

**RECEIVED**

**03-07-2013**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

---

Appeal No. 2012AP002513CR

---

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

RAPHFEAL LYFOLD MYRICK

Defendant-Appellant,

---

APPEAL FROM THE JUDGMENT OF CONVICTION AND  
SENTENCE ENTERED IN THE MILWAUKEE COUNTY CIRCUIT  
COURT, THE HONORABLE REBECCA F. DALLET PRESIDING.

---

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

---

ZALESKI LAW FIRM  
Steven W. Zaleski  
State Bar No. 1034597  
10 E. Doty St., Ste. 800  
Madison, WI 53703  
608-441-5199 (Telephone), 608-441-5707 (Fax)  
Attorney for Defendant-Appellant

**TABLE OF CONTENTS**

ISSUES PRESENTED.....1

POSITION ON ORAL ARGUMENT AND PUBLICATION.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS.....5

ARGUMENT.....21

THE TRIAL COURT ERRED IN ADMITTING MYRICK’S TESTIMONY  
AT WINSTON’S PRELIMINARY HEARING AS PART OF THE STATE’S  
CASE-IN-CHIEF.....21

A. Standard of review.....21

B. Myrick’s testimony was inadmissible under Wis. Stat. Sec. 904.10.....22

C. The trial court’s reliance on **State v. Nash**, 123 Wis.2d 154,  
366 N.W.2d (Ct. App. 1985), review denied, 122 Wis.2d 784,  
367 N.W.2d 224 (1985) was misplaced.....30

D. Section 904.10 must be interpreted so as to exclude Myrick’s  
testimony in order to avoid absurd result or interpretation of statute.....34

E. The trial court erred in admitting Myrick’s statements without first  
conducting a hearing under Wis. Stat. Sec. 971.31(3).....36

CONCLUSION.....39

CERTIFICATIONS.....

APPENDIX.....

**TABLE OF AUTHORITIES**

Cases

**Loy v. Bunderson**, 107 Wis.2d 400, 320 N.W.2d 175 (1982).....21

**Maryland Arms Ltd. Partnership v. Connell**, 2010 WI 64, 326 Wis.2d 300,  
786 N.W.2d 15.....29

**Rogers v. Richmond**, 365 U.S. 534 (1961).....38

**Solowicz v. Forward Geneva Nat., LLC**, 2010 WI 20, 323 Wis.2d 556,  
780 N.W.2d 111.....29

**State v. Agnello**, 226 Wis.2d 164, 593 N.W.2d 427 (1999).....38

**State v. Clappes**, 136 Wis.2d 222, 401 N.W.2d 759 (1987).....39

**State v. Cofield**, 2000 WI App 196, 238 Wis.2d 467,  
618 N.W.2d 214.....21

**State ex. rel. Goodchild v. Burke**, 27 Wis.2d 244, 133 N.W.2d 753 (1965).....37

**State v. Gould**, 56 Wis.2d 808, 202 N.W.2d 903 (1973).....34

**State v. Hoppe**, 2003 WI 43, 261 Wis.2d 294, 661 N.W.2d 407.....39

**State v. Mason**, 132 Wis.2d 427, 393 N.W.2d 192 (Ct. App. 1986).....23

**State v. Nash**, 123 Wis.2d 154, 366 N.W.2d 146 (Ct. App. 1985).....4

**State v. Norwood**, 2005 WI App 218, 287 Wis.2d 679,  
706 N.W.2d 683.....27

**Wisc. Prof'l. Baseball Park v. Mitsubishi Heavy Indus.**, 2007 WI App 185,  
304 Wis.2d 637, 738 N.W.2d 87.....22

Statutes

Wis. Stat. Sec. 904.10.....1

Wis. Stat. Sec. 971.31(3).....1

Wis. Stat. Sec. 990.01(1).....23

Wis. Stat. Sec. 908.01(4)(b).....27

14<sup>th</sup> Amendment, United States Constitution.....38

## **ISSUES PRESENTED**

Does Wis. Stat. Sec. 904.10 prohibit the admission of Myrick's preliminary hearing testimony against a co-defendant, given pursuant to a plea agreement, as part of the State's case-in-chief?

The trial court answered: No.

## **POSITION ON ORAL ARGUMENT AND PUBLICATION**

Counsel would welcome oral argument should this Court determine that such argument would be helpful in addressing the issues presented in this brief.

Counsel believes that publication will be warranted as this appeal will clarify the circumstances under which statements under Wis. Stat. Sec. 904.10 are deemed to be "in connection with" a plea agreement. The appeal will also clarify whether Sec. 904.10 applies to statements made in-court and under oath. The appeal will finally clarify if Wis. Stat. Sec. 971.31(3) applies to statements made by the defendant in-court and under oath.

## **STATEMENT OF THE CASE**

The State charged Myrick in Milwaukee County Case No. 09CF003494 with first degree intentional homicide as a party to a crime and possession of a firearm by a felon. A-Ap.103.

The criminal complaint alleged the following: at 10:50 p.m. on July 26, 2009, Milwaukee police detective Jeremiah Jacks responded to a 911 call of a reported homicide. A-Ap.100. Upon arriving at the scene, Jacks discovered the body of Marquise Harris in an alley behind 4371 N.15<sup>th</sup> Street in the City of Milwaukee. A-AP.100. Harris was lying face down and had multiple gunshot wounds to the right side of his torso and back. A-Ap.100. A medical examiner pronounced Harris dead at the scene. A-AP.101. At approximately one minute after the 911 call, 10:39 p.m., a second police officer, Rachel Booth, was on patrol about 6 blocks away from the homicide site, when she observed a 2 door Chevy Tahoe traveling at a high rate of speed, far in excess of the speed limit, southbound on N.15<sup>th</sup> Street. A-Ap.101. Booth observed that the Tahoe did not have a front license plate and that it had a cracked windshield. A-Ap.101. Booth pursued the Tahoe. A-Ap.101. At 3465 N. 16<sup>th</sup> Street, the Tahoe pulled over and a man jumped out of the driver's seat and ran away. A-Ap.101.

Booth turned her attention to the passenger of the vehicle, later identified as Raphfeal Myrick. A-Ap.101. Booth observed Myrick run into the front yard of 3465 N.16<sup>th</sup> Street. A-Ap.101. As Myrick ran away, Booth observed him reach into his waistband as if to pull out a weapon. A-Ap.101. Booth drew her service pistol and shouted at Myrick to stop and show his hands. A-Ap.101. Myrick then made a turning motion, reached into his waistband, and threw something onto the ground in front of 3465 N.16<sup>th</sup> St. A-Ap.101. Myrick went to the ground and Booth took him into custody. A-Ap.101. Booth then looked for what Myrick had thrown to the ground and discovered a Ruger semi-automatic handgun. A-Ap.101. Booth went back to the Tahoe and observed inside what appeared to be an AK47 style assault rifle. A-Ap.101. There was blood and fluid on the Tahoe's driver's side rear tire, rim, and wheel well. A-Ap.101.

