STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II/IV

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Case No. 2010AP2516-CR

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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

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# SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

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# SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

The plaintiff-respondent, State of Wisconsin, submits this supplemental brief addressing the impact of *State v. Denson*, 2011 WI 70, __Wis. 2d __, 799 N.W.2d 831, as ordered by this court August 11, 2011.

## ARGUMENT

### I. THE *DENSON* DECISION REQUIRES A POSTCONVICTION EVIDENTIARY HEARING ONLY WHEN THE DEFENDANT PROVES THERE HAS BEEN EITHER A DEFECTIVE WAIVER COLLOQUY OR NO COLLOQUY AT ALL; AND ONLY IF THE STATE IS PREPARED TO PROVE THE DEFENDANT'S RIGHT TO TESTIFY WAS NOT VIOLATED, OR IF IT WAS, THE VIOLATION WAS HARMLESS.

In its August 11, 2011 order, this court expressed the belief that *State v. Denson* requires a postconviction evidentiary hearing whenever, "a defendant has waived his or her right to testify, and properly raises a claim that the waiver was invalid because it was not voluntary and knowing." The state believes that *Denson* does not so hold. Rather, consistent with *State v. Weed,* 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485, a postconviction evidentiary hearing is required only when the defendant proves there has been either a defective waiver colloquy or no colloquy at all; and alleges that this rendered his waiver involuntary and unintelligent.

Here, there was a full waiver colloquy at trial, as required by *Weed,* advising Hunt of the right to testify, ascertaining that he discussed the right with counsel and advising Hunt of the consequences of testifying. *State v. Weed,* 263 Wis. 2d 434, ¶ 43. The remaining issue, as Hunt describes it, is whether despite the colloquy "the circuit court, prosecutor, and trial counsel unduly coerced and pressured Mr. Hunt into waiving his right to testify for reasons *not apparent on the record."* Hunt's Supplemental Brief at 1 (emphasis added). An evidentiary hearing to allow Hunt to develop the facts as to what occurred off the record is required only if Hunt's

postconviction motion specifically alleges what facts he intends to prove at the hearing and the record does not conclusively show that Hunt is not entitled to relief. *State v. Bentley,* 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996); *Nelson v. State,* 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). *See State v. Balliette,* 2011 WI 79, ¶¶ 18, 42-50, __ Wis. 2d __, __ N.W.2d __.

> The majority in *Howell* stated: "The correct interpretation of *Nelson/Bentley* is that an evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient non-conclusory facts." *Id.* ¶ 77 n. 51.

*State v. Balliette,* 2011 WI 79, ¶ 50.

Hunt's motion cannot stand on conclusory allegations alone but must specifically allege within its four corners who, what, when, where, how and why to substantiate the serious claim that Hunt's waiver was coerced by his attorney, the prosecutor and the court; or that Hunt's waiver was caused by the prejudicially deficient performance of his trial counsel. *State v. Balliette*, 2011 WI 79, ¶¶ 53-59; *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433. Hunt's motion lacks the requisite factual specificity.

Hunt argued in his opening brief, and the state concurred, that there is no need for a postconviction evidentiary hearing into the validity of Hunt's waiver of his right to testify here because the record of the colloquy speaks for itself. Hunt's opening brief at 26-28; State's response brief at 19 n.5.

In *Denson,* the supreme court held that the trial court "must conduct" a postconviction evidentiary hearing "once a defendant properly raises in a postconviction motion the issue of an invalid waiver of the right not to testify." *State v. Denson,* 2011 WI 70, ¶ 70. In so

holding, the court cited to *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986) (waiver colloquy prior to a guilty plea), and *State v. Klessig*, 211 Wis. 2d 194, 207, 564 N.W.2d 716 (1997) (waiver of trial counsel colloquy). Those cases – *Bangert* and *Klessig* – concern the procedural requirements for a valid waiver colloquy. When there is no colloquy, or when the waiver colloquy on the record is deficient, those cases require relief for the defendant unless the state proves at a postconviction evidentiary hearing that the waiver of the constitutional right(s) in question was in fact knowing and voluntary *despite the defective or non-existent waiver colloquy. See State v. Cross*, 2010 WI 70, ¶¶ 19-20, 326 Wis. 2d 492, 786 N.W.2d 64; *State v. Brown*, 2006 WI 100, ¶¶ 39-42, 293 Wis. 2d 594, 716 N.W.2d 906; *State v. Garcia*, 2010 WI App 26, ¶¶ 4, 9, 323 Wis. 2d 531, 779 N.W.2d 718; *State v. Jaramillo*, 2009 WI App 39, ¶¶ 14, 18, 316 Wis. 2d 538, 765 N.W.2d 855.

