STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2010AP2516-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LESHURN HUNT,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, HONORABLE BRUCE E. SCHROEDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the trial court err when, in its colloquy with Hunt regarding his decision whether or not to testify, it explored with him the risks of testifying?

The trial court rejected Hunt's postconviction argument that it "coerced" him into not testifying by making "threats" regarding what the state might ask him on cross-examination.

2. Did the trial court err in how it conducted the hearing on Hunt's motion to suppress his statements to police?

The trial court denied Hunt's motion to suppress his statements to police after a hearing that began before trial and continued at various points during trial. Hunt did not object to how the trial court conducted the hearing. Hunt raised this issue for the first time in his postconviction motion.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state requests neither oral argument nor publication. The briefs of the parties should adequately address the legal and factual issues presented. This case involves the application of established principles of law to the facts presented.

STATEMENT OF THE CASE

Hunt appeals (66) from a judgment of conviction (44; A-Ap. 131-32) and from an order denying direct postconviction relief, entered in the Circuit Court for Kenosha County, Honorable Bruce E. Schroeder, presiding (65; A-Ap. 101).

After a trial held October 6 through 8, 2008, a Kenosha County jury returned verdicts finding Hunt guilty as charged of armed robbery, felon in possession of a firearm, two counts of false imprisonment while using a dangerous weapon, and two counts of threat to injure while using a dangerous weapon (33-38; 76:179-81). Hunt was sentenced to consecutive prison terms for the six offenses totaling sixty-two years of initial confinement, followed by thirty-two years of extended supervision (77:13-14).

A judgment of conviction was duly entered (44; A-Ap. 131-32). Hunt then filed for direct postconviction relief, seeking a new trial on the ground that the trial court's colloquy with him regarding his decision whether or not to testify coerced him to decide against testifying (59). The trial court denied relief after a non-evidentiary postconviction hearing held September 21, 2010 (78; A-Ap. 102-130). The court issued a written order denying postconviction relief September 23, 2010 (65; A-Ap. 101). Hunt now appeals (66).

STATEMENT OF RELEVANT FACTS

The evidence of Hunt's guilt

Hunt waived his right to testify at the close of the state's case (76:94-95; A-Ap. 156-57). He did so after a colloquy with the court during which Hunt initially indicated he wished to testify, but ultimately decided against doing so (76:82-95; A-Ap. 144-57). Hunt put on no defense, and argued to the jury that the state failed to prove its case beyond a reasonable doubt (76:141-63).

The state proved at trial that Hunt robbed the Dollar Saver store on Sheridan Road in Pleasant Prairie, Kenosha County, just after 4:00 p.m., June 26, 2006, approximately one-and-a-half hours after he robbed a store in nearby Waukegan, Illinois, under similar circumstances. The clerk at the Dollar Saver store, Khrista Araujo, positively identified Hunt from a police photo array, from a surveillance video taken at the gas station across the street moments earlier, and positively identified him in court, as the man in the black hooded sweatshirt and wearing a "do rag" around his head who brandished a duct-taped shotgun, robbed the store, and ordered her and a co-worker into the bathroom at gunpoint before he fled (74:196-218, 226-27). Araujo's co-worker, Robert Edmaiston, provided a similar description of the Dollar Saver store robbery by the man in the black hooded sweatshirt whose image Edmaiston identified from a surveillance videotape taken at the gas station across the

street moments earlier (75:48-62). Hunt's image was in fact caught on a surveillance video at the Citgo gas station across the street moments earlier (75:48-60).

The cashier at the Stateline Citgo gas station across the street from the Dollar Saver store, Thomas Leech, saw a man in a black hooded sweatshirt acting suspiciously around 4:00 p.m. June 26th. Leech identified the man he described on the gas station's surveillance video (83:20-27). Another employee at the Citgo station, Pamela Bubeck, wrote down the license plate number of the car the man in the black hooded sweatshirt pumped gas into (this was standard practice in the station's effort to catch drivers who fill up and drive off without paying) (83:30-32, 45-46). The license plate number was registered to Hunt's car (83:47). Bubeck identified the man caught on the surveillance video as the same man she saw pumping gas into the car with Hunt's license number (83:34-37).