Prior to trial, Myrick, by and through privately retained counsel, negotiated a plea agreement which required him to cooperate with the State in connection with the prosecution of the alleged co-defendant whom the police had identified as Justin Winston. A-Ap.130-131. The plea agreement required Myrick to debrief and provide testimony against Winston. A-Ap.130-131. Pursuant to the plea agreement, Myrick provided

a debriefing to Milwaukee police detectives and testified against Winston at Winston's preliminary hearing. A-Ap.69:32. After Myrick's testimony at Winston's preliminary hearing and before the entry of any plea of guilty or no contest, the plea agreement between Myrick and the State fell through and the case proceeded to trial. 62:1. At trial, the State sought to introduce as part of its case-in-chief the testimony that Myrick gave at Winston's preliminary hearing. 62:5-6. Myrick objected on the basis that such testimony was given as part of the plea negotiations with the State and therefore inadmissible. 62:5-9. Myrick additionally objected to the trial court's admitting such statements without first holding the requisite hearing under Wis. Stat. Sec. 971.31(3). 63:11. The trial court overruled Myrick's objections and ruled that the evidence was admissible in the State's case-in-chief. 62:11, 63:12, 64:83, 67:88-90. In making such decision, the trial court relied on **State v. Nash**, 123 Wis.2d 154, 366 N.W.2d 146 (Ct. App. 1985), review denied, 122 Wis.2d 784, 367 N.W.2d 224 (1985). 67:17,90. After a four day trial, the jury found Myrick guilty. 71:7. After a presentence investigation, the trial court sentenced Myrick to life imprisonment and ordered that he be eligible for release to extended supervision on July 26, 2043. A-Ap.104. The trial court additionally

sentenced Myrick to 5 years confinement and 5 years extended supervision, concurrent, on the felon in possession of a firearm charge. A-Ap.105. Myrick timely filed a notice of intent to pursue postconviction relief, 35:3, and the State Public Defender appointed the undersigned counsel to represent Myrick on postconviction matters. 43:2. Myrick filed a notice of appeal and these proceedings follow. 43:2.

## **STATEMENT OF FACTS**

The plea agreement between Myrick and the State took the form of a letter drafted by Assistant District Attorney Mark S. Williams, and signed by Myrick and his trial counsel.<sup>1</sup> A-AP.130-131. The letter provided in part as follows:

The State is making the following offer of resolution based on Mr. Myrick being willing to cooperate in the prosecution of numerous cases involving Justin Winston. The State seeks debriefing and testimony in any case involving criminal conduct of Justin Winston, including the homicides of Maurice Pulley and Marquise Harris. The defendant as part of this negotiation agrees to testify truthfully whenever called upon by the State in the homicides of Marquise Harris and Maurice Pulley and any other criminal conduct the defendant is aware of involving Justin Winston.

In exchange, the State will amend the charge regarding the murder of Marquise Harris to one of Felony Murder with an underlying charge of Armed Robbery.

In exchange for the defendant's truthful testimony on the murder of Marquis Harris and Maurice Pulley and any other incidents of criminal conduct that Mr. Myrick is aware of involving Justin Winston, the State would recommend a period of 12-13 years initial

---

<sup>1</sup> The record contains only an unsigned copy of the letter agreement.



confinement in the Wisconsin State Prison. You would be free to argue for any sentence you deem appropriate.

The State requires a completely truthful debriefing statement by Raphfeal Myrick and this proffer/debriefing is to be conducted by City of Milwaukee Police Detectives Kent Corbett and/or Tom Casper and/or their designee, in your presence. The detective(s) would be armed with a copy of this proffer letter and until and assuming this proffer letter is signed by you and your client no debriefing will be allowed. Furthermore, the detective(s) who will interview your client assuming he agrees with the terms of this proffer letter, do not have the power and will not make any additional offers, promises or threats to your client other than what is set forth within the confines of this proffer letter. Anything related to said officers by Raphfeal Myrick during said proffer/debriefing will not be used against him in the prosecution of his case except for impeachment purposes at trial. They may also wish to record the interview.

The State is completely free to pursue any and all investigative leads derived in any way from the proffer/debriefing, which could result in the acquisition of evidence admissible against your client, Mr. Myrick, in subsequent proceedings. Furthermore, if Mr. Myrick should subsequently testify contrary to the substance of the proffer/debriefing or any portion thereof, nothing shall prevent the State, as represented by the Milwaukee County District Attorney's Office or federal government, from using the substance of the proffer/debriefing at sentencing, or for any purpose at trial for impeachment or in rebuttal to the testimony of your client, or for any prosecution for perjury or obstructing. A-AP.130-131.

Myrick gave the detectives the proffer/debriefing. 62:5. Myrick also testified at Winston's preliminary hearing. 62:5. Prior to trial, Myrick argued that such testimony was inadmissible because it was made pursuant to the plea agreement:

THE COURT: All right. Mr. Kovac, this is a statement under oath in a court of law. How does the State not get to use this? 62:6

ATTORNEY KOVAC: Because it's all part of the proffer. He said he was going to cooperate and then he's making a statement. When it talks about the fruits of derivative use, that's not continuing statements by him. We don't have to—every time he sits down and talks, we don't have to reinitiate the proffer. If they—if he made a statement and then they are able to go out and find a gun because of it or they are able to find another witness, that's derivative use, but what the proffer insures him is that the statements that he's making— 62:6.

THE COURT: During the proffer. 62:6.

ATTORNEY WILLIAMS: During the proffer. 62:6.

ATTORNEY KOVAC: Well, and that's part— 62:6.

THE COURT: This is a prior statement made under oath. 62:6.

ATTORNEY KOVAC: Well, but that's a statement made after he proffered and it's consistent with his testimony—that's consistent with the agreement that he made under the proffer letter. If he had testified at the—pursuant to the negotiations at the trial— 62:6.

THE COURT: I think the State could use that too. 62:7.

ATTORNEY KOVAC: Not in its—not in its case in chief. Only for impeachment purposes. But to say that, all right, you are going to sit down and tell us everything you know about this case. Oh, and now we want you to testify at the preliminary hearing, but we can use that preliminary hearing—we can't use what you said in the room with the detective, but we can use the preliminary hearing. When he only testified at the preliminary hearing consistent with the agreement that he made under the terms of the proffer letter. 62:7.

THE COURT: The way I read this proffer letter, it says that anything related during the proffer will not be used against him in the prosecution except for impeachment. If he goes on to make a statement under oath in a court, that's—I mean when you are looking at hearsay (sic) law, that is—has a presumption of reliability at least to overcome hearsay and I don't think the State gets stuck not using it. 62:7.

ATTORNEY KOVAC: Judge, because it's all—the only reason he did that was because of the agreement he made pursuant to the proffer letter and that—for the—for the State to be able to do this is inconsistent with the—with the spirit of the proffer letter.

Also, that proffer letter is drafted by the government. It's effectively a contract. And any ambiguity—and this is certainly an ambiguity. I mean for them to say you are telling us about this, but we are not going to use it against you. That's what they are saying in the proffer letter. We won't use it against you except for impeachment purposes. So this is what he tells them. And then he goes to the preliminary hearing pursuant again to the agreement that he has as evidenced in the proffer letter drafted by the government and then—then to say that the government can use what he said at the preliminary hearing. 62:8.

ATTORNEY WILLIAMS: The proffer had nothing to do with his testimony at the preliminary hearing. Other than guaranteeing him a certain recommendation by the State

if he continued to testify. It has—his testimony at the preliminary hearing is not part of the proffer. It's independent of the proffer. 62:8.