The issue whether the waiver colloquy occurred or was defective is to be distinguished from the situation where the waiver colloquy required by *Weed* occurred, but the defendant challenges his waiver on an independent ground such as those presented here: even assuming the waiver colloquy conformed with *Weed*, trial counsel's ineffectiveness caused Hunt to waive his right to testify; or, even assuming the waiver colloquy conformed with *Weed*, Hunt's waiver was coerced by defense counsel, the prosecutor and the trial judge. *State v. Hampton*, 2004 WI 107, ¶¶ 50-51, 57-58, 61-63, 274 Wis. 2d 379, 683 N.W.2d 14. *Also see State v. Allen*, 274 Wis. 2d 568, ¶ 13; *State v. Balliette*, 2011 WI 79, ¶¶ 54-57.

If the colloquy satisfied *Weed*, Hunt would bear the burden of pleading and then proof at the postconviction hearing that his waiver of the right to testify was in fact unknowing or involuntary for some other reason not readily apparent from the record such as coercion and/or ineffective counsel. *See State v. Balliette*, 2011 WI 79, ¶¶ 56-59; *State v. Hoppe*, 2009 WI 41, ¶¶ 62-65,

317 Wis. 2d 161, 765 N.W.2d 794; *State v. Hampton*, 274 Wis. 2d 379, ¶¶ 62-63.

> The *Bangert* and *Nelson/Bentley* motions, however, are applicable to different factual circumstances. A defendant invokes *Bangert* when the plea colloquy is defective; a defendant invokes *Nelson/Bentley* when the defendant alleges that some factor extrinsic to the plea colloquy, *like ineffective assistance of counsel or coercion,* renders a plea infirm.

*State v. Howell*, 2007 WI 75, ¶ 74, 301 Wis. 2d 350, 734 N.W.2d 48 (emphasis added, footnote omitted).

Here, there was a *prima facie* valid waiver colloquy on the record in full conformity with *Weed*. Hunt was fully informed of the right to testify and the court ascertained that he and counsel discussed the right. The court then explored with Hunt and counsel the consequences of testifying. Although Hunt says he is also trying to present a *Bangert*-type challenge to the colloquy itself, Hunt's supplemental brief at 1, he is in reality arguing that based on evidence outside the trial record, his waiver of the right to testify was constitutionally infirm because his attorney, the prosecutor and the court all coerced it; and/or the ineffectiveness of trial counsel caused him to waive the right.

Even though Hunt would bear the burden of proving coercion and ineffective counsel at the *Bentley*-type hearing, there is no need for a postconviction evidentiary hearing here because the essence of Hunt's claim – the trial court coerced his waiver when it explored the risks of testifying – rises or falls based on the transcript of the waiver colloquy. *See* Hunt's initial brief at 26-28. There is no need, after all, to call the trial judge as a witness to establish whether his remarks coerced Hunt's waiver because the record speaks for itself as to what the court said. More to the point, Hunt offers no proof that what was said by the court regarding the risks he faced was inaccurate or misleading.