The day after the robbery, June 27th, police found Hunt's car at his home in Waukegan bearing the same license number as that written down a day earlier by the Citgo gas station employee. Police also observed in plain view on the back seat of Hunt's car a black hooded sweatshirt, and a bandana or "do rag" (76:14-16, 63, 69).

When interviewed by police the day after the robbery, June 27th, Hunt initially denied being in Wisconsin or being at the Citgo station the day before. Then, after police confronted him with the surveillance photo and the fact that a car with his license number was observed at the gas station, Hunt admitted he was at that Citgo station in Wisconsin the day before. Hunt then stretched out his hands as if in preparation to be handcuffed and said to the interrogating officer, "[Y]ou've got the video, you can lock me up" (76:12-14, 61-62; 83:90-94).

The trial court allowed the state to introduce evidence of the Waukegan, Illinois robbery committed one-and-one-half hours earlier (for which Hunt had

already been convicted in Illinois) to prove Hunt's *modus operandi* and his identity in the Wisconsin robbery (74:163-64; 75:76-77). The victim in the Waukegan robbery, Julie Chirnoff, described the 2:30 p.m. robbery committed by a man in a black hooded sweatshirt with a duct-taped shotgun who ordered her into a back room and robbed her store. Chrinoff also picked out Hunt's photo from a police photo array and positively identified Hunt in court as the robber (75:74-88; 76:21-23). Hunt's fingerprints were lifted from the door handle leading into Chirnoff's Waukegan store (75:93-96; 76:6-9, 38-42).

Hunt's waiver of his right to testify

At the close of the state's case, the prosecutor announced to the court that he and defense counsel had been in discussions about what would happen if Hunt decided to testify. The prosecutor advised that if Hunt took the stand and denied involvement in the Waukegan robbery, he would confront Hunt with the Illinois judgment of conviction entered against him for that offense (76:72; A-Ap. 134). The trial court ruled that this would be proper impeachment because the judgment represents proof of Hunt's guilt beyond a reasonable doubt (76:73-75; A-Ap. 135-37).

The prosecutor then stated he would oppose any testimony by Hunt that he was beaten by police into confessing to (apparently) both the Waukegan and Wisconsin robberies (76:76-77; A-Ap. 138-39). Defense counsel insisted that Hunt should be allowed to testify that he was beaten by police during the interview (76:77-78; A-Ap. 139-40). The trial court tentatively ruled that the "beating" testimony would be irrelevant if the beating occurred after Hunt confessed, but would be relevant if it occurred before he confessed (76:79-80; A-Ap. 141-42).

The court then engaged Hunt in the required colloquy addressing whether or not he wished to exercise his right to testify. The court explained that it is exclusively Hunt's decision whether or not to testify but

that the prosecutor may ask him questions about anything that is relevant, including the Waukegan robbery and the number of his prior convictions (76:82-83; A-Ap. 144-45). Hunt said he would "love to testify (76:84; A-Ap. 146), but then added: "I know he [the district attorney] can't tell me what all the questions he's going to ask me. I understand that." Hunt then asked whether he could discuss the alleged beating in his testimony. The trial court answered, only if it is relevant (76:85-86; A-Ap. 147-48). At this point, defense counsel requested and was granted additional time to talk this over with Hunt (76:86; A-Ap. 148). When the recess ended, Hunt and his attorney assured the court they had sufficient time to talk this over. Hunt assured the court that no threats or promises were made to him and his mind was clear. Again, Hunt said he wished to testify (76:87-88; A-Ap. 149-50).

The prosecutor then announced that he and defense counsel had both agreed that, if asked, Hunt would admit he has five prior convictions. Those consisted of the recent Waukegan armed robbery conviction, along with four Illinois convictions in 1984 for murder, armed robbery, burglary and theft, for which Hunt remained in custody from 1984 to November 27, 2001 (76:89-90; A-Ap. 151-52). Defense counsel agreed that Hunt would have to admit if asked that he had five prior convictions (76:90; A-Ap. 152).