THE COURT: I don't see how it can be deemed to be part of the proffer, Mr. Kovac. I really don't. 62:8.

ATTORNEY KOVAC: Well—62:8.

THE COURT: I mean if you even look at the next paragraph, it basically says this whole thing is null and void if he refuses to cooperate. But I still don't think under any circumstances the State can use a proffer in its case in chief. I mean even—even without such a letter as this. But when he takes the stand and he swears to tell the truth in a court of law, why can't the State use that. I still—I don't think there's anything in this letter that prevents the State and I don't think there's anything in the case law that prevents the State from using that. 62:9.

At trial, the State introduced Myrick's testimony through a question and answer format wherein a Detective Kent Corbett read to the jury the answers that Myrick gave in response to the State's questions. 69:32.

Myrick's testimony as presented to the jury was as follows:

MR. WILLIAMS: Mr. Myrick, what I am going to ask you to do is remember back to the day of July 26<sup>th</sup>, 2009. Do you remember being with a Justin Winston in your black Tahoe and going to an alley between North 38<sup>th</sup> Street and North 39<sup>th</sup> Street? 69:33

THE WITNESS: Yeah. 69:33.

MR. WILLIAMS: And on arriving there—did you arrive there between North 39<sup>th</sup> and North 38<sup>th</sup> Street? 69:33.

THE WITNESS: Yeah. 69:33.

MR. WILLIAMS: What happened when you arrived there? 69:33.

THE WITNESS: Um—My cousin got out. 69:33.

MR. WILLIAMS: And who is your cousin. 69:33.

THE WITNESS: Justin. 69:33

MR. WILLIAMS: Is that Justin Winston? 69:33.

THE WITNESS: Yeah. 69:33.

MR. WILLIAMS: When Justin Winston got out , what happened? 69:33.

THE WITNESS: Um—He went through a couple houses. He was gone for awhile.  
69:34.

MR. WILLIAMS: Did he come back? 69:34.

THE WITNESS: Yeah, he came back. 69:34

MR. WILLIAMS: And when he came back, what did you observe, what did you see?  
69:34

THE WITNESS: He asked me why he with him. 69:34.

MR. WILLIAMS: Could you see the person's face. 69:34.

THE WITNESS: No. 69:34.

MR. WILLIAMS: So what happened when he came back with somebody, what did you  
do with that person? 69:34.

THE WITNESS: I popped him. I popped the hatch. He put him in back, and they both  
got in there. 69:34.

MR. WILLIAMS: The back of your Tahoe? 69:34.

THE WITNESS: Yes. 69:34.

MR. WILLIAMS: What happened after this person was placed in the back of your  
Tahoe? 69:34?

THE WITNESS: I drove off. 69:34.

MR. WILLIAMS: Did you see if Mr. Winston had any type of weapon in his hand when  
this person go into the back of your Tahoe? 69:34.

THE WITNESS: He had a 9. 69:35.

MR. WILLIAMS: A 9mm gun? 69:35.

THE WITNESS: Yep. 69:35.

MR. WILLIAMS: Where did you drive off to? 69:35.

THE WITNESS: To 15<sup>th</sup> and Capital somewhere, Fiebrantz, Congress, one of the two. Congress. 69:35.

MR. WILLIAMS: And where was Mr. Winston as you drove off? 69:35.

THE WITNESS: In the back. 69:35.

MR. WILLIAMS: And who was in the back with—69:35.

THE WITNESS: The victim. 69:35.

MR. WILLIAMS: And would that—did you drive off to the 4300 block of North 15<sup>th</sup> Street? 69:35.

THE WITNESS: Yep. 69:35.

MR. WILLIAMS: What happened when you got there? 69:35.

THE WITNESS: We got there. I popped the hatch. I let it down. Him and the victim got out. 69:35.

MR. WILLIAMS: And had you seen the victim's face yet? 69:35.

THE WITNESS: No, not yet. 69:35.

MR. WILLIAMS: Why is that? 69:35.

THE WITNESS: Because he had something over his face. 69:35-36.

MR. WILLIAMS: When the victim got out of the vehicle, what happened then? 69:36.

THE WITNESS: I fired a shot toward him. 69:36.

MR. WILLIAMS: Do you know if you hit the victim or not? 69:36.

THE WITNESS: I know I didn't. 69:36.

MR. WILLIAMS: Then what happened? 69:36.

THE WITNESS: I got in and TJ reached to the back of the seat, grabbed an assault rifle and shot him. 69:36.

MR. WILLIAMS: Is TJ Justin Winston? 69:36.

THE WITNESS: Yeah. 69: 69:36.

MR. WILLIAMS: How many times did Justin Winston shoot this young man? How many shots did you hear him fire at this young man? 69:36.

THE WITNESS: I heard a lot. 69:36.

MR. WILLIAMS: What happened when Justin Winston was firing the rifle at the young man, the man that you had picked up, did you see what the man did? 69:36.

THE WITNESS: What do you mean? 69:36.

MR. WILLIAMS: When Justin Winston shooting (sic) the man, where was the man? 69:36.

THE WITNESS: He was down. 69:36.

MR. WILLIAMS: When had he fallen down or when had he gone to the ground? 69:37.

THE WITNESS: Not to (sic) the shot did he go down. 69:37.

MR. WILLIAMS: To your shot or Justin Winston's shot? 69:37.

THE WITNESS: When I took a shot toward him he went down. 69:37.

MR. WILLIAMS: And could you approximate how many shots Mr. Winston fired at the person? 69:37.

THE WITNESS: No. 69:37.

MR. WILLIAMS: It was multiple? 69:37.

THE WITNESS: It was too fast. 69:37.

MR. WILLIAMS: Then where did you guys go? 69:37.

THE WITNESS: We made a left out the alley and went down 15<sup>th</sup> across Capitol, across Atkinson and got to Keefe. That's when we seen the squad car made a right on 15<sup>th</sup> and Keefe and made a left on 16<sup>th</sup> and Keefe. 69:37.

MR. WILLIAMS: Did you know about the time this was? 69:37.

THE WITNESS: 10:30, 10:40. 69:37.

MR. WILLIAMS: And then there was further questioning. 69:37.

MR. KOVAC: I think we have to continue, your Honor. We can't edit it. 69:38.

MR. WILLIAMS: It's not being edited. 69:38.

THE COURT: You can continue, Line 16. 69:38.

MR. WILLIAMS: Everything you told us about, that occurred in the City of Milwaukee, the County of Milwaukee, and the State of Wisconsin, is that correct? 69:38.

THE WITNESS: Yes. 69:38.

MR. WILLIAMS: And is Justin in court today? 69:38.

THE WITNESS: Yes. 69:38.

MR. WILLIAMS: Could you identify him, please, by what he is wearing and where he is sitting? 69:38-39.

THE WITNESS: Orange, to the right. 69:39.

MR. WILLIAMS: And I would ask the record to reflect Mr. Winston has been identified and—69:39.

-----

MR. WILLIAMS: Mr. Myrick, what day did you say this incident occurred? 69:52.

THE WITNESS: On the 26<sup>th</sup> or—25<sup>th</sup> or 26<sup>th</sup>. 69:52.

