

RECEIVED

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

05-24-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016AP251-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

MICHA S PRUITT,

Defendant-Respondent.

PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 2, THE HONORABLE JOSANN M. REYNOLDS, PRESIDING

Erin Hanson
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Appellant
State Bar No. 1037939

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
(608)266-4211
erin.hanson@da.wi.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT ON PUBLICATION AND ORAL ARGUMENT . . .	iv
STATEMENT OF THE ISSUES	iv
STATEMENT OF THE CASE	1
ARGUMENT	8
CONCLUSION	25
CERTIFICATION	26
CERTIFICATE OF COMPLIANCE.	27
APPENDIX CERTIFICATION	28
INDEX TO APPENDIX	29

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE(S)</u>
<u>Clean Wis., Inc. v. Public Serv. Comm'n</u> , 2005 WI 93, ¶ 175, 282 Wis. 2d 250, 700 N.W.2d 768	23
<u>Hensley v. Endicott</u> , 2001 WI 105, ¶ 7, 245 Wis. 2d 607, 629 N.W.2d 686	14
<u>Kalal v. Circuit Court for Dane County</u> , 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.	21
<u>Martineau v. State Conservation Comm'n</u> , 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970) . .	23
<u>Phelps v. Physicians Ins. Co. of Wis.</u> , 2009 WI 74, ¶ 36, 319 Wis. 2d 1, 768 N.W.2d 615 .	8,21
<u>Rao v. WMA Securities, Inc.</u> , 2008 WI 73, ¶35, 310 Wis. 2d 623, 639, 752 N.W.2d 220, 228. .	13
<u>State v. Hanson</u> , 2012 WI 4, ¶ 16, 338 Wis. 2d 243, 808 N.W.2d 390	9
<u>State v. Hemp</u> , 2014 WI 129, ¶ 13, 359 Wis. 2d 320, 856 N.W.2d 811	8,9
<u>State v. St. George</u> , 2002 WI 50, ¶ 14, 252 Wis 2d 499, 643 N.W.2d 777	17
<u>State v. Smith</u> , 2002 WI App 118, ¶ 15, 254 Wis. 2d 654, 648 N.W.2d 1517,22-23
<u>State v. Venneman</u> , 180 Wis. 2d 81, 508 N.W.2d 404 (1993).2,3,9-12,14
<u>State v. Wedgeworth</u> , 100 Wis. 2d 514, 536, 302 N.W.2d 810, 822 (1981)	18
<u>Taylor v. Illinois</u> , 484 U.S. 400, 410, 108 S.Ct. 646 (1988)	13

STATUTES CITED

Wis. Stat. § 751.12	13
Wis. Stat. § 807.13	4
Wis. Stat. § 885.50(1)	19
Wis. Stat. § 885.54(1)(c).	20
Wis. Stat. § 885.54(1)(d).	20
Wis. Stat. § 885.54(1)(h).	20
Wis. Stat. § 885.56	19
Wis. Stat. § 885.64(3)	20,21
Wis. Stat. § 906.11	2,6,21-24
Wis. Stat. § 967.04	19
Wis. Stat. § 967.083-5,8-11, 13-16,18-24
Wis. Stat. § 967.08(2)	2,13,16
Wis. Stat. § 970.03(13).	5
Wis. Stat. § 972.02(1)	6
Wis. Stat. § 972.11(1)	5

Other Authorities Cited

Wisconsin Jury Instructions-Criminal (2015), 300 Credibility of Witnesses	12
---	----

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Although the State believes that the issues addressed can be decided by applying existing law to these facts, because the trial court expressed uncertainty of the existing law by fellow members of the judiciary, the State believes that publication may be necessary to assist the judiciary and the parties in litigating Wis. Stat. § 967.08 motions. As the State believes it has adequately addressed the issues in its brief, oral argument is not necessary.

STATEMENT OF THE ISSUES

- I.** AS A MATTER OF LAW, DOES SECTION 967.08 OF THE WISCONSIN STATUTES PROHIBIT TELEPHONIC TESTIMONY AT A CRIMINAL JURY TRIAL?

The trial court allowed telephone testimony over the objection of the State.