The prosecutor asked the trial court that he also be allowed to explore the details of the 1984 offenses on cross-examination because they were so similar to the offenses at issue here. The trial court refused to rule on that request unless and until the matter arises during Hunt's testimony (76:90-91; A-Ap. 152-53). The court then advised Hunt there was a "substantial risk" the prosecutor might be allowed to explore these areas on cross-examination as relevant to his credibility (76:90-92; A-Ap. 152-54). The prosecutor also sought permission to explore the details of the 1984 offenses on cross-examination because Hunt claimed to have been beaten by

police then, just as he now claims he was beaten by police under similar circumstances in 2006. This would be relevant to the credibility of Hunt's claim that his statement should not be believed by the jury because it was beaten out of him by police. Once again, the trial court was not willing to rule on the prosecutor's request in a vacuum (76:93; A-Ap. 155).

At this point, Hunt changed his mind and decided against testifying (76:94-95; A-Ap. 156-57). Hunt never made an offer of proof as to what his testimony would have been. Hunt did not object or move for a mistrial. As noted above, Hunt personally acknowledged that the prosecutor did not have to tell him what questions he was going to ask on cross-examination (76:85-86; A-Ap. 147-48).[1]

The postconviction hearing

Although his argument was somewhat less than articulate at the postconviction hearing, Hunt apparently expected the trial court to rule on precisely what questions the prosecutor could and could not ask on cross-examination before it could accept his waiver of the right to testify (78:4-5, 15; A-Ap. 105-06, 116). On the other hand, if the court was not required to provide him with an advance ruling regarding what questions could and could not be asked, then Hunt preferred to be left in the dark

[1] Hunt testified on his own behalf at a suppression hearing out of the jury's presence the day before. Hunt testified that he requested but was denied the presence of counsel during the interview and his confession was beaten out of him by Waukegan police officer Thomas (83:76-87, 103-04). The trial court denied the suppression motion after finding that Hunt was "a liar" and the entirety of his testimony, especially Hunt's claim that he was beaten by police, was incredible (83:125-29). The court chose to believe the police officers who interviewed Hunt and insisted there was no beating, they fully complied with *Miranda v. Arizona,* 384 U.S. 436 (1966), and his statements were voluntary (74:52-54, 60-62, 72-74, 103-24; 75:16-27). Based on its credibility determinations, the trial court found that the statements were obtained from Hunt in full compliance with *Miranda* and were voluntary (83:125-30).

about what the prosecutor might ask him on cross-examination (78:5; A-Ap. 106).

Hunt objected to the trial court's decision allowing the state to confront him with the Waukegan judgment of conviction if he denied any involvement in that offense (78:8-9; A-Ap. 109-10). Hunt also objected to any questions about the 1984 Illinois offenses to rebut his claimed lack of involvement in the similar Wisconsin robbery, or his claim that his confession to the Wisconsin robbery was beaten out of him (78:10-11; A-Ap. 111-12). The trial court again explained it was not required to determine in advance and in a vacuum what questions the prosecutor may and may not ask on cross-examination to help Hunt decide whether or not to testify (78:15; A-Ap. 116). The court pointed out these are matters that should have been discussed between Hunt and his attorney beforehand (78:18; A-Ap. 119).

The prosecutor explained that he was just being cautious. He wanted Hunt to understand the risks of testifying, including the possibility he might be cross-examined about the 1984 offenses, and wanted to do this out of the presence of the jury before Hunt testifies rather than during his cross-examination. The prosecutor maintained there were no "threats" here; it was proper, and not a "threat," to tell Hunt he would be cross-examined about the Waukegan judgment of conviction if Hunt denied involvement in that robbery. It was proper, and not a "threat," to tell Hunt the state would challenge his credibility on cross-examination with proof that he has five prior convictions (78:20-22; A-Ap. 121-23). The prosecutor explained further that it was never his intent to introduce extrinsic evidence on rebuttal about any of this; he only intended to cross-examine Hunt about the Waukegan robbery and the 1984 offenses should those inquiries be made relevant by Hunt's testimony on direct (78:22-24; A-Ap. 123-25).

