunt might offer that he was innocent of the Waukegan armed robbery. But claiming the need for this "rebuttal" ignores that the State already had adduced evidence that would preemptively "rebut" any claim Mr. Hunt would make: the Waukegan victim had already testified, as had a fingerprint technician. Mr. Hunt's testifying did not inherently invest the Waukegan judgment with added relevance. As the court conceded:

> ...we know the law is not foolproof and [Mr. Hunt] could in fact be innocent [of the Waukegan offense] in spite of the [judgment of] conviction, but if he seeks to do that [testify to his innocence], the State is entitled, I think, to bring in the judgment of conviction to show that it has been proved in another place that he was convicted of that crime. [76:75, App. 137]

Hence, the court seemingly acknowledged that the judgment was not additional substantive evidence. Yet, the court concluded it could be used as such in the event Mr. Hunt testified. Regardless of judicial motive or lack thereof, the effect of this reasoning was to coerce Mr. Hunt to waive his right to testify.

D. A new trial should be ordered on the present Record. In the alternative, an evidentiary hearing is necessary.

1. No evidentiary hearing can erase the deficiencies manifest in the protracted and improper colloquy that caused Mr. Hunt to change his position and relinquish the right to testify.

The State opposed an evidentiary hearing, noting that Mr. Hunt's claims involved matters already of record. (61:1,63). Mr. Hunt agrees with that to some extent, and also notes that the post-conviction process afforded the State an opportunity, which it declined, to provide any documentation that could render valid the evidentiary threats included in the colloquy where Mr. Hunt retreated from claiming his right to testify. Mr. Hunt's reply to the State's post-conviction position underscores the information the State should have provided, if it even existed:

> The transcript [(App. 133-157)] reveal[s] a series of threats culminating in the astonishing news to Mr. Hunt that the 1984 case might well be fair game and then, when that might not have been enough, that the jury would be told that he falsely claimed he was beaten in that case, so he was likely lying about having been beaten by police in connection with this case. He waived the right to testify only after a protracted series

of possible attacks were threatened. The State offers no precedent to support what transpired.

Mr. Hunt knew his own counsel possessed no evidence from the 1984 case, and that he was being ambushed with the suggestions, for example, that any claim of police brutality in that case was false. Mr. Hunt had little choice under the circumstances but to give up telling the jury that his inculpatory statements in this case were coerced: if he did, the jury would falsely have been told a similar prior claim was also was false.

. . .

...the State may be onto something here: because it does not dispute the evidence in the extant record, the legal conclusion is compelling, without further evidence, that improper coercion was present. The State's argument certainly brings this much into focus: it will not be enough at an evidentiary hearing, given the objective/independent-appellate-review/constitutional-fact nature of the inquiry, if the court merely believes Mr. Hunt was made of such strong stuff that he made his decision freely and voluntarily despite the circumstances. *Absent proof from the State showing that the threats were well-grounded and proper, the threatened evidence was so unjustifiable and objectively menacing as to be impermissibly coercive as a matter of law.*

The threats were improper if issued without sufficient evidence to back them up. In fact, they were improper regardless of what evidence the State possessed, because whatever the State possessed, it withheld from the defense. Trial counsel rendered ineffective assistance when he failed to obtain this information for Mr. Hunt's consideration before deciding whether to testify. The court erred when it participated in conveying the threats—thus making them credible by dint of judicial

> endorsement—while refusing to rule on whether they were credible in terms of evidentiary support.
>
> The State and the court at trial seemed to justify all the threats with a claim that they were giving Mr. Hunt fair notice. *But how was fair notice given if the State was bluffing? How was fair notice given when the State did not disclose any actual evidence to support the threats?* How was fair notice given when the court allowed the various threats to be made, and at least endorsed by the court in theory, but where the court refused to rule on just how realistic the threats were?
>
> This court must either grant the motion, because the State does not dispute its essential factual allegations, or grant an evidentiary hearing, because the post-conviction motion alleges facts that, if true, entitle Mr. Hunt to relief. *See*, ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996), cited at page 23 of the post-conviction motion. [(62:3-4) (emphasis added)].

The post-conviction motion hearing was held after this reply was filed. The State did not, presumably because it could not, deny the core allegations that the court had allowed it to convey, as credible, threats to admit damaging evidence, when there was insufficient basis in fact or law to make those threats.

2. If an evidentiary hearing is ordered, it should be on the issues of ineffective assistance of counsel but also whether the waiver was unknowing and coerced independent of counsel's performance.

The post-conviction motion alleged that, even if it was true that the court could raise threats in the colloquy without resolving them, he was denied the effective assistance of his

attorney, who should have asserted discovery and other due process rights to obtain adequate information. (59:12-14).

Ineffective assistance of counsel claims are reviewed under a two-pronged test of deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711, 714 (1985).