If, on the other hand, this court concludes based on the waiver colloquy transcript that the trial court coerced Hunt's waiver of the right to testify when it explored the risks with him, the state would then be afforded the opportunity to prove at a *Bangert*-type evidentiary hearing that his waiver was *in fact* voluntary and intelligent despite the trial court's allegedly coercive remarks. This could be done with testimony from defense counsel or Hunt himself that they strategically decided against having Hunt testify after they discussed those very same risks before the trial court brought them up during the colloquy. *See State v. Bangert*, 131 Wis. 2d at 274-75. *Also see Galowski v. Murphy*, 891 F.2d 629, 636-37 (7th Cir. 1989). In that sense, and that sense alone, a post-conviction evidentiary hearing "is an appropriate remedy" for ascertaining whether Hunt's waiver was voluntary and intelligent *in fact* – the only relevant constitutional inquiry whether or not there was a waiver colloquy. *State v. Denson*, 2011 WI 70, ¶ 68 ("In any case, *whether or not the circuit court conducts an on-the-record colloquy*, it remains that a criminal defendant must knowingly, voluntarily, and intelligently waive his or her right not to testify" (emphasis added). [1]

[1] This is not to be confused with proof of "harmless error." The state would not be arguing at the *Bangert*-type hearing that the violation of the right to testify was harmless. *Compare* discussion at "II," *infra*, concerning proof of harmless error at a *Bentley*-type hearing. Rather, the state would take it upon itself to prove that Hunt's right to testify was not violated because of what he and counsel discussed before the colloquy. This is consistent with the court's acknowledgement in *Denson* that:

> Defense counsel has the primary responsibility for advising the defendant of his or her corollary rights to testify and not to testify and for explaining the tactical implications of both. "[V]iewed objectively, the defendant's testimony may increase the likelihood of conviction." *Colorado v. Mozee*, 723 P.2d 117, 125 (Colo.1986). In that sense, we believe it "unlikely that a competent defense counsel would allow a defendant to take the stand without a full explanation of the right to remain silent and the possible consequences of waiving that right." *Id.*

*State v. Denson*, 2011 WI 70, ¶ 65.

Moreover, as the state argued at pp. 11-13 of its response brief, Hunt waived or forfeited any right to appellate review of his *Bangert*-type claim that the trial court's colloquy coerced his waiver of the right to testify. Hunt did not interpose a contemporaneous objection during or immediately after the colloquy at a point when the trial court could have cured any error with minimal disruption of the trial (76:94-95; A-Ap. 156-57). To compound the problem, Hunt did not then and does not now present an offer of proof as to what his testimony would have been if the trial court had not coerced him into waiving the right. A timely offer of proof might have given Hunt and his attorney, the trial court and the prosecutor insight into what would or would not be a relevant area of inquiry on cross-examination, or relevant rebuttal testimony, thereby further informing the decision whether or not to testify. By not timely objecting, then, Hunt failed to "properly" raise the argument that his right to testify was denied by the trial court's allegedly coercive colloquy with him. *See State v. Denson*, 2011 WI 70, ¶ 70.

On the merits, the trial court did not coerce anything during the colloquy. Nothing in either *Weed* or *Denson* prevents trial courts from exploring with a defendant during the waiver colloquy the consequences of the decision whether or not to testify. As this court has held, the trial court is required to explore with the defendant the "consequences" of that decision during the colloquy. *State v. Jaramillo*, 316 Wis. 2d 538, ¶ 14. The "informed consent" approach taken by the trial court here was entirely consistent with that requirement. There was no violation of the right to testify because Hunt's waiver was voluntary and intelligent thanks to the thorough colloquy the trial court engaged him and his attorney in before he decided against testifying, and after being made fully aware of the potential risks. *Compare Woolfolk v. Commonwealth*, 339 S.W.3d 411, 417-18 (Ky. 2011) (trial court's cautioning a defendant of the risk of perjury if he testifies falsely not invalid *per se*, but it is improper for

trial judge to mislead or "badger" the defendant about that risk).[2]

If Hunt's postconviction motion is deemed one seeking a *Nelson/Bentley*-type hearing, no hearing is called for here because his motion is woefully insufficient in alleging within its four corners who, what, when, where, how and why with respect to the claims of coercion and ineffective counsel that would require proof outside the trial record. *See State v. Balliette*, 2011 WI 79, ¶¶ 53-59. *See* Hunt's initial brief at 29 (arguing only that trial counsel "should have asserted discovery and other due process rights to obtain adequate information.").

## II. VIOLATION OF THE RIGHT TO TESTIFY IS SUBJECT TO HARMLESS ERROR ANALYSIS AND *DENSON* DOES NOT HOLD TO THE CONTRARY.