MR. WILLIAMS: Of what month? 69:52.

THE WITNESS: July. 69:52.

MR. WILLIAMS: What year? 69:52.

THE WITNESS: 2009. 69:52.

MR. WILLIAMS: And you indicate that you were with Mr. Winston on that date. Who was driving? 69:52.

THE WITNESS: He was driving over there. He drove over there. 69:52.

MR. WILLIAMS: Drove over where? 69:52.

THE WITNESS: To the alley of 39<sup>th</sup>. 69:52.

MR. WILLIAMS: Okay. And when Mr. Winston drove over to the alley on 39<sup>th</sup>, where were you sitting? 69:52.

THE WITNESS: In the passenger's seat. 69:52.

MR. WILLIAMS: Prior to getting there, had there been any discussion as to why you were going to that location? 69:52.

THE WITNESS: Yeah. 69:52.

MR. WILLIAMS: What discussion was that? 69:52.

THE WITNESS: The discussion was to go look for Coop. 69:53.

MR. WILLIAMS: Coop? 69:53.

THE WITNESS: Yeah. 69:53.

MR. WILLIAMS: C-o-o-p? 69:53.

THE WITNESS: Yep. 69:53.

MR. WILLIAMS: Who is Coop? 6:53.

THE WITNESS: My sister's boyfriend. Well, ex-boyfriend. 69:53.

MR. WILLIAMS: And when you got to that location, did you ever see Coop? 69:53.

THE WITNESS: I didn't see nobody until he brought him back. 69:53.

MR. WILLIAMS: And the person who he brought back did you later understand to be Coop? 69:53.

THE WITNESS: No, it wasn't Coop. 69:53.

MR. WILLIAMS: So you go to this alley near 39<sup>th</sup> Street looking for Coop. Mr. Winston drove over, he got of the car, is that correct? 69:53.

THE WITNESS: Yep. 69:53.

MR. WILLIAMS: You stayed in the car? 69:53.

THE WITNESS: Yep. 69:53.



MR. WILLIAMS: At that time did you have any type of firearm in your possession?  
69:53.

THE WITNESS: Nope. 69:53.

MR. WILLIAMS: Were there any firearms in that vehicle that you were aware of ?  
69:54

THE WITNESS: Yep. 69:54.

MR. WILLIAMS: What were they and where were they? 69:54.

THE WITNESS: Mag. 90 was in the back seat. 69:54.

MR. WILLIAMS: What type of firearm is that? 69:54.

THE WITNESS: Assault rifle. 69:54.

MR. WILLIAMS: What other firearm, if any, where you aware of in the vehicle? 69:54.

THE WITNESS: There were only one in the vehicle. He had the 9 with him. 69:54.

MR. WILLIAMS: What is a 9? 69:54.

THE WITNESS: A 9mm, a Ruger. 69:54.

MR. WILLIAMS: A handgun? 69:54.

THE WITNESS: A handgun. 69:54

MR. WILLIAMS: At some point you indicate Mr. Winston came back to the vehicle  
with another person, is that correct? 69:54.

THE WITNESS: Yes. 69:54.

MR. WILLIAMS: You didn't see who the person was at that time, is that correct? 69:54

THE WITNESS: Yep. 69:54.

MR. WILLIAMS: Wait before I finish my question before you answer, all right? 69:54.

THE WITNESS: Yep. 69:55

MR. WILLIAMS: Mr. Winston got into the back seat of the vehicle with this—69:55.

THE WITNESS: Not the back seat, the back hatch. 69:55.

-----

MR. WILLIAMS: Just trying to figure out what happened, okay. Now, Mr. Winston comes back to the vehicle with another person, correct? 69:55.

THE WITNESS: Right. 69:55.

MR. WILLIAMS: At that time, where are you seated? 69:55.

THE WITNESS: In the passenger's seat. 69:55.

MR. WILLIAMS: As you indicated I believe, that Mr. Winston and this other person ended up in the back seat of the vehicle, is that correct? 69:55.

THE WITNESS: Not the back seat, the back area where the tire goes. 69:55.

MR. WILLIAMS: Okay. You're talking about what one would refer to as a trunk? 69:55.

THE WITNESS: Yeah. 69:55

MR. WILLIAMS: And when Mr. Winston brought that person to the back hatch or trunk, was the trunk open? 69:56.

THE WITNESS: Popped the hatch, he opened it. 69:56.

MR. WILLIAMS: Mr. Winston opened it. 69:56.

THE WITNESS: Yeah. 69:56.

MR. WILLIAMS: Did you—what did you see—I'm sorry, did you see him do it? 69:56.

THE WITNESS: Yep. 69:56

MR. WILLIAMS: And then what happened? 69:56.

THE WITNESS: They got in the back. He pulled the back up. He slammed the back, the top part down which is the window, and I drove off. 69:56.

MR. WILLIAMS: He put this person in—in the back hatch, as you refer to it, and is that the trunk of the vehicle. 69:56.

THE WITNESS: It's a Tahoe, the back space in the back of a Tahoe. 69:56.

MR. WILLIAMS: Question: I understand. So where was Mr. Winston after he put the person in the back? 69:56.

THE WITNESS: Outside, getting in. 69:56.

MR. WILLIAMS: When he got in, what part of the vehicle did he get in? 69:56.

THE WITNESS: The back. The—69:57.

MR. WILLIAMS: The back seat? 69:57.

THE WITNESS: The back area where he put the victim in. 69:57.

MR. WILLIAMS: He put him in from the back of the vehicle, is that correct? 69:57.

THE WITNESS: Right. 69:57.

MR. WILLIAMS: Then he closed it. 69:57.

THE WITNESS: Right. 69:57.

MR. WILLIAMS: Then he came around to the driver's side, passenger side? 69:57.

THE WITNESS: I drove off, he stayed in the back with the victim. 69:57.

MR. WILLIAMS: When he put the person in the back, did he get in the back as well? 69:57.

THE WITNESS: Yes. 69:57.

MR. WILLIAMS: So they get in one after the other? 69:57.

THE WITNESS: Right. 69:57.

MR. WILLIAMS: Then he closed it from the inside of the vehicle? 69:57.

THE WITNESS: Right. 69:57.

MR. WILLIAMS: And at that point did you move over to the driver's seat? 69:57.

THE WITNESS: When he got in. 69:57.

MR. WILLIAMS: Why did you do that? 69:58.

THE WITNESS: He can't drive from the back. 69:58.

MR. WILLIAMS: Okay. Why did you drive? 69:58.

THE WITNESS: Because he told me to drive. 69:58.

MR. WILLIAMS: And where did you go? 69:58.

THE WITNESS: On 15<sup>th</sup> and Fiebrantz. 6:58.

MR. WILLIAMS: So you went to 15<sup>th</sup> and Fiebrantz. What happened then? 69:58.

THE WITNESS: I popped the hatch, I opened the back and got out. 69:58.

MR. WILLIAMS: Wait a minute. You say you popped the hatch. Were you inside the vehicle when you popped it? 69:58.

THE WITNESS: I popped the hatch from the inside. I got out, opened the top window and opened the hatch, and they both got out. 69:58.

MR. WILLIAMS: Right. 69:58.

