STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2015AP002154-CR
Circuit Court Case No. 2013CF002723

Appeal No. 2015AP002155-CR
Circuit Court Case No. 2013CM002488

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

EARNEST LEE NICHOLSON,
DEFENDANT-APPELLANT.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE MARY TRIGGIANO AND MEL FLANAGAN PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Did the Circuit Court Properly Deny Mr. Nicholson's Motion To Dismiss Case Number 2013CM002488 on the grounds that he Was Denied His Constitutional Right to Effective Assistance of Counsel and that the Order Upon Which this Prosecution Was Based was Void Without a Hearing?

The trial court found that the No Contact Order Issued in Case Number 2011CF005715 Was a Valid Exercise of the Court's

Discretion and that Trial Counsel Was Not Ineffective for Failing to Collaterally Attack that Order.

Did the Circuit Court Properly Deny Mr. Nicholson's Motion For a New Trial in Case Number 2013CF002723 on the Ground that He Was Denied His Right to a Fair Trial by the Admission of Evidence that Affected his Substantial Rights Without a Hearing?

The trial court found that the out of court statements by MDF was admissible as an excited utterance and that the statement was not testimonial.

Did the Circuit Court Properly Deny Mr. Nicholson's Motion For a New Trial in case numbers 2013CM002488 and 2013CF002723 on the ground that he was denied his constitutional right to testify?

The trial court found that Mr. Nicholson forfeited his right to testify.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The opportunity for oral argument is requested because of the novelty of the issues presented. Publication is requested. The case will enunciate a new rule of law or modify, and clarify an existing rule. § 809.23(1)(a)1 stats. Further, the issues will present an established rule of law in a factual situation significantly different from that in published opinions. § 809.23(1)(a)2 stats.

STATEMENT OF THE CASE

In Milwaukee County case number 2013CM002488, Mr. Nicholson was charged by criminal complaint in count one with intentionally violating a court order issued under §973.049(2) for a

misdemeanor conviction, as a repeater, contrary to § 941.39(2), § 939.51(3)(a), 968.075(1)(a) and § 939.62(1)(a) stats. on or about June 6, 2013, in count two with intentionally causing bodily harm to MDF, by an act done with intent to cause bodily harm to that person, without consent, as a repeater, contrary to § 940.19(1), § 939.51(3)(a), 968.075(1)(a) and § 939.62(1)(a) stats. on or about June 6, 2013, and in count three with disorderly conduct, as a repeater, contrary to § 947.01(1), § 939.51(3)(b), 968.075(1)(a) and § 939.62(1)(a) stats. on or about June 6, 2013.

That complaint was filed on June 8, 2013.

Initial appearance was held on that date. Mr. Nicholson appeared in person and by counsel. Bail was set at $500.00 cash. Pretrial conference was scheduled for June 28, 2013.

In Milwaukee County case number 2013CF002723, Mr. Nicholson was charged by criminal complaint in count one with causing great bodily harm to MDF by an act done with intent to cause bodily harm to that person, as a repeater, contrary to § 940.19(4), § 939.50(3)(h), 968.075(1)(a) and § 939.62(1)(b) stats. on or about November 24, 2011.[1]

That complaint was filed on June 14, 2013.

[1] This charge had previously been issued as count one in Milwaukee County case number 2011CF005715 but was dismissed without prejudice on March 13, 2012.

Initial appearance was held on that date. Mr. Nicholson appeared in person and by counsel. Bail was set at $5000.00 cash.

Preliminary examination was scheduled on June 28, 2013. Mr. Nicholson appeared in person and by counsel. Preliminary examination was waived. The State filed an information alleging the same offense stated in the complaint.

Arraignment was scheduled on July 18, 2013. That hearing was adjourned to July 30, 2013, when Mr. Nicholson was not produced for the proceeding.

On July 30, 2013, Mr. Nicholson appeared in person and by counsel. Pleas of not guilty were entered. The court ordered case numbers 2013CF002723 and 2013CM002488 joined for trial.

The cases were scheduled for jury trial on October 21, 2013.