The trial court denied the postconviction motion. The court analogized its approach in the colloquy with

Hunt to a doctor's obtaining "informed consent" from a patient before a surgical procedure (78:25; A-Ap. 126). None of this should have come as a surprise to Hunt as he and his attorney presumably had discussed before trial his prior record and its potential impact on his testimony. The court thought it "bizarre" that Hunt would prefer to know nothing, and be lead "like a lamb to slaughter into the cross-examination," rather than be informed of the risks before deciding whether or not to testify (78:26; A-Ap. 127).

The court went on to reject as contrary to law Hunt's alternative argument that he should be told precisely what questions the prosecutor may and may not ask on cross-examination before making the decision whether or not to testify (78:26; A-Ap. 127). The court concluded that Hunt was given "an opportunity for informed consent" far beyond what most defendants get. The court did not tell Hunt during the colloquy anything beyond what his lawyer should already have told him (78:28; A-Ap. 129). The court concluded:

> And I think it was only fair to the defendant to tell him, you know, there is some risk. And as I say, I'm not telling him anything that his lawyer wouldn't have already told him or, at least, should have already told him. And even if the lawyer hadn't told him, I think most people with the intelligence that Mr. Hunt obviously had would have known that there was some risk there. So all that happened here was a clear-cut case of informed consent, and your motion is denied.

(78:28-29; A-Ap. 129-30).

ARGUMENT

THE TRIAL COURT PROPERLY EXPLORED THE CONSEQUENCES OF TESTIFYING IN ITS COLLOQUY WITH HUNT BEFORE HE DECIDED NOT TO TESTIFY.

A. The applicable law concerning waiver of the right to testify in Wisconsin.

In *State v. Weed*, 2003 WI 85, ¶¶40-43, 263 Wis. 2d 434, 666 N.W.2d 485, the supreme court held in its law-developing capacity that from that day forward Wisconsin trial courts must engage criminal defendants who decide not to testify in a colloquy to determine whether their waiver of the fundamental right to testify was voluntary and intelligent. *Accord State v. Garcia,* 2010 WI App 26, 323 Wis. 2d 531, 779 N.W.2d 718. Although the court did not expressly say so, it appears this requirement was imposed in its supervisory authority over the lower courts of this state. *See State v. Bangert*, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986). The court acknowledged that this is a minority position among courts across the land, noting that the majority of courts have "concerns regarding trial strategy and the integrity of the attorney-client relationship." *State v. Weed,* 263 Wis. 2d 434, ¶41. This constitutional question is reviewed *de novo,* but in light of the undisputed or not clearly erroneous facts as found by the trial court. *Id.* ¶13.

This court has held that the corollary to the right to testify, that being the right *not* to testify, is fundamental as well, and the defendant's waiver thereof must be knowing and voluntary. *State v. Jaramillo,* 2009 WI App 39, ¶¶10-11, 316 Wis. 2d 538, 765 N.W.2d 855. This court held, however, that it lacked the supervisory authority over circuit courts to require an on-the-record waiver colloquy with the defendant. Such a requirement must come, as it did in *Weed,* from the Wisconsin Supreme Court. *Id.* ¶16. This court, instead, *recommended* that circuit courts

engage in such a colloquy when a defendant decides to testify. *Id.* ¶17.[2]

If there has been no colloquy, once the issue is raised in the defendant's postconviction motion, the postconviction court must determine whether the defendant knowingly and voluntarily waived his right not to testify. *Id.* ¶18. The postconviction court must ascertain at that stage, "whether the defendant knew about the right not to testify, the consequences of not testifying, and that this right could be exercised even if the defendant's attorney counseled to the contrary." *Id.* ¶14.