THE WITNESS: What then—I'm sorry. What happened then? 69:58.

MR. WILLIAMS: He said here, take a shot at him. 69:58.

THE WITNESS: Who said that? 69:59.

THE WITNESS: Justin. 69:59.

MR. WILLIAMS: And what happened at that time that occurred, what did he do, if anything? 69:59.

THE WITNESS: He ran, he got back in the driver's seat. 69:59.

MR. WILLIAMS: Mr. Winston did, right? 69:59.

THE WITNESS: Right. 69:59.

MR. WILLIAMS: Sorry, Mr. Winston did? 69:59.

THE WITNESS: Right. 69:59.

MR. WILLIAMS: What happened to the other person, what did he do? 69:59.

THE WITNESS: He went down. 69:59.

MR. WILLIAMS: Did he go down because you shot at him? 69:59.

THE WITNESS: No. He went down because he heard a shot, like any other regular person would. 69:59.

MR. WILLIAMS: And where did the shot come from? 69:59.

THE WITNESS: The handgun I had. 69:59.

MR. WILLIAMS: How did you get that handgun? 69:59.

THE WITNESS: TJ passed it to me. 69:59.

MR. WILLIAMS: And when he passed it to you, indicate he said take a shot at him, correct (sic)? 69:60.

THE WITNESS: Correct. 69:60.

MR. WILLIAMS: And you did, in fact, take a shot at him, correct? 69:60.

THE WITNESS: Right. 69:60.

MR. WILLIAMS: Correct? 69:60.

THE WITNESS: Right. 69:60.

MR. WILLIAMS: Did you see whether you hit him with any type of bullet? 69:60.

THE WITNESS: I know I didn't hit him. 69:60.

MR. WILLIAMS: You know you didn't hit him? 69:60

THE WITNESS: Right. 69:60.

MR. WILLIAMS: How do you know that? 69:60.

THE WITNESS: Because where he was standing and where I pointed it at I couldn't hit him. 69:60.

MR. WILLIAMS: Where was he standing at and where were you pointing at? 69:60.

THE WITNESS: He was standing right where Mark Williams at. Took a shot this way toward the garage. 69:60.

MR. WILLIAMS: Your testimony is that you intentionally shot away from him so you would not hit him, is that correct? 69:60.

THE WITNESS: Right. 69:61.

MR. WILLIAMS: And that was this handgun, right? 69:61.

THE WITNESS: Right. 69:61.

MR. WILLIAMS: Excuse me for interrupting. This is the court talking. I think for purposes of the record I should put a description of the defendant's actions. When he was indicating how he took a shot, the defendant stood up, kind of pointed his hand directly straight in front of him where the assistant district attorney happens to be seated and called him by name, and then to indicate to where the victim was standing, and then he moved his hand and arm toward the right at an angle. Is that a fair description for the record? 69:60-61.

-----

MR. WILLIAMS: After you fired your shot, you indicate Mr. Winston then fired a number of shots from inside the vehicle toward this individual, is that correct? 69:62.

THE WITNESS: Right. 69:62.

MR. WILLIAMS: Did you know whether Mr.—that action you described caused this individual on the ground to be hit by any bullets? 69:62.

THE WITNESS: I don't know what you mean by that? 69:62.

MR. WILLIAMS: Did you see whether or not the person on the ground got hit by any bullets? 69:62.

-----

THE WITNESS: No. 69:62.

MR. WILLIAMS: Who drove off in the vehicle? 69:62

THE WITNESS: Justin. 69:62.

MR. WILLIAMS: And what happened after you drove off? 69:63.

THE WITNESS: We made a left, rode down 15<sup>th</sup> across Capitol, across Atkinson, got to 15<sup>th</sup> and Keefe, we seen the squad car, made a right, made a left on 16<sup>th</sup>. He threw the 9 out while he made a left, I mean while he made a left, and he jumped out and ran. 69:63.

MR. WILLIAMS: Now, the police were chasing the vehicle at the time, that is correct? 69:63.

THE WITNESS: Right. 69:63.

MR. WILLIAMS: You ran as well? 69:63.

THE WITNESS: No. 69:63.

MR. WILLIAMS: Did you get out of the vehicle? 69:63.

THE WITNESS: Yep. 69:63.

MR. WILLIAMS: What did you do? (And then go to 14.) Were you arrested as a result of the shooting? 69:63.

THE WITNESS: Not that I know of, arrested, because we was—I guess it was a high speed chase. 69:63.

MR. WILLIAMS: Did there come a time when you were aware that you were arrested because of the shooting of this individual? 69:63.

THE WITNESS: Yeah. 69:64.

MR. WILLIAMS: Do you know if Mr. Winston hit the man that was by the garage? 69:64.

-----

THE WITNESS: Yes, because when we got pulled over there was blood on the tire, and in the newspaper it said he got ran over. He never got ran over. 69:64.

-----

MR. WILLIAMS: (14) So why is the reason you don't know if Mr. Winston had shot the person? Does that make sense to you or should I rephrase it? 69:64.

THE WITNESS: Rephrase it. 69:64.

MR. WILLIAMS: You shoot, you indicated you didn't know if Mr. Winston had shot the person, is that correct? 69:64.

THE WITNESS: Right. 69:64.

MR. WILLIAMS: Why is it you don't know that? 69:64.

THE WITNESS: Because I didn't turn around and look and see. 69:64.

MR. WILLIAMS: But when you observed him shooting, was he shooting at the person? 69:64.

THE WITNESS: He shot toward the person. He shot back toward him. 69:65.

## **ARGUMENT**

THE TRIAL COURT ERRED IN ADMITTING MYRICK'S TESTIMONY AT WINSTON'S PRELIMINARY HEARING AS PART OF THE STATE'S CASE-IN-CHIEF.

### **A. Standard of review.**

We review the evidentiary decisions of the circuit court to determine whether it erroneously exercised its discretion. **Loy v. Bunderson**, 107 Wis.2d 400,414-15, 320 N.W.2d 175 (1982). We will sustain an evidentiary ruling if the circuit court considered the relevant facts, applied the correct rule of law and came to a conclusion that a reasonable judge could reach. **State v. Cofield**, 2000 WI App 196, ¶7, 238 Wis.2d 467, 618 N.W.2d 214. Discretionary determination, to be sustained, must demonstrably be made and based upon facts appearing in record and reliance on appropriate and applicable law, and most importantly,



discretionary determination must be product of rational mental process by which facts of record and law relied upon are stated and are considered together for purpose of achieving reasoned and reasonable determination.

**Wisc. Prof'l. Baseball Park v. Mitsubishi Heavy Indus.**, 2007 WI App 185, ¶39, 304 Wis.2d 637, 738 N.W.2d 87. Trial court erroneously exercises its discretion when it: 1) fails to consider and make record of relevant factors; 2) considers improper or clearly irrelevant factors; and 3) gives too much weight to any single factor. **Id.** Abuse of discretion may also occur when trial court makes error of law. **Id.** at ¶40.

B. Myrick's testimony was inadmissible under Wis. Stat. Sec. 904.10.

Wis. Stat. Sec. 904.10, "Offer to plead guilty; no contest; withdrawn plea of guilty" provides as follows:

Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. *Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.* Wis. Stat. Sec. 904.10. Italics added.