Prior to commencement of the actual trial on that date, the State moved the court to admit certain out of court statements attributed to the alleged victim, MDF, as nontestimonial, when MDF did not appear for trial. Following an evidentiary hearing on that issue, the court ruled:

> THE COURT: The CAD report will be used to inform the testimony of when people got a call, when they arrived, and what he saw when he

> arrived. This officer or other officers may be testifying, I don't know. But, you know, what he heard, what he saw, what concerned him at that time in terms of the safety, and that one statement really, that's it.

(R 56, p. 44, ll. 9-16; App. p. 135)

Trial proceeded. Prior to jury selection, the state moved to dismiss counts two and three in case number 2013CM002488. This motion was granted by the court. (R 57, p. 12, ll. 20-25)

During the course of the trial at least two distinct issues arose.

The first issue involved the allegation of Mr. Nicholson's intentionally violating a court order issued under §973.049(2) for a misdemeanor conviction, as a repeater, contrary to § 941.39(2), § 939.51(3)(a), 968.075(1)(a) and § 939.62(1)(a) stats.

The initial context of the discussion concerned whether Mr. Nicholson would stipulate that an order had been issued under §973.049(2) prohibiting Mr. Nicholson from having contact with MDF. The court inquired how the state intended to prove the allegation. The state's theory consisted of admitting a letter from Mr. Nicholson requesting that the supposed no contact order be amended and the judgment from case number 2011CF005715. (R 58, pp. 4-10)

The second issue concerned Mr. Nicholson's physical presence in the courtroom during the trial. After repeated discussions with Mr. Nicholson, the court concluded that Mr. Nicholson should be excluded from the courtroom. (R 60, pp. 3-13) After the state concluded its case, Mr. Nicholson was returned to the courtroom to determine if he intended to testify. The court concluded based on its colloquy with Mr. Nicholson that he had waived his right to testify. (R 60, pp. 25-41; App. 136-52)

The jury convicted Mr. Nicholson of the submitted offenses as charged.

At the conclusion of the trial, Judge Flanagan took trial counsel's motion to withdraw under advisement, pending the State Public Defender's interviewing Mr. Nicholson. The cases were adjourned to October 31, 2013.

New counsel was appointed for Mr. Nicholson. The cases were adjourned for sentencing on December 23, 2013.

On December 23, 2013, the cases were adjourned off the record to February 17, 2014.

On February 17, 2014, the cases were adjourned to March 28, 2014.

Between February 17, 2014 and March 28, 2014, Mr. Nicholson made several pro se filings including one described as

"Get Judge Mel Flanagan to Remove Herself from my case", another described as "Remove Attorney Scott Phillips as his Attorney" and another described as "Motion for a Mistrial".

On March 28, 2014, counsel for Mr. Nicholson withdrew with Mr. Nicholson indicating that he would retain private counsel.

Subsequently Mr. Nicholson contacted the State Public Defender indicating that he wanted counsel appointed. A third attorney was then appointed for Mr. Nicholson.

Following multiple adjournments and pro se filings, third counsel's motion to withdraw was heard and denied by the court on September 5, 2014.

On October 24, 2014, Judge Flanagan sentenced Mr. Nicholson in case number 2013CF002723 to a maximum term of imprisonment of 6 years (consecutive to case 2013CM002488), with credit for 0 days time served; with an initial term of confinement in the Wisconsin State Prison system of 3 years and a maximum term of extended supervision of 3 years.

In case number 2013CM002488, the Court ordered Mr. Nicholson to serve 153 days (Consecutive to case 2013CF2723), in the House of Correction, with 153 days credit for time served.

Notice of Intent to Pursue Postconviction Relief was filed on October 27, 2014.

Counsel was appointed on December 1, 2014.

On February 2, 2015, Mr. Nicholson filed a pro se motion to discharge appellate counsel and proceed pro se.

That motion was denied on February 3, 2015.

Mr. Nicholson again asked current counsel to withdraw and on February 27, 2015, counsel filed a motion to withdraw as appellate counsel. (R 35) On March 2, 2015, the Circuit Court received further correspondence from Mr. Nicholson indicating that he no longer wished counsel to withdraw. (R 39)

The State Public Defender filed a report indicating that no further appointment of counsel would be made. (R 36)

Counsel's motion to withdraw as appellate counsel was denied by order dated March 12, 2015. (R 38)

The last transcript was received on March 16, 2015.