B. Hunt waived any right to review of the trial court's colloquy by not objecting to it.

Hunt complained for the first time in his postconviction motion and now on appeal that the trial court in its colloquy went too far in discussing with him the serious risks he faced by testifying. Hunt complained for the first time in his postconviction motion and now on appeal that the trial court "coerced" him into deciding against testifying with "threats" about what the prosecutor might ask him on cross-examination (59:8-11; 62:3-4; Hunt's brief at 10-12, 23-26). Hunt *now* complains that the trial court "compromised [his] right to knowingly and voluntarily decide whether to testify." Hunt's brief at 18 (initial capitalization omitted). Hunt, however, never objected on that ground at the time of the colloquy. Hunt never complained to the trial court at the time of the colloquy that he felt "coerced" by its "threats." Hunt merely waived his right to testify at the conclusion of the colloquy without objection (76:94-95; A-Ap. 156-57).

[2] The issue whether the Wisconsin Supreme Court should mandate in its supervisory capacity an on-the-record colloquy between the trial court and the defendant to ascertain whether waiver of the right *not* to testify is voluntary and intelligent, is now pending before that court. *State v. Rickey R. Denson,* Appeal No. 2009AP0694-CR.

Moreover, Hunt never provided the trial court with an offer of proof as to what his testimony would have been had the court's "threats" not prevented him from testifying. *See* Wis. Stat. §901.03(1)(b).[3]

Failure to object at trial generally precludes appellate review of a claim, even if it is of constitutional dimension. *See, e.g., State v. Huebner*, 2000 WI 59, ¶¶10-11, 235 Wis. 2d 486, 611 N.W.2d 727; *State v. Davis*, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996); *State v. Edelburg*, 129 Wis. 2d 394, 400-01, 384 N.W.2d 724 (Ct. App. 1986).

To properly preserve an objection for review, the litigant must "articulate the specific grounds for the objection unless its basis is obvious from its context[] . . . so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." *State v. Agnello*, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427 (1999) (citation omitted).

A defendant waives or forfeits appellate review of an error by failing to make both a contemporaneous objection and a motion for mistrial. *See, e.g., Haskins v. State*, 97 Wis. 2d 408, 424, 294 N.W.2d 25 (1980); *Neely v. State*, 97 Wis. 2d 38, 54-55, 292 N.W.2d 859 (1980); *State v. Patino*, 177 Wis. 2d 348, 380, 502 N.W.2d 601 (Ct. App. 1993). The purpose of the waiver rule is to enable the trial court to avoid or correct any error with minimal disruption of the proceedings. *See State v. Boshcka*, 178 Wis. 2d 628, 643, 496 N.W.2d 627 (Ct. App. 1992). *Also see State v. Guzman*, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717.

[3] For the first time in his postconviction motion and now on appeal, Hunt presented an offer of proof that his allegation he was beaten by police in 1984 was later "substantiated." Hunt's brief at 11.

The United States Supreme Court has held that constitutional rights of this nature are waived, or forfeited, by a defendant's (or his attorney's) failure to object when the constitutional violation occurred. *Levine v. United States*, 362 U.S. 610, 619 (1960). *See Yakus v. United States*, 321 U.S. 414, 444 (1944) ("[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right"). *Also see Peretz v. United States*, 501 U.S. 923, 936-37 (1991); *United States v. Broce*, 488 U.S. 563, 574-76 (1989); *United States v. Van Waeyenberghe*, 481 F.3d 951, 957-58 (7th Cir. 2007) (holding that a double jeopardy challenge can be forfeited by failure to object).

The trial court engaged Hunt in a waiver colloquy that, it believed, comported with the requirements set out by the court in *State v. Weed.* Hunt never gave the trial court the opportunity to correct its alleged violation of his constitutional right to testify because he never called the alleged violation to its attention. Hunt never explained to the court that its efforts to comply with *Weed,* and to ensure that his decision whether or not to exercise his right to testify was knowing and voluntary, amounted to a series of "threats" that undermined the right. Hunt never moved for a mistrial on the ground that the trial court's "threats" prevented him from testifying when it was his desire to do so. Nor did Hunt present an offer of proof as to what his testimony would have been. Had he done so, it would have crystallized the issues and enabled the trial court to evaluate what would and would not be a relevant area of inquiry on cross-examination. *See* Wis. Stat. §901.03(1)(b); *State v. Groh,* 69 Wis. 2d 481, 488-89, 230 N.W.2d 745 (1975); *State v. Moffett,* 46 Wis. 2d 164, 168-69, 174 N.W.2d 263 (1970). This court should not, therefore, review Hunt's forfeited challenge to the adequacy of the colloquy on its merits. *Compare State v. Jaramillo,* 316 Wis. 2d 538, ¶14 (no waiver where the trial court failed to engage the defendant in *any* waiver colloquy before he took the stand at trial, and the issue was raised for the first time postconviction).