In its August 11, 2011 order, this court expressed the view that, "*Denson* appears to indicate that in a *Weed* situation, harmless error analysis does not apply." That observation is correct, but only in a *Bangert*-type situation

[2] Hunt *speculates* that the state lacked sufficient proof to inquire of him on cross-examination about the 1984 Illinois convictions and the circumstances of his confession then, but offers no proof in his motion that the state's position was unfounded. Furthermore, Hunt offered no proof as to why he decided not to testify about anything else merely because there was a "substantial risk" the trial court might allow some cross-examination about the 1984 Illinois offenses if his testimony somehow made them relevant (76:91-92; A-Ap. 153-54). The trial court only stated that it might allow some inquiry about the 1984 offenses ("Don't 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." (76:92; A-Ap. 154)). Hunt had to offer specific proof in his motion, *see Balliettte,* because the burden of proof at a *Bentley*-type hearing would be on him to show it was wrong for the trial court to discuss the risk of inquiry into the 1984 offenses on cross-examination.

when the defendant proves there was either no *Weed* colloquy, or a defective one.

In *Denson*, the court rejected an automatic reversal rule even when the defendant proves there was either no waiver colloquy or a defective one. 2011 WI 70, ¶ 69. The defendant prevails, but only if he also alleges the defect rendered his waiver involuntary or unintelligent, and the state is unable to prove at a postconviction hearing that the waiver of the right to testify was in fact voluntary and intelligent despite the defective colloquy.

The *Denson* court held that a trial court's "complete failure to engage" in a waiver colloquy is not subject to the harmless error rule. *Id.* ¶ 69 n.13. The court continued, "the State does not argue, and we do not adopt, the position that a circuit court's failure to conduct such a colloquy is harmless." *Id.*

> A defendant's right to an evidentiary hearing under *Bangert* cannot be circumvented by either the court or the State asserting that based on the record as a whole the defendant, despite the defective colloquy, entered a constitutionally sound plea.

*State v. Howell*, 301 Wis. 2d 350, ¶ 7. *Also see id.* ¶ 70.

All this means is that the state cannot prevent an evidentiary hearing when there is no waiver colloquy by arguing harmless error. Once the defendant proves there was no colloquy, or a defective one, and alleges this rendered his waiver involuntary or unintelligent, the trial court must provide him a *Bangert*-type hearing at which the state would be required to prove that, despite the defective colloquy, he in fact understood the right to testify and knowingly and voluntarily decided against testifying. If the state fails to meet that burden, he gets a new trial. The remedy for the defective colloquy is not automatic reversal; the defendant wins a new trial *unless the state proves* at a postconviction evidentiary hearing that, despite the defective colloquy, the defendant's

waiver of the right to testify was in fact knowing and voluntary. *See State v. Cross,* 326 Wis. 2d 492, ¶¶ 19-20; *State v. Brown,* 293 Wis. 2d 594, ¶¶ 36-37.

As discussed above, this is not a *Bangert*-type case. It does not concern the trial court's failure to conduct the colloquy. There was a colloquy that satisfied the minimal requirements set forth in *Weed.* Hunt's argument is that, despite the *prima facie* valid colloquy, the trial court coerced his waiver of the right to testify by going too far in exploring the risks of that decision with him. Then, in only conclusory fashion, Hunt argues that his waiver was also coerced by his ineffective counsel, the prosecutor and the trial court; such coercion and ineffectiveness would be proven with evidence outside the trial record. Hunt's motion offers next to nothing as to what that extra-record evidence would be.