A claim of ineffective assistance of counsel presents a mixed question of fact and law. A reviewing court will not disturb a trial court's findings as to what happened unless they are clearly erroneous, but it will decide without deference to the trial court whether counsel's performance, as a matter of law, was deficient or prejudicial. ***Pitsch***, 124 Wis. 2d at 634. An evidentiary hearing is usually necessary to resolve the issue. ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The post-conviction motion noted that, if Mr. Hunt was improperly coerced, he is entitled to relief independent of his attorney's performance. (59:11-12). A "claim [that a defendant] did not knowingly and voluntarily waive the right not to testify [or *to* testify[15]] is not confined to a claim of ineffective assistance of counsel." ***State v. Jaramillo***, 2009 WI App 39, ¶13, 316 Wis. 2d 538, 544-45, 765 N.W.2d 855:

> ...To hold to the contrary would mix apples and oranges: whether a defendant has been denied assistance of

[15] The rights to testify and to not testify are of the same constitutional stature. *See*, ***Ferguson v. Georgia,*** 365 U.S. 570, 582 (1961); ***Harris v. New York***, 401 U.S. 222, 230 (1971); ***Rock v. Arkansas***, 483 U.S. 44, 51 (1987) (finding the right "in several provisions of the Constitution"). Honoring these rights is "essential to due process of law in a fair adversarial process." ***Faretta v. California***, 422 U.S. 806, 819, n. 15 (1975).

> counsel is an inquiry directed at the *attorney's* behavior; whereas whether a defendant knowingly and voluntarily waived the right not to testify [or to testify] asks what the *defendant* knew and understood... [(emphases in original).]

Indeed, even when defense counsel's tactics are alleged as the very source of coercion, counsel's effectiveness is a separate issue from whether coercion invalidated the waiver of a fundamental right. ***Basley***, 298 Wis. 2d at 232, ¶15 (guilty plea was invalid if tendered under the duress of counsel's coercive conduct) (showing of ineffective assistance not required).

A waiver of the right to testify is only valid if it meets the standards set forth in ***Johnson v. Zerbst***, 304 U.S. 458 (1938). ***Weed***, 263 Wis. 2d at ¶39. Counsel has not found cases dealing directly with coercing a waiver of the right to testify as opposed to ***Weed*** situations focusing on the "knowing" requirement: it appears to be quite unprecedented that a court would engage a defendant to assure a free and voluntary decision about testifying, but then entertain and at least partially endorse such a series of threats as to what could happen if he did so.

II. A New Trial is Also Necessary Because the Court Failed to Conduct a Sufficiently Coherent Suppression Hearing to Provide a Reliable Decision as to Whether Mr. Hunt was Beaten by Police, and When, in Relation to Making Inculpatory Statements. The Court also Failed to Conduct an Adequate Hearing or Make a Reliable Finding as to What Statements Were Obtained in Violation of ***Miranda v. Arizona***.

This issue, presented in Mr. Hunt's post-conviction motion (59:22-23) but not ruled on at the non-evidentiary hearing (78), need not be reached here if this court orders a new trial. In that event, Mr. Hunt would be restored to the pretrial position of raising motions, including suppression motions. And, the trial court would be entitled to exercise discretion afresh: "Judicial discretion is by definition an exercise of proper judgment that could reasonably permit an opposite conclusion by another judge." ***State v. Wurtz***, 141 Wis.2d 795, 800, 416 N.W.2d 623 (Ct. App. 1987).

The trial court conducted an evidentiary hearing on Mr. Hunt's pretrial motions to suppress his statements, but the court did not conduct a pretrial hearing. Instead, the court conducted a "during-trial" hearing amid breaks during jury selection, after opening statements and the presentation of some of the State's witnesses, and after presentation of even more of the State's case. The court could not even determine at the close of the State's trial case when Mr. Hunt gave his statements in connection with when he claimed he was beaten. (76:21-26, App. 133-138).

In the course of proceedings, the State adduced testimony from Waukegan Detective Scott Thomas and Pleasant Prairie Lieutenant Paul Ratzburg. Detective Thomas testified to at least four encounters with Mr. Hunt; he and Lt.

Ratzburg verified that Ratzburg was present in two of the encounters, but the record is murky as to which of the encounters with Thomas alone occurred before and which occurred after those involving Ratzburg.

The court concluded that Mr. Hunt was "a liar," based on his criminal record and because some of his testimony struck the court as implausible or inconsistent with "common sense." (83: 125-126) The court would only accept his claims insofar as they were "corroborated" by other evidence. *Id*. at 125. The post-conviction motion alleged that, at a hearing on this motion, Mr. Hunt would produce photographs corroborating the injuries he claimed. (59:22-23). Moreover, although Detective Thomas claimed that Mr. Hunt agreed to answer some questions, he admitted that Mr. Hunt refused to answer others. The record is murky as to which was which, and the record should be clear, if for no other reason than that the court was apparently willing to accept claims by Mr. Hunt that were corroborated.

During cross-examination of Mr. Hunt's sister, the prosecutor challenged her claim that she saw Mr. Hunt's injuries. The prosecutor suggested that the judge at Mr. Hunt's bond hearing in Illinois had noted that there were no injuries. *Id*. at 74-75.[16] In addition to sorting out the exact sequence of the statements claimed by the two officers, and comparing them to statements and surrounding circumstances claimed by Mr. Hunt, the court should have had the photos of Mr. Hunt's injuries, and Mr. Hunt was deprived of the effective assistance of counsel when the photographs were not introduced.

[16] The post-conviction motion alleged that, to the extent the prosecutor implied there was a transcript of those proceedings, the implication is false; the bond hearing was not reported.

CONCLUSION

Mr. Hunt asks this court to reverse the judgment of conviction, and the order denying post-conviction relief, and remand this case for a new trial. In the alternative, he asks this court to reverse the order denying post-conviction relief and remand for an evidentiary hearing.

Dated this 22nd day of February, 2011.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,872 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of February, 2011.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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