By order dated May 20, 2015, this Court extended the time for filing a notice of appeal or postconviction motion until July 17, 2015, and by further order dated July 15, 2015, that time was extended until August 28, 2015.

A postconviction motion was filed on August 27, 2015 and denied without hearing by written order filed on October 7, 2015. (R 49; App. 110-18)

Mr. Nicholson's notice of appeal and statement on transcript were filed on October 22, 2015.

The record on appeal was prepared to be forwarded to the Court of Appeals on November 25, 2015. By order dated December 3, 2015, this Court extended that time limit to December 18, 2015. That record was received in this Court on December 23, 2015.

By order dated December 3, 2015, this Court ordered the cases consolidated for briefing and disposition.

By order dated January 6, 2016, this Court ordered that case number 2015AP2155-CR be decided by a three-judge panel.

By order dated January 25, 2016, this Court extended the time for filing defendant-appellant's brief until March 4, 2016.

STATEMENT OF FACTS

A complete understanding of the facts requires reviewing Milwaukee County circuit court case number 2011CF005715. In that case, Mr. Nicholson was charged in count one with causing great bodily harm to MDF by an act done with intent to cause bodily harm to that person, as a repeater, contrary to §§ 940.19(4), 939.50(3)(h), 968.075(1)(a) and 939.62(1)(b) stats. alleged to have occurred on or about November 24, 2011. In count two of case number 2011CF005715, Mr. Nicholson was charged with resisting

an officer, as a repeater, contrary to §§ 946.41(1), 939.51(3)(a) and 939.62(1)(b).

Count 1 in case number 2011CF005715 was dismissed without prejudice on March 13, 2012, when MDF failed to appear for trial. Count 2 of that case proceeded to trial on March 13-14, 2012. Mr. Nicholson was convicted as charged.

On April 3, 2012, the court, the Honorable Mel Flanagan, presiding, sentenced Mr. Nicholson to one year of initial confinement, less 130 days credit[2] and one year of extended supervision on the resisting conviction. In that sentencing hearing, the Court also ordered various conditions including a no contact order with MDF:

> You are to have no contact at all with this victim. None.

(App. p. 128, ll. 16-17)

> And then, if you were to violate the no contact order, you could be charged again with violating the conditions of your supervision, and you could be charged with another nine-month offense for doing

[2] On April 23, 2012, the judgment of conviction was ordered amended the judgment of conviction to reflect a total of 131 days of sentence credit

that.

As well as being revoked on your supervision and having to serve the ES time.

(App. pp. 129-30)

The allegation of Mr. Nicholson causing great bodily harm to MDF by an act done with intent to cause bodily harm to that person, as a repeater, contrary to §§ 940.19(4), 939.50(3)(h), 968.075(1)(a) and 939.62(1)(b) stats. alleged to have occurred on or about November 24, 2011, was reissued as case number 2013CF002723.

Further facts will be stated as necessary.

ISSUES PRESENTED

I. THE CIRCUIT COURT IMPROPERLY DENIED MR. NICHOLSON'S MOTION TO DISMISS CASE NUMBER 2013CM002488 ON THE GROUNDS THAT HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND THAT THE ORDER UPON WHICH THIS PROSECUTION WAS BASED WAS VOID.

A. Standard of Review

Statutory interpretation is reviewed de novo. *In Matter of the Guardianship of James DK*, 2006 WI 68, ¶ 13, 291 Wis.2d 333, 343, 718 N.W.2d 38, citing *State v. Reed,* 2005 WI 53, ¶ 13, 280 Wis. 2d 68, 695 N.W.2d 315.

The purpose of statutory interpretation is to determine what a statute means so that it may be given its full, proper, and intended effect. The Court begins with the statute's language assuming that the legislature's intent is expressed in the words it used. *Id*., ¶ 45. Language is generally given its common, ordinary, and accepted meaning. Id. If the meaning is plain, the Court ordinarily stops the inquiry. *Id*.

B. § 973.049 Clearly and Unambiguously Sets Forth the Legislative Intent on its Face.

§ 973.049 was enacted by 2005 WISCONSIN ACT 32:

"An Act to create 941.39 and 973.049 of the statutes; relating to: sentencing discretion of a court and providing a penalty.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. 941.39 of the statutes is created to read:

941.39 Victim or co-actor contact. Whoever intentionally violates a court order issued under s. 973.049 (2) is guilty of a Class A misdemeanor.