The *Nelson/Bentley* inquiry into the alleged violation of Hunt's constitutional right to testify is subject to the harmless error rule: Hunt is not entitled to relief if the state proves beyond a reasonable doubt the verdict would not have changed if he had testified. This court has so held. *State v. Flynn,* 190 Wis. 2d 31, 55-57, 527 N.W.2d 343 (Ct. App. 1994). Hunt asserts he is "aware of no authority that conclusively establishes that violating the right to testify or not to testify is structural error or trial error." Hunt's supplemental brief at 14. In truth, the cases from across the land holding that a proven violation of the right to testify is trial error subject to harmless error analysis are legion. *Id.*; *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). The court may look to what, if any, impact Hunt's proffered testimony would have had on the trial in assessing whether the error was harmless. *See United States v. Smith,* No. 09-15589, 2011 WL 2693201, *4-5 (11th Cir. 2011); *Palmer v. Hendricks,* 592 F.3d 386, 398-99 (3d Cir. 2010); *Barrow v. Uchtman,* 398 F.3d 597, 608 n.12 (7th Cir. 2005); *Woolfolk v. Commonwealth,* 339 S.W.3d at 418-21

(and cases cited therein); *Quarels v. Commonwealth*, 142 S.W.3d 73, 80-82 (Ky. 2004); *People v. Allen*, 44 Cal. 4th 843, 80 Cal. Rptr. 3d 183, 187 P.3d 1018, 1037-39 (2008); *People v. Johnson*, 62 Cal. App. 4th 608, 72 Cal. Rptr. 2d 805, 821 (1998) (citing this court's decision in *State v. Flynn*); *People v. Solomon*, 220 Mich. App. 527, 560 N.W.2d 651, 656 (1996) (citing *Flynn*). *Also see Alexander v. United States*, 219 F. App'x 520, 523-24 (7th Cir. 2007) (when the denial of the right to testify is caused by the ineffective assistance of counsel, the defendant must prove actual prejudice); *Galowski v. Murphy*, 891 F.2d at 636-37 (same); *State v. Cross*, 326 Wis. 2d 492, ¶ 33 (to establish a due process violation resulting from the trial court's providing misinformation about the maximum penalty for the offense to which the defendant is entering a guilty plea, the defendant must prove actual prejudice; otherwise, the error is harmless).

> We are not persuaded by Palmer's argument that his attorney's alleged failure to advise him of his right to testify falls within this very limited category of errors that are *per se* reversible. First, every authority we are aware of that has addressed the matter of counsel's failure to advise a client of the right to testify has done so under *Strickland's* two-prong framework, which requires the petitioner to "show that [the deficient conduct] actually had an adverse effect on the defense." . . .
>
> Moreover, *Strickland* itself cannot be read to carve out a prejudice exception for right-to-testify cases. . . .
>
> Finally, Palmer's claim that his attorney failed to advise him of his right to testify in his own defense is not the sort of structural defect for which the automatic reversal rule is reserved. "[M]ost constitutional errors" are of the trial type, *Fulminante*, 499 U.S. at 306, 111 S.Ct. 1246, and, as the Supreme Court recently emphasized, the few errors that have been classified as structural defects have been so categorized because the nature of the right at issue is such that "the effect of the violation cannot be ascertained" on review under traditional "harmless-error standards." *Gonzalez-Lopez*,

> 548 U.S. at 148, 149 n. 4, 126 S.Ct. 2557 (quoting *Vasquez v. Hillery,* 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)). . . .
>
> By contrast, a defendant's testimony (or lack thereof) occurs "during the presentation of the case to the jury" and "may therefore be quantitatively assessed in the context of other evidence presented. . . ." *Fulminante,* 499 U.S. at 307-08, 111 S.Ct. 1246. . . .
>
> Of course, the defendant's own testimony is very likely to be highly important . . . . But it is precisely the fact that the contours of the defendant's probable testimony (as expressed in an affidavit on collateral review) can be assessed in the context of the evidence as a whole that distinguishes the right-to-testify issue from structural defects, the effects of which are inherently elusive, intangible, and not susceptible to harmless error review.

*Palmer v. Hendricks,* 592 F.3d at 397-99.

Here, Hunt would not prevail unless he could prove (a) the trial court's remarks were coercive because they were false or misleading; and (b) he would have testified but for the trial court's coercive remarks. If he succeeds, the state would then bear the burden of proving beyond a reasonable doubt that the result would be the same if Hunt had testified. *See People v. Allen,* 187 P.3d at 1038-41.

As explained at pages 17-19 of the state's response brief, there is no reasonable doubt that the verdict would have remained the same had Hunt testified. The evidence of his guilt was overwhelming. *See id.* at 3-5. Hunt's postconviction motion is deficient, however, because he failed to present an offer of proof on the face of the motion or in an affidavit accompanying it as to what his testimony would have been.