As noted earlier in this brief, trial for counsel for Myrick argued that Myrick's testimony at Winston's preliminary hearing was part and parcel of the plea agreement letter and therefore inadmissible. 62:6-11. The State

argued that plea agreement had “nothing to do with his testimony at the preliminary hearing,” and that the testimony was “independent of the proffer.” 62:8. The trial court accepted the State’s argument, “I don’t see how it can be deemed to be part of the proffer, Mr. Kovac. I really don’t.” 62:8. In failing to conclude that Myrick’s testimony was made “in connection with” the plea agreement and therefore inadmissible, the trial court erred. A plain reading of Sec. 904.10 indicates that statements made in court “in connection” with a plea offer are not inadmissible. According to Wis. Stat. Sec. 990.01(1), all words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning. Wis. Stat. Sec. 990.01(1). Myrick maintains that the phrase “in connection with” has only common and ordinary meaning and should be construed as such. Indeed, Sec. 904.10 as been found to be clear and unambiguous on its face and should therefore be construed according to its plain meaning. See **State v. Mason**, 132 Wis.2d 427,432, 393 N.W.2d 192 (Ct. App. 1986). In determining the common, ordinary or plain meaning of what it means to be “in connection with,” we know that Webster’s New Third International Dictionary defines the term

“connection” as “the state of being connected or linked” or a “relationship or association in thought (as of cause and effect, logical sequence, mutual dependence or involvement). Webster’s New Third International Dictionary (2002). When we thus consider the common and ordinary meaning of what it means to be in “connection with,” it is clear that Myrick’s testimony was “in connection with” the plea agreement letter. In the most general sense, there was plainly a relationship or association between the testimony and the plea agreement. More particularly, there was a causal, logical and sequential relationship between the plea agreement letter and the testimony. The plea agreement letter spoke specifically to “testimony” to be given by Myrick:

The State seeks debriefing and **testimony** in any case involving criminal conduct of Justin Winston, including the homicides of Maurice Pulley and Marquise Harris. The defendant as part of this negotiation agrees to **testify** truthfully whenever called upon by the State in the homicides of Marquise Harris and Maurice Pulley and any other criminal conduct the defendant is aware of involving Justin Winston. A-Ap.130-131.

In exchange for the defendant’s truthful **testimony** on the murder of Marquis Harris and Maurice Pulley and any other incidents of criminal conduct that Mr. Myrick is aware of involving Justin Winston, the State would recommend a period of 12-13 years initial confinement in the Wisconsin State Prison. You would be free to argue for any sentence you deem appropriate. A-Ap.130-131.

The plea agreement letter as such not only expressly contemplated Myrick’s testimony but required it as part of the agreement. Myrick did not stand to gain any favorable recommendation in sentence or reduction in

charges by merely talking to the detectives, debriefing, or giving a “proffer.” The terms of the letter made it clear that Myrick had to testify in order to get the benefit of the plea agreement. Moreover, such testimony was not limited to a preliminary hearing or to just the case involving Marquise Harris. The agreement expressly required Myrick’s testimony in “any” case involving the criminal conduct of Justin Winston and “whenever called upon by the State.” AAp.130-131. But for the plea agreement, Myrick’s preliminary hearing testimony would not have existed. Myrick’s testimony was not gratuitously given; nor was it simply that of a citizen fact witness who testified under a subpoena. The only reason Myrick appeared at Winston’s preliminary hearing to offer testimony against Winston was because the plea agreement required it. There was thus a logical, causal, and sequential relationship between the plea agreement letter and Myrick’s testimony. As such, Myrick’s testimony was clearly made “in connection with” the plea agreement letter and inadmissible under Sec. 904.10. The trial court erred in concluding that it was not.

In admitting Myrick’s testimony, the trial court found that because Myrick’s statements were made “in court” and “under oath” they simply were not protected under Sec. 904.10. 62:6,9,11. The trial court’s

conclusion in such regard constituted an erroneous application of Sec. 904.10 and the relevant case law. Section 904.10 expressly contemplates “statements made in court” and provides that if they are made “in connection with” a plea offer, they are inadmissible. Myrick would argue that it is commonplace for a defendant in entering a plea to explain his version of the offense or otherwise make statements about the offense with which he is charged. Myrick would argue that it is similarly commonplace for such testimony to be under oath. In **State v. Mason**, 132 Wis.2d 427, 393 N.W.2d 102 (Ct. App. 1986), the defendant, charged with multiple counts of sexual assault against his daughter, appeared in court at a plea hearing and, pursuant to a plea agreement, admitted to having sexual relations with his daughter. See **Id.** at p.429. The defendant subsequently withdrew his plea and proceeded to trial wherein the defendant on direct examination denied ever having sexual intercourse with his daughter. **Id.** at p.429. The trial court allowed the prosecutor to impeach the defendant with his prior statements made at the plea hearing. On appeal, the court of appeals concluded that the defendant’s “in court” statements at the plea hearing were inadmissible under Sec. 904.10 and ordered a new trial. **Id.** at p.432. The **Mason** court determined that the [Intent is plainly set forth in

the last sentence of the statute which provides, “Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.”] **Id.** In a different case, **State v. Norwood**, 2005 WI App 218, 287 Wis.2d 679, 706 N.W.2d 683, the trial court reasoned that the defendant’s prior statements were admissible as “admissions by a party” under Sec. 908.01(4)(b). **Id.** at ¶21. In rejecting the trial court’s rationale, the court of appeals ruled that [Admissions incidental to an offer to plead, however, are a special kind of admission: they are impossible to segregate from the offer itself because the offer is implicit in the reasons advanced therefore. Wisconsin Stat. §904.10 trumps §908.01(4)(b) because it excludes only this particular category of party admissions and therefore is more specialized than the latter statute.] **Id.** **Norwood** is very applicable to this case in two respects. First, it recognizes that it is impossible to segregate admissions incidental to an offer to plead from the offer itself. Indeed, Myrick’s statements to the detectives, his debriefing, and his subsequent testimony were all part and parcel of the plea agreement. The statements made, whether out-of-court to the detectives, or in-court at the preliminary hearing, were all interwoven with the plea agreement. It is a fiction to, as the State did below, 62:8, attempt

to characterize Myrick's testimony as "having nothing to do with" the plea agreement and being "independent" from it. As the court in **Norwood** recognized, it is impossible to segregate the admissions incidental to the offer from the offer itself. Second, **Norwood** tells us that Sec. 904.10 trumps more general evidentiary statutes which may seemingly allow for the admission of Myrick's statements. In this regard, it does not matter whether Myrick's statements would otherwise be admissible as "admissions" by a party under Sec. 908.01(4)(b) or, as found by the trial court in this case, "prior statements by witness" under Sec.908.01(4)(a). If such "admissions" or "prior statements" were made "in connection with" a plea offer, they are inadmissible under the more specific statute, Sec. 904.10. The trial court reasoned as follows in admitting Myrick's preliminary testimony:

when he takes the stand and he swears to tell the truth in a court of law, why can't the State use that. I still—I don't think there's anything in this letter that prevents the State and I don't think there's anything in the case law that prevents the State from using that. 62:9.

The trial court was wrong. Sec. 904.10 plainly prevented the State from using Myrick's testimony as did the supporting case law referenced above.