Section 2. 973.049 of the statutes is created to read:

973.049 Sentencing; restrictions on contact. (1) In this section:

(a) "Co-actor" means any individual who was a party to a crime considered at sentencing, whether or not the individual was charged with or convicted of the crime considered at sentencing.

(b) "Crime considered at sentencing" means any crime for which the defendant was convicted or any read-in crime, as defined in s. 973.20 (1g) (b).

(2) When a court imposes a sentence on an individual or places an individual on probation for the conviction of a crime, the court may prohibit the individual from contacting victims of, or co-actors in, a crime considered at sentencing during any part of the individual's sentence or period of probation if the court determines that the prohibition would be in the interest of public protection. For purposes of the prohibition, the court may determine who are the victims of any crime considered at sentencing.

(3) If a court issues an order under sub. (2), the court shall inform the individual of the prohibition and of the penalty under s. 941.39."

The statute was subsequently amended by 2011 WISCONSIN ACT 267:

"An Act to renumber and amend 941.39; to amend 968.075 (5) (a) 2. and 973.049 (2) and (3); and to create 941.39 (1) of the statutes; relating to: prohibitions against contacting certain persons and providing penalties.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. 941.39 of the statutes is renumbered 941.39 (intro.) and amended to read:

941.39 Victim, witness, or co-actor contact. (intro.) Whoever intentionally violates a court order issued under s. 973.049 (2) is guilty of one of the following:

(2) If the court order results from a conviction for a misdemeanor, a Class A misdemeanor.

Section 2. 941.39 (1) of the statutes is created to read:

941.39 **(1)** If the court order results from a conviction for a felony, a Class H felony.

Section 3. 968.075 (5) (a) 2. of the statutes is amended to read:

968.075 **(5)** (a) 2. An arrested person who intentionally violates this paragraph shall be required to forfeit may be fined not more than $1,000 $10,000 or imprisoned for not more than 9 months or both.

Section 4. 973.049 (2) and (3) of the statutes are amended to read:

973.049 **(2)** When a court imposes a sentence on an individual or places an individual on probation for the conviction of a crime, the court may prohibit the individual from contacting victims of, witnesses to, or co-actors in, a crime considered at sentencing during any part of the individual's sentence or period of probation if the court determines

that the prohibition would be in the interest of public protection. For purposes of the prohibition, the court may determine who are the victims of or witnesses to any crime considered at sentencing.

(3) If a court issues an order under sub. (2), the court shall inform the individual of the prohibition and of the penalty under s. 941.39 include the prohibition in the judgment of conviction for the crime.

Section 5. Initial applicability.

(1) The treatment of section 973.049 (2) and (3) of the statutes first applies to sentences imposed or placements made on the effective date of this subsection."[3]

Since Mr. Nicholson was sentenced in case number 2011CF005715 on April 3, 2012, the statutory amendments of 2011 WISCONSIN ACT 267, are not applicable to his situation.

Although "...words and phrases shall be construed according to common and approved usage ... technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning." § 990.01(1)

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[3] Date of enactment: April 9, 2012
2011 Assembly Bill 269 Date of publication*: April 23, 2012

* Section 991.11, Wisconsin Statutes 2009-10: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

The phrase "crime considered at sentencing" is clearly and specifically defined as "...any crime for which the defendant was convicted or any read-in crime, as defined in s. 973.20 (1g) (b)."

Language "...bracketed by quotation marks" is "...an unusual and significant legislative signal that the statute should be followed to the letter." *State v. Douangmala*, 2002 WI 62, ¶ 21, 253 Wis.2d 173, 646 N.W.2d 1.

"The statutory language is given its common and ordinary meaning, and technical or specially-defined terms are given the technical or special definitional meaning assigned to them. If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 20, 260 Wis.2d 633, 660 NW 2d 656 (internal citations omitted)

C. The Circuit Court's Statutory Interpretation of § 973.049 Contravenes the Clearly and Unambiguously Stated Meaning of that Statute.

It is undisputed that a Court has broad discretion is fashioning in a criminal sentence. § 973.01(5) provides that "...Whenever the court imposes a bifurcated sentence under sub. (1), the court may impose conditions upon the term of extended supervision."