C. The trial court's on-the-record colloquy satisfied both the letter and spirit of *Weed* and *Jaramillo.*

Hunt complains that the trial court did *too much* to protect his constitutional right to decide whether or not to testify. According to Hunt, the trial court "threatened" and "coerced" him when it correctly advised him that the prosecutor would be allowed to establish he had five prior convictions; to confront him with the Waukegan judgment of conviction should he deny any involvement in that offense, and might be allowed to challenge the credibility of his claim that he was beaten by police with proof that he made the same claim under almost identical circumstances in 1984 (59:8-10; 62:3-4; Hunt's brief at 10-12, 23-26).

According to Hunt, it would have been better had the trial court left him in the dark about the risks of testifying (78:5; A-Ap. 106; Hunt's brief at 22). The trial court wisely saved Hunt from himself when it chose to engage him in the colloquy required by *Weed* to obtain his "informed consent." Having been properly and thoroughly apprised of the potential risks, Hunt and his attorney balanced those risks against the benefits of testifying, before Hunt decided not to testify (76:94-95; A-Ap. 156-57).

What Hunt wanted is not what the law now requires. The trial court followed both the letter and spirit of the law when it explored with Hunt "the consequences of" testifying. *State v. Jaramillo,* 316 Wis. 2d 538, ¶14 (so holding with respect to the corollary right not to testify). One such "consequence" is that Hunt risked being impeached with his five prior convictions. Another "consequence" is that Hunt risked being confronted with the Waukegan judgment of conviction to impeach any testimony by him that he was not involved in that robbery. Yet another "consequence" is that Hunt might be asked questions regarding his claim that police beat him in 1984

to impeach him should he testify that police beat his confession out of him under similar circumstances in 2006.

The trial court was correct to label as "bizarre" Hunt's belief that it was better for him to be left in the dark until questions on these topics (and perhaps others) were sprung on him during cross-examination at trial (78:26; A-Ap. 127). Hunt cited no authority to the trial court then, and he cites none now, for that novel proposition because there obviously is none. Again, case law now requires Wisconsin trial courts to explore with defendants during the waiver colloquy the "consequences" of testifying or not testifying. That is precisely what the trial court tried to do here. Sure, the trial court might have satisfied this requirement by merely asking defense counsel whether he explored with Hunt the consequences of testifying, and then asking Hunt whether he agreed with counsel, *see State v. Garcia*, 323 Wis. 2d 531, ¶13, but the thorough colloquy engaged in here ensured against any bogus future ineffective assistance of counsel challenge by laying out completely on the record what specific consequences, relevant to this particular case, were explored before Hunt decided not to testify.[4]

Hunt also cites no authority for his novel alternative proposition: that the trial court must advise him what questions it will allow and not allow the prosecutor to ask on cross-examination before he has to decide whether or not to testify. Nothing in *Weed* requires such a radical and time-consuming exercise. Such a rule would require trial courts to make prospective evidentiary rulings

[4] Hunt seems to be arguing for a return to the pre-*Weed* jurisprudence where an on-the-record waiver colloquy of the right either to testify or not to testify was not required because it risked interfering with the attorney-client relationship, and risked coercing a defendant into making a decision against his own wishes. Hunt's brief at 19-20. That is the position the state took in both *Weed* and *Jaramillo,* and is the sound position of a majority of jurisdictions in this country. *See State v. Weed,* 263 Wis. 2d 434, ¶41.