Additionally, the plea agreement letter itself limited the State's use of information provided by Myrick. In this regard, the plea agreement letter

restricted the State's use of the "substance of the proffer/debriefing or any portion thereof" to "impeachment" or "rebuttal" should Myrick testify at trial. See A-Ap.130-131. The agreement did not authorize the State to use such information in its case-in-chief. Under **Norwood**, the substance of the proffer/debriefing must be interpreted to include Myrick's subsequent testimony as it is impossible to segregate admissions incidental to the offer to plead from the offer itself. Further, the language, "Any portion thereof" would similarly encompass the subsequent testimony. Myrick's testimony was certainly a portion or part of the plea agreement and proffer. Moreover, to the extent that the language of the agreement presents an ambiguity, the ambiguity should be construed against the drafter. See **Maryland Arms Ltd. Partnership v. Connell**, 2010 WI 64, ¶23, 326 Wis.2d 300, 786 N.W.2d 15. Language is ambiguous if it is susceptible to more than one reasonable interpretation. **Solowicz v. Forward Geneva Nat., LLC**, 2010 WI 20, ¶36, 323 Wis.2d 556, 780 N.W.2d 111. The State drafted the plea agreement letter. Therefore, to the extent that the State's chosen language, phraseology, or context has created an ambiguity, such ambiguity should be construed against it. The plea agreement letter must



be interpreted to include Myrick's testimony as part of the proffer/debriefing.

C. The trial court's reliance on **State v. Nash**, 123 Wis.2d 154, 366 N.W.2d 146 (Ct. App. 1985), review denied, 122 Wis.2d 784, 367 N.W.2d 224 (1985), was misplaced.

The trial court indicated that it was "very confident" in its decision to admit Myrick's testimony based on **State v. Nash**, 123 Wis.2d 154, 366 N.W.2d 146 (Ct. App. 1985). 67:17,90. However, when we examine **Nash** in detail it is clear that **Nash** is significantly different from this case and not applicable. In **Nash**, prior to entering a plea of guilty to the charge of first degree murder, the defendant testified in previous trials involving his co-defendants. **Id.** at p.158. After withdrawing his plea, Nash proceeded to trial where he took the stand in his own defense and gave testimony significantly different from the testimony given at the two trials of his co-defendants. **Id.** The State attempted to impeach Nash with evidence of his prior testimony at the trials of the co-defendants. Nash objected on the basis of Section 904.10. **Id.** The trial court overruled Nash's objection and allowed the State to use Nash's prior testimony for impeachment purposes. **Id.** at pp.159-160. The court of appeals affirmed the trial court's decision

to admit the evidence. **Id.** at p.160. In making its ruling, the **Nash** court focused on two considerations. First, the court reasoned that since the testimony was given after the plea agreement had been reached, there was to be no more negotiation and therefore, no more reason to promote negotiation. **Id.** at p.160. Second, the court reasoned that there should be a sanction for Nash's untruthful testimony. **Id.** The differences between Nash and this case are thus numerous and make **Nash** inapplicable. First, the trial court in **Nash** allowed the State to use Nash's prior testimony for *impeachment* purposes not as part of its case-in-chief. **Id.** p.158. Similarly, unlike Myrick, Nash testified and therefore made himself subject to impeachment and rebuttal by the State. Third, the **Nash** court focused on the element of the "untruthfulness" of Nash's testimony. The court considered that not only did Nash's trial testimony differ from the testimony he gave in the previous cases, it differed "significantly." **Id.** at p.158. In this case, since Myrick did not testify, any potential issue as to the consistency or truthfulness of his testimony did not exist. Fourth, the **Nash** court determined that allowing Nash to be impeached by his prior testimony was necessary in order to sanction him. **Id.** In this case, there was no basis for the trial court to impose such a sanction on Myrick. Fifth,

unlike in **Nash**, in this case, the plea negotiations and each party's obligations under the plea agreement had not been completed. The plea agreement letter required Myrick to testify not only at Winston's preliminary hearing but "in any case involving criminal conduct of Justin Winston, including the homicides of Maurice Pulley and Marquise Harris" and "whenever called upon by the State in the homicides of Marquise Harris and Maurice Pulley and any other criminal conduct the defendant is aware of involving Justin Winston." A-Ap.130-131. The plea agreement letter additionally contemplated that negotiations would *continue* to occur based on "any other criminal case that may be generated or charged based upon information provided by Myrick or of which his testimony would be deemed to be relevant and material.." A-Ap.130. Italics added. As such, unlike in **Nash**, the performance of the plea agreement and negotiations under it were ongoing and continuous. Unlike in **Nash**, there was thus continued reason to promote negotiation. The State wanted to get the continued benefit of Myrick's information and testimony in subsequent cases and Myrick wanted to get the continued benefit of an even lower set of charges or sentence recommendation. Finally, Myrick had an express, written agreement with the State which limited how the information

obtained from him could potentially be used against him at trial. There is no showing in **Nash** that the defendant had the benefit of any such express agreement. For the above reasons, Myrick maintains that **Nash** was distinguishable from the circumstances presented in this case and not applicable. The trial court's reliance on **Nash** was thus misplaced and erroneous.

Myrick would additionally argue that **Nash** is inconsistent with the letter and spirit of Sec. 904.10 as well as with **Norwood** and **Mason**, and should be distinguished or overruled. In this regard, **Mason** provides as follows:

[The intent (of 904.10) is plainly set forth in the last sentence of the statute which provides, "Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers *is not admissible.*" Section 904.10 (emphasis added). This sentence clearly states, without limitation or qualification, that such statements are not admissible. We thus conclude that the language of sec. 904.10 clearly and unambiguously indicates the intent to prohibit for any purpose the use of statements made in connection with a guilty plea, later withdrawn, at a subsequent trial.] **Mason**, 132 Wis.2d at pp.432-433.

Under **Mason**, there is no qualification or limitation to the reach of Sec. 904.10. If a statement is made "in connection with" a foregoing plea or

offer it is not admissible. To the extent that **Nash** qualifies, limits, or otherwise carves out an exception to Sec. 904.10, it conflicts with the plain intent and express language of the statute as well with other cases which interpret Sec. 904.10.

D. Section 904.10 must be interpreted so as to exclude Myrick's testimony in order to avoid an absurd result or interpretation of statute.

It is well-established that in terms of statutory construction, absurd results or interpretations should be avoided. See **State v. Gould**, 56 Wis.2d 808,812, 202 N.W.2d 903 (1973). Myrick maintains that the argument accepted by the trial court, that the plea agreement had "nothing to do with (Myrick's) testimony at the preliminary hearing," and that the testimony was "independent of the proffer," 62:8, makes for an absurd result as it pertains to plea negotiations between the State and a criminal defendant. The trial court's interpretation suggests that a criminal defendant loses the protection afforded by Sec. 904.10 if, in addition to cooperating with the State by communicating information informally or by proffer, the defendant testifies to such information. The trial court's rationale ignores the reality that most cooperating defendants, like Myrick, are required to provide testimony against co-defendants or other defendants as part of their own

deals with the government. Any information provided “off the record,” through proffer, or otherwise by informal means, is subject to hearsay and “confrontation” challenges. Such information is therefore only minimally useful to the State. To get any real benefit out of a defendant’s willingness to make a statement against another defendant, the State must get that defendant’s commitment to testify. This is why Myrick’s agreement with the State expressly required his testimony. This is also why the benefit to Myrick came only if he testified. The informal statements made to Detectives Corbett and/or Casper had minimal, if any value, to the State without Myrick’s testimony. The statements were similarly worthless to Myrick unless he backed them up with his testimony. Indeed, the plea agreement makes clear that Myrick would receive no benefit from merely making a statement or proffer to the detectives; he had to testify to get the benefit of the bargain:

In exchange for the defendant’s truthful **testimony** on the murder of Marquis Harris and Maurice Pulley and any other incidents of criminal conduct that Mr. Myrick is aware of involving Justin Winston, the State would recommend a period of 12-13 years initial confinement in the Wisconsin State Prison. You would be free to argue for any sentence you deem appropriate. A-Ap.130.