"It is within the broad discretion of the [circuit] court to impose conditions as long as the conditions are reasonable and appropriate."

State v. Koenig, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 837, 656 N.W.2d 499, 501.

That discretion is not boundless and conditions must be reasonable and appropriate.

This sentencing Court could reasonably have found that a no contact order with MDF under this general provision was appropriate.

Violation of that order, as noted by the Court, could result in Mr. Nicholson's being charged with violating the terms of his extended supervision and possibly revoked. (App. pp. 129-30)

D. The Circuit Court's Exercise of Discretion is Erroneous in This Instance.

However, the Court went further stating to Mr. Nicholson that he "...could be charged with another nine month offense for doing that." (App. pp. 129-30)

§ 973.049 does provide the Court discretion in the language that "the court may prohibit the individual from contacting victims of, or co-actors in, a crime considered at sentencing" and "...the court may determine who are the victims of any crime considered at sentencing."

The existent case law further defines that discretion. The postconviction order cites *State v. Campbell*, 2011 WI App 18, 794 N.W.2d 276, 794 NW 2d 276, in support of the conclusion that:

The defendant's conviction for resisting an officer is therefore inexorably linked to his alleged actions toward F Had the officers not attempted to arrest the defendant for the injuries to F the resisting would not have occurred.

(R 49, p. 5; App. 114)

Campbell is a sexual assault case dealing with the wide range of damage occasioned by sexual assault within the family unit and is both factually specific to that situation and inapposite here.

This broad interpretaion of § 973.049 renders the operative definition of "crime considered at sentencing" surplusage. "Crime considered at sentencing" means any crime for which the defendant was convicted or any read-in crime, as defined in s. 973.20 (1g) (b).

The court erroneously exercises its discretion when it applies the wrong legal standard or makes a decision not reasonably supported by the facts of record. *State v. Avery*, 2013 WI 13,¶ 23, 345 Wis.2d 407, 826 N.W.2d 60.

While the allegation of substantial battery was clearly considered at sentencing in a colloquial sense, it was not "considered at sentencing" as that term is legally defined. The court's finding to the contrary is the result of the application of the wrong legal standard.

E. Trial Counsel Was Ineffective.

To establish ineffective assistance of counsel, a defendant must satisfy a two-part test. First, he must show that his counsel's performance was deficient. Second, he must prove that the deficient performance prejudiced the defense. *State v. Griffin*, 220 Wis.2d 371, 390, 584 N.W.2d 127, 135 (Ct.App. 1998), review denied, 221 Wis.2d 654, 588 N.W.2d 631 (1998).

Trial counsel's performance was admittedly deficient:

> 4. Although I reviewed the charging section of the criminal complaint in Case No. 13CM2488 that includes s. 941.39 and s. 973.049 (1)(a) and (2), I somehow overlooked the definition of " Crime considered at sentencing"in s. 973.049 (1)(b). I also reviewed Judge Mel Flanagan's order prohibiting contact from Case No.11CF5715 and Jury Instruction No. 1375. . Had I reviewed the definition of "Crime considered at sentencing", I would have filed a motion collaterally attacking the validity of the no contact order from case number 11CF5715 which formed the basis for the prosecution in case number 13CM002488. I now realize that the District Attorney's office improperly charged Earnest Nicholson in Count 1 of the Criminal Complaint in Case No. 13CM2488.
>
> Richard E. Thomey II

(R 48, p. A-2)

As to prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 694 688, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984); *Griffin, supra,* Wis.2d at 391, N.W.2d at 135.

If this Court adopts defendant-appellant's interpretation of § 973.049, Mr. Nicholson was clearly prejudiced.

II THE CIRCUIT COURT IMPROPERLY DENIED MR. NICHOLSON'S MOTION FOR A NEW TRIAL IN CASE NUMBER 2013CF002723 ON THE GROUND THAT HE WAS DENIED HIS RIGHT TO A FAIR TRIAL BY THE ADMISSION OF EVIDENCE THAT AFFECTED HIS SUBSTANTIAL RIGHTS WITHOUT A HEARING.

A. Standard of Review

Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law reviewed de novo. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996)). The circuit court must hold an evidentiary hearing if the defendant's motion raises such facts. *Id.* (*citing Bentley*, 201 Wis. 2d at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972)).