in a vacuum, subject to change if the evidence comes in differently than anticipated. Certainly, Hunt could have sought a ruling *in limine* by making an offer of proof with his own testimony out of the presence of the jury, or with a summary of his anticipated trial testimony. *See* Wis. Stat. §§901.03(1)(b) and 901.04. To date, the state, the circuit court and this court do not know how Hunt would have testified because he failed to make an offer of proof. Absent any offer of proof on his part, it is absurd for Hunt to expect the trial court to rule in a vacuum on the scope of the state's cross-examination without any idea what his testimony on direct would be. The circuit court made it clear to Hunt it would only allow cross-examination on matters that are relevant. Absent an offer of proof as to what his testimony would be, the circuit court could not be expected to know whether an area of cross-examination is "relevant" unless and until it heard Hunt's testimony on direct at trial. *See State v. Moffett,* 46 Wis. 2d at 168-69.

Hunt does not dispute that his five prior convictions were relevant and admissible and, as such, could be addressed on cross-examination. The Waukegan judgment of conviction would have been relevant and admissible had Hunt denied on direct examination any involvement in that now conclusively proven offense. Although Hunt objected to any inquiry into the 1984 offenses (for which he had spent most of the years between them and the 2006 robberies in custody), he does not explain why cross-examination would have been irrelevant, assuming he denied any involvement in the 2006 Dollar Saver store and Waukegan robberies; or, assuming Hunt claimed his confession was beaten out of him in 2006, just as he claimed he was beaten by police under similar circumstances in 1984.

Finally, the trial court correctly reasoned that it was doing nothing more in its colloquy with Hunt than what defense counsel presumably had already done with him. Defense counsel was fully aware of the Waukegan robbery conviction. Counsel was also fully aware of the 1984 murder/robbery/burglary/theft convictions, as his

client served some seventeen years in prison for them, and defense counsel agreed that they comprised four of Hunt's five prior convictions (the other being the Waukegan robbery conviction) (76:89-90; A-Ap. 151-52). No doubt, when discussing with Hunt whether he should testify, trial counsel tried to anticipate what the state might ask on cross-examination about those five prior offenses. No doubt counsel told his client the state would likely establish that he has five prior convictions, that he was tried and convicted in Waukegan if he should deny any involvement in that offense, and the state might try to question him about the 1984 offenses. Counsel might also have feared that, depending on how his testimony went, Hunt might inadvertently "open the door" to detailed rebuttal testimony about the similar 1984 offenses to attack his credibility.

D. Any error in the trial court's colloquy was harmless.

Proven violations of the right to testify are subject to harmless error analysis. *Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir. 1988); *Arredondo v. Pollard*, 498 F. Supp. 2d 1113, 1127-28 (E.D. Wis. 2007), *aff'd*, 542 F.3d 1155 (7th Cir. 2008). Thus, in cases where the defendant claims he was denied the right to testify, the court looks to what impact his testimony would have had on the trial. *Barrow v. Uchtman*, 398 F.3d 597, 608 n.12 (7th Cir. 2005). *Also see Alexander v. United States*, 219 F. App'x 520, 523-24 (7th Cir. 2007) (when the claimed denial of the right to testify is presented in the context of an ineffective assistance challenge, a defendant who proves deficient performance must also prove actual prejudice). *Also see Reynolds v. United States,* 2010 WL 3835057, *3 (S.D. W. Va. Sept. 29, 2010).

There is no reasonable doubt that the verdict would have been the same had Hunt testified. *See State v. Harvey*, 2002 WI 93, ¶44, 254 Wis. 2d 442, 647 N.W.2d 189. His testimony would have had no conceivable result-changing impact on the trial.