Given this reality as to the state of negotiations between a cooperating defendant and the State, as we see in this case, it would be unreasonable if

not absurd to interpret Sec. 904.10 in such a way that it does not apply if a defendant's statements take the form of testimony. Such an interpretation would eviscerate the statute. The purpose of section of 904.10 is to promote the disposition of criminal cases by compromise. See **Nash**, 123 Wis.2d 154 at p.159. The exclusion was created to allow for free and open discussion between the prosecution and defense during attempts to reach a compromise. **Id.** It does not further this purpose to interpret the statute in such a way that a defendant loses his protection under Sec. 904.10 when he testifies consistent with and as required by his plea agreement with the State. If anything, such an interpretation would create a chilling effect on a criminal defendant's willingness to cooperate with the government. For these reasons, such an interpretation should be avoided.

E. The trial court erred in admitting Myrick's statements without first conducting a hearing under Wis. Stat. Sec. 971.31(3).

Trial counsel objected to the trial court admitting Myrick's testimony at Winston's preliminary hearing without first conducting the requisite hearing under Wis. Stat. Sec. 971.31(3) which provides as follows:

The admissibility of *any* statement of the defendant *shall* be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial. Wis. Stat. Sec.971.31(3). Italics added.

The trial court overruled trial counsel's objection on the basis that Sec. 971.31(3) did not apply to statements made in-court and under oath. 63:12. Section 971.31(3) uses mandatory language. It plainly states that the admissibility of "any" statement "shall" be determined by the court in an evidentiary hearing. The statute does not distinguish between in-court and out-of-court statements, between sworn and unsworn statements, or between recorded or unrecorded statements. The statute states "all" statements. The statute similarly commands that the court "shall" conduct an evidentiary hearing. There is no basis in the statute or elsewhere for the trial court's conclusion that the statute does not apply to in-court statements. The trial court seems to suggest that because an in-court statement is sworn and recorded it is not subject to a **Goodchild** challenge.<sup>2</sup> But sworn and/or recorded statements are subject to **Goodchild** all the time. Consider an out-of court verbal statement given under oath. Myrick would argue that such statement must first satisfy **Goodchild** before it can be admitted notwithstanding that it may have been made under an oath. The same is true of a statement recorded by audio or visual means. Just because it is recorded and we can see or hear it, does not mean it does not have to

---

<sup>2</sup> **State ex rel. Goodchild v. Burke**, 27 Wis.2d 244, 133 N.W.2d 753 (1965).



meet the standards of **Goodchild**. Myrick would further argue that just because a statement occurs in-court does not mean that it is voluntary. An in-court statement could reasonably be the product of coercion, force or undue pressure. Consider the circumstance of a defendant who offers a plea of guilty or no contest at a plea hearing. Just because a plea and its attendant statements are made in-court and perhaps under oath does not mean that they are presumptively or legally deemed to be freely or voluntarily made. Indeed, prior to accepting a plea, a court is required under Wis. Stat. Sec. 971.08(1)(a) to determine that the plea is voluntarily made. Just as a defendant's statements at a plea hearing may be the product of undue influence or coercion, so too may be other in-court statements. It is logical therefore that such statements would be subject to **Goodchild** before they can be used against a defendant at a criminal trial. Under the due process clause of the Fourteenth Amendment, statements that are not voluntary are not admissible. **Rogers v. Richmond**, 365 U.S. 534, 540 (1961). The State has the burden of proving voluntariness by a preponderance of the evidence. **State v. Agnello**, 226 Wis. 2d 164,182, 593 N.W.2d 427. In determining voluntariness, one consideration is whether the declarant has received inducements to make his statements.

See **State v. Clappes**, 136 Wis.2d 222, 235-36, 401 N.W.2d 759 (1987); see also **State v. Hoppe**, 2003 WI 43, ¶¶39-40, 261 Wis.2d 294, 661 N.W.2d 407. As such, Myrick was entitled to argue at a **Goodchild** hearing that his statements were not voluntarily made but made only because of the various inducements and promises made by the government. At such hearing, Myrick likewise enjoyed the benefit of forcing the State to prove otherwise by a preponderance of the evidence. In admitting Myrick's statements without a **Goodchild** hearing, the trial court deprived Myrick of his right to challenge the voluntariness of his statements. The trial court similarly relieved the State of its evidentiary burden under **Goodchild** and Sec. 971.31(3). In doing so, the trial court erred.

## **CONCLUSION**

Myrick respectfully contends that the trial court erred for all of the above reasons and requests that this Court vacate the judgment of conviction and sentence and/or remand the case to the trial court for a new trial.

Dated this \_\_\_\_\_ day of March 2013.

Respectfully submitted,

BY: \_\_\_\_\_/s/ \_\_\_\_\_

Zaleski Law Firm

Steven W. Zaleski

State Bar No. 1034597

10 E. Doty St., Ste. 800

Madison, WI 53703

608-441-5199 (Telephone), 608-441-5196(Fax)

Attorney for Defendant-Appellant

**CERTIFICATION 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 s. 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 upon all opposing parties.

Dated this \_\_\_\_day of March 2013

**THE ZALESKI LAW FIRM**

BY: \_\_\_\_\_/s/\_\_\_\_\_

Steven W. Zaleski

State Bar No. 1034597

10 E. Doty St., Ste. 800

Madison, WI 53703

608-441-5199 (Telephone)

608-441-5707 (Fax)

Attorney for Defendant-Appellant

## **CERTIFICATION**

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 9227 words.

Dated this \_\_\_\_\_ day of March 6, 2013.

### **THE ZALESKI LAW FIRM**

BY: \_\_\_\_\_/s/\_\_\_\_\_

Steven W. Zaleski

State Bar No. 1034597

10 E. Doty St., Ste. 800

Madison, WI 53703

608-441-5199 (Telephone)

608-441-5707 (Fax)

Attorney for Defendant-Appellant

## **CERTIFICATION**

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 s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 the 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.

Dated this \_\_\_\_\_ day of March 2013.

### **THE ZALESKI LAW FIRM**

BY: \_\_\_\_\_/s/\_\_\_\_\_  
Steven W. Zaleski  
State Bar No. 1034597  
10 E. Doty St., Ste. 800  
Madison, WI 53703  
608-441-5199 (Telephone)  
608-441-5707 (Fax)

Attorney for Defendant-Appellant