A circuit court's decision to admit or refuse to admit evidence is generally reviewed for an erroneous exercise of discretion. *Weborg v. Jenny*, 2012 WI 67, ¶ 41, 341 Wis.2d 668, 816 N.W.2d 191.

If the evidence is admissible under the rules of evidence, then this Court determines whether the admission of those statements violated the right to confrontation. *State v. Manuel*, 2005 WI 75, ¶

25, 281 Wis.2d 554, 697 N.W.2d 811. Whether the admission of hearsay evidence violated a defendant's right to confrontation presents a question of law, which is review de novo. *Id.* (citing *State v. Weed*, 2003 WI 85, ¶ 10, 263 Wis.2d 434, 666 N.W.2d 485).

B. The Circuit Court Improperly Found that the Hearsay Admitted at Trial Was Nontestimonial.

The Court must determine whether the absent witness' hearsay was testimonial or nontestimonial. *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177, (2004); *Davis v. Washington,* 547 U.S. 813, 126 S. Ct. 2266, 2273-74 (2006). Testimonial hearsay is admissible only when the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *State v. Deadwiller,* 2013 WI 75, ¶ 1, 834 NW 2d 362, citing *Crawford, supra*, U.S. 51.

For a statement to be testimonial, it must be a "...made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford, supra,* at 52.

The officer's testimony is not particularly clear but it appears that at some point in time he asked MDF to identify her assailant and the officer indicated that she identified Earnest Nicholson:

Q. And did you -- you later learned that the subject responsible was named Earnest Nicholson, correct?
A. That's correct.

Transcript 10/21/13, p. 16, ll. 8-10; and further;

A. I was able to get the details out of her that it was her live-in boyfriend, Earnest Nicholson, who had done this to her, that he choked her, he punched her. She was willing to be a complainant.
Q. Now how was she responding to your questions?
A. Intermittently between crying, screaming, groaning in pain.

(R 56, p. 20, ll. 4-10

The Circuit Court determined that MDF's statement was admissible as an excited utterance:[4]

> But I think that it's clear that she was a -- she was making a very, very excited utterance at the time. She was extremely uncomfortable and in tremendous pain and loud and yelling and screaming and crying. And that since excited utterance is a firmly rooted hearsay

[4] **908.03 Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

exception, the issue of her unavailability at the trial is not an issue the court has to look at at this time. The only issue becomes whether this is testimonial or not testimonial under the -- under Crawford.

And, you know, the questions that were asked I think were necessary for medical and safety reasons.

(R 56, pp.42-43; App. 133-34)

The excited utterance exception has three requirements. First, there must be a "startling event or condition." *Muller v. State*, 94 Wis.2d 450, 466, 289 N.W.2d 570 (1980). Second, the declarant must make an out-of-court statement that relates to the startling event or condition. Finally, the related statement must be made while the declarant is still "under the stress of excitement caused by the event or condition." *Id.* Essentially, "[i]t must be shown that the statement was made so spontaneously or under such psychological or physical pressure or excitement that the rational mind could not interpose itself between the spontaneous statement or utterance stimulated by the event and the event itself." *State v. Martinez*, 150 Wis.2d 62, 73, 440 N.W.2d 783 (1989), (quoting *Wilder v. Classified Risk Ins. Co.*, 47 Wis.2d 286, 292, 177 N.W.2d 109 (1970)).

The statement attributed to MDF does not meet this criterion and should not have been admitted as an excited utterance.

Additionally, MDF's statement was testimonial in nature and should not have been admitted. It is incongruous to describe MDF's statements as non-testimonial when the interview by officer Waldorf had gone to the extent of asking her if she were willing to act as complainant:

> I was able to get the details out of her that it was her live-in boyfriend, Earnest Nicholson, who had done this to her, that he choked her, he punched her. She was willing to be a complainant.

(R 56, p. 20, ll. 4-7)

Police asking who has committed a particular act would lead an objective witness to reasonably believe that the statement would be available for use at trial

MDF's statement was improperly admitted. This statement was the only evidence identifying Mr. Nicholson and affected his substantial rights.

III. The Circuit Court Improperly Denied Mr. Nicholson's Motion For a New Trial in Case Numbers 2013CM002488 and 2013CF002723 on the Ground that He Was Denied his Constitutional Right to Testify.