As discussed above, the clerk who was robbed at the Dollar Saver store positively identified Hunt in a police photo array and at trial as the man in the black hooded sweatshirt and wearing a "do rag" who robbed her with a duct-taped shotgun. The clerk at the Citgo station across the street positively identified Hunt in a police photo array and at trial as the suspicious-acting black man in a black hooded sweatshirt who purchased gas there minutes before the robbery committed by a black man in a black hooded sweatshirt across the street. Hunt's image was captured on surveillance video at the Ctigo station minutes before the robbery across the street. Hunt's car, bearing his license plate number, was observed at the same time parked next to a gas pump at the Citgo station. Police found Hunt's car at his Waukegan home the next day bearing the same license number as that jotted down by a clerk at the Citgo station the day before. In the backseat, police observed a black hooded sweatshirt, and a bandana or a "do rag." A man fitting the identical description robbed a store in nearby Waukegan, Illinois one-and-one-half hours before the Dollar Savings store robbery in Wisconsin. The owner of the Waukegan store positively identified Hunt in a police photo array and in court as the man who robbed her. Hunt's fingerprints were found on the door handle to the Waukegan store. Hunt initially denied to police that he was in Wisconsin or at the Citgo station on June 26th. When confronted with the surveillance video and license plate number evidence, Hunt changed his tune and admitted he was at the Citgo station that day. Hunt then held out his hands as if to be handcuffed and told police, in essence, that they had him.

Hunt presented no offer of proof as to what his testimony would have been. Whatever it might have been, it would not have diminished in any rational sense the power of the evidence against him. If Hunt denied involvement, he would have had to explain how it was his image appeared on the Citgo station's surveillance video, how the car bearing his license number got there and why he was acting suspiciously. Hunt would have had to explain the amazing coincidence that some other black

man fitting his description and wearing an identical black hooded sweatshirt committed an armed robbery across the street moments later. Hunt would have had to explain the amazing coincidence that some other black man fitting his description and wearing an identical black hooded sweatshirt robbed a store in Waukegan earlier that afternoon. Hunt would then have had to explain how his fingerprints got on the door handle at the Waukegan store. Finally, Hunt would have had to convince the jury why the positive identifications made of him by the citizen eyewitnesses in police photo arrays and in court should be disregarded.

If Hunt testified that his admission he was at the Citgo station around the time of the robbery was beaten out of him, he would again have had to explain how it was that his image was on the gas station's surveillance tape, and how it was that a car bearing his license number was parked at a gas pump there directly across from the Dollar Saver store minutes before the robbery. Regardless of how Hunt testified, he would have had to admit on cross-examination that he had five prior convictions. And, if he denied involvement in the Waukegan robbery, and regardless whether the prosecutor confronted him with the judgment of conviction, Hunt would still have had to explain how his fingerprints got on the door handle at that store. It is clear beyond a reasonable doubt, indeed beyond any doubt, that the jury would have found Hunt guilty with or without his testimony.[5]

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[5] The state concurs with Hunt's alternative argument there is no need to remand for an evidentiary hearing. Hunt's brief at 26-28. The state believes the record as it stands conclusively shows Hunt's challenge is utterly devoid of merit and any further proceedings would be a waste of time. Hunt argues in the alternative that there should be an evidentiary hearing into the effectiveness of trial counsel if the trial court's colloquy is upheld. Hunt's brief at 28-30. This argument must be rejected out-of-hand as wholly undeveloped and improper. Hunt offers no proof that counsel performed deficiently other than the hopelessly conclusory allegation that trial counsel "should have asserted discovery and other due process rights to obtain adequate information." Hunt's brief at 29. This is as (footnote continued)

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction and the order denying postconviction relief be AFFIRMED.[6]

Dated at Madison, Wisconsin this 6th day of April, 2011.

Respectfully submitted,

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deficient as it gets. Moreover, Hunt's beef regarding the colloquy is with the trial court, not trial counsel. *Id. See State v. Pettit,* 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[6] The state chooses not to address on its merits the vague and conclusory argument presented at "II," pp. 31-32, of Hunt's brief that the suppression hearing was somehow prejudicially deficient. This, too, is undeveloped and improper appellate argument. *State v. Pettit,* 171 Wis. 2d at 646-47. Hunt does not explain why his attorney did not object to how the hearing was conducted or why counsel did not introduce the photos of his supposed injuries caused by police brutality. In any event, as explained at I. D., above, Hunt would have been found guilty even if his admission that he was at the Citgo gas station on June 26th had been suppressed because the police beat it out of him.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,151 words.

Dated this 6th day of April, 2011.

_____
DANIEL J. O'BRIEN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 6th day of April, 2011.

_____
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