> With that focus in mind, the error that Smith contends was made is not a structural one. It is not impossible, or all that difficult, to assess the effect of the claimed error on the outcome of the trial. A defendant who was persuaded not to testify, or

> prevented from testifying, can establish the harm he suffered by proffering the testimony that he would have given. . . .
>
> Smith has never made any attempt to proffer what his testimony would have been, but that does not change the fact that he could have done so.

*United States v. Smith*, 2011 WL 2693201, *4. *See Ray v. Commonwealth*, 55 Va. App. 647, 688 S.E.2d 879, 881-82 (2010).

> Nonetheless, if the facts to which a defendant offered to testify would not have affected the verdict, the exclusion of his or her testimony was harmless.

*People v. Allen*, 187 P.3d at 1039.

The record conclusively shows that any error is harmless and there is accordingly no need for an evidentiary hearing because, regardless of what his testimony might have been, the verdict would not change. Hunt would have had to explain away a number of coincidences; would have had to convince the jury not to believe his confession or any of the citizen-witnesses who positively identified him; would have had to convince the jury to disregard the fact that his car was at the gas station across the street and police found a black-hooded sweatshirt and a "do rag" in his car the next day; and would have had to convince the jury to disregard the import of the surveillance video across the street from the robbery; ignore the presence of his fingerprints at the scene of the Waukegan robbery earlier that afternoon; and ignore the fact that the robber at both locations wore a black-hooded sweatshirt and a "do rag," while brandishing a duct-taped shotgun. A different verdict might be possible, because anything is possible, but it is clear

beyond a reasonable doubt that the verdict would not have been different had Hunt testified.[3]

Furthermore, as discussed at n.1 above, if there is to be a *Bangert*-type evidentiary hearing, the state would also be prepared to prove that Hunt's waiver of the right to testify was *in fact* voluntary and intelligent even assuming the waiver colloquy was defective. The state would take it upon itself to prove that Hunt's discussions with defense counsel provided Hunt with a full and accurate understanding of the right to testify, and of the benefits and risks of testifying, and the trial court's accurate but supposedly coercive remarks added nothing new. *See State v. Flynn*, 190 Wis. 2d at 55-57; *Galowski v. Murphy*, 891 F.2d at 636-37.

In conclusion, Hunt is not entitled to a *Bangert*-type hearing, because (1) Hunt's motion alleging a defective colloquy is insufficient; and (2) the record conclusively shows he is not entitled to relief. The record of the colloquy speaks for itself. The trial court properly adhered to the requirements of *Weed* when it engaged Hunt in a thorough waiver colloquy. It did not coerce Hunt into waiving his right to testify by accurately exploring the consequences of testifying with him.

Hunt is also not entitled to a *Bentley*-type evidentiary hearing to present proof outside the record that his attorney, the prosecutor and the court all coerced his waiver because (1) his allegations of coercion and ineffective assistance are only conclusory; and (2) the record conclusively shows that any violation of the right to testify was harmless, and any ineffectiveness of counsel causing him to waive that right was non-prejudicial. It is clear beyond a reasonable doubt Hunt's testimony would not have changed the jury's verdict due to the

[3] For those same reasons, this court should summarily reject Hunt's conclusory ineffective assistance challenge because the record conclusively shows he would be unable to prove prejudice even assuming he could prove deficient performance.

overwhelming evidence of guilt presented. This analysis is consistent with both *Weed* and *Denson* and, more generally, with *Balliette* and the cases leading up to it requiring factual specificity in a postconviction motion alleging a constitutional violation before a hearing need be held.

## CONCLUSION

Therefore, for the reasons set forth above and in the state's initial brief, the State of Wisconsin respectfully requests that the judgment of conviction and the order denying postconviction relief be AFFIRMED.

Dated at Madison, Wisconsin this 21st day of September, 2011.

Respectfully submitted,

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## 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 4,052 words.

Dated this 21st day of September, 2011.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

## 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 21st day of September, 2011.

_____
DANIEL J. O'BRIEN
Assistant Attorney General