A. Standard of Review

The issue of whether an individual is denied a constitutional right is a question of constitutional fact reviewed independently as a question of law." *State v. Cummings,* 199 Wis.2d 721, 748, 546 N.W.2d 406 (1996). The circuit court's findings of evidentiary or historical fact are accepted unless they are clearly erroneous. *State v. Ndina,* 2009 WI 21, ¶ 45, 315 Wis.2d 653, 761 N.W.2d 612. Constitutional principles are applied to those evidentiary or historical facts independently but benefitting from the lower courts' analyses." *Id.*

"[F]orfeiture" and "waiver" embody different legal concepts. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Ndina, supra*, ¶ 29 citing *United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)

A circuit court must "conduct a colloquy with the defendant in order to ensure that the defendant is knowingly and voluntarily waiving his or her right to testify." *State v. Weed,* 2003 WI 85, ¶ 40, 263 Wis.2d 434, 666 N.W.2d 485.

"[T]he right to testify may, in appropriate cases, be subject to forfeiture where conduct incompatible with the assertion of the right is at issue." *State v. Anthony*, 2015 WI 20, ¶ 56, 860 N.W.2d 10.

B. The Circuit Court Improperly Found that Mr. Nicholson Waived his Right to Testify in his Defense.

During the course of the trial, Mr. Nicholson had been removed from the courtroom. When the issue of his testifying arose, he was returned to the courtroom. The Court conducted a colloquy with Mr. Nicholson. (R 60, pp. 25-41; App. 136-52)

There was no distinct conclusion to that colloquy. Mr. Nicholson remained in the courtroom but did not testify.

The Circuit Court concluded that he had waived the right to testify. The record is devoid of evidence that Mr. Nicholson knowingly and voluntarily waived his right to testify.

C. The Record Does Not Support the Conclusion that Mr. Nicholson Forfeited his Right to Testify in his Defense.

The Court recognized two distinct interests in determining forfeiture of the right to testify:

"The first involves the circuit court's ability to control the presentation of evidence so as to ensure the fairness and reliability of the criminal trial process"; *Anthony*, *supra,* ¶ 75

"The second distinct interest underlying the circuit court's forfeiture determination concern[s] the preservation of dignity, order, and decorum in the courtroom"; *Anthony*, *supra,* ¶ 80 and concluded that "...the question remains whether the circuit court's complete denial

of that right was in fact reasonable under the circumstances." *Anthony*, *supra,* ¶ 84

The Circuit Court's factual findings are outlined in the order denying the postconviction motion. (R 49 pp. 6-8; App. 115-17).

These findings do not reasonably support the total denial of Mr. Nicholson's right to testify. To the contrary, the record reflects that Mr. Nicholson was present in the courtroom after this interchange with the court and conformed to the court's directives.

He should have been allowed to testify and the total denial of that right violated his right to a fair trial.

CONCLUSION

The Circuit Court's statutory interpretation of § 973.049 is an erroneous exercise of discretion. The judgment of conviction in case number 2013CM002488 should be vacated and remanded with directions to dismiss the case.

The improper admission of hearsay evidence in case number 2013CF002723 facially affected Mr. Nicholson's substantial rights and denied his right to confrontation. The judgment in this case should be vacated and remanded with directions to grant Mr. Nicholson a new trial. Alternatively, this case should be remanded with directions to conduct an evidentiary hearing on Mr. Nicholson's claim.

Mr. Nicholson was improperly denied his constitutional right to testify on his own behalf in both cases. The judgment of convictions should be vacated and remanded with directions to grant Mr. Nicholson new trials in both cases. Alternatively, these cases should be remanded with directions to conduct an evidentiary hearing to determine what Mr. Nicholson's testimony would have been and the impact it may have had on the verdict.

Dated: February 29, 2016.

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2015AP002154CR
Circuit Court Case No. 2013CF002723

Appeal No. 2015AP002155CR
Circuit Court Case No. 2013CM002488

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

EARNEST LEE NICHOLSON,
DEFENDANT-APPELLANT.

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 30 pages and 5,101 words.

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

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

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ELECTRONIC CERTIFICATION

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief pursuant to § 809.19(12).

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