- II.** DID THE CIRCUIT COURT ERR BY INVOKING SECTION 906.11 OF THE WISCONSIN STATUTES, DESPITE THE MORE SPECIFIC STATUTORY PROVISIONS IN SECTION 967.08, WHICH DO NOT ALLOW FOR TELEPHONE TESTIMONY AT A CRIMINAL JURY TRIAL?

The trial court ruled that 906.11 allows the court discretion to allow telephone testimony at a criminal jury trial.

STATEMENT OF THE CASE:
FACTS AND PROCEDURAL HISTORY

On October 16, 2014, Micha Pruitt had her initial appearance in Dane County Circuit Court, Case Number 14CM2220 (3). She was charged with misdemeanor counts of Battery and Disorderly Conduct (2:1). The case proceeded to jury trial and a jury was selected on February 1, 2016, with the trial to commence on February 5, 2016 (26).

On February 3, 2016, a status conference was held. (30). At that status conference, Pruitt's attorney informed the trial court that an "important witness" had booked a flight to Las Vegas for the day of the jury trial and was thus essentially unavailable (40:2-3; A-Ap. 2-3)¹. Pruitt's attorney asked the court "...to consider an adjournment." (40:3-4; A-Ap. 3-4). Upon questioning by the court, Pruitt's counsel stated that the witness had been personally served with a subpoena (40:4; A-Ap. 4). The trial court then asked if anybody had the witness's phone number and if either party opposed the witness appearing by telephone (40:4; A-Ap. 4). The State immediately opposed the witness appearing by telephone (40:4; A-Ap. 4). The State explained that the witness should be physically

¹ No finding of unavailability of the witness, under Wis. Stat. § 908.04 or any other statute, was proposed by Pruitt or made by the trial court.

present so that the jury could determine the witness's credibility and so that the State could conduct a proper cross-examination (40:5; A-Ap. 5). The State cited Wis. Stat. § 967.08(2) and *State v. Venneman*² in arguing to the court that telephone testimony was not allowed at a jury trial (40:5; A-Ap. 5). The court found that confrontation clause implications do not apply because it was Pruitt's witness and that under Wis. Stat. § 906.11 the court has discretion to allow telephone testimony (40:5-6; A-Ap. 5-6). The court ruled that the defense was able to have the witness appear by telephone (40:6; A-Ap. 6). In making its ruling, the court stated, "...I may be wrong, but then somebody can make the law and we'll know moving forward. I wouldn't mind at all a higher court decision telling me one way or the other that I'm right or wrong, but I could find no case directly on point." (40:7; A-Ap. 7). The court reiterated, "But I think that you will find there is no case on point interpreting that statute in conjunction with the Court's discretion to control its proceedings and specifically where there is no confrontation clause implication." (40:7; A-Ap. 7).

² *State v. Vennemann*, 180 Wis. 2d 81, 508 N.W.2d 404 (1993).

On February 4, 2016, the State filed a Motion to Reconsider (32; A-Ap. 11-16). In that motion, the State provided the court with several reasons that it should reconsider its decision allowing Pruitt's witness to testify by telephone. The State informed the court that the credibility of the witness was imperative to the case and that the jurors should have the opportunity to observe the appearance and demeanor of the witness on the witness stand (32:1; A-Ap. 11). The State addressed that its ability to cross-examine the witness would be impaired and that fundamental questions about the fairness of the proceedings would be raised (32:1-2; A-Ap. 11-12). The State discussed how it would be prevented from full and effective cross-examination of the witness because telephone testimony would prevent the State from utilizing the video of the charged incident during cross-examination (32:2; A-Ap. 12). The State directed the court's attention to Wis. Stat. § 967.08 and *State v. Vennemann*³ (32:2-4; A-Ap. 12-14).

Finally, the State pointed out that telephonic testimony was specifically allowed in civil jury trials,

³ *State v. Vennemann*, 180 Wis. 2d 81, 508 N.W.2d 404 (1993).

under Wis. Stat. § 807.13, but that there was no parallel statute allowing telephonic testimony in criminal jury trials (32:4; A-Ap. 14).

The trial court held a motion hearing on the State's Motion to Reconsider on February 4, 2016, the same day it was filed (33). During the hearing, the court acknowledged that it had read the State's motion and its cited authorities (41:2-3; A-Ap. 18-19). Pruitt, through her attorney, then argued that because the State did not want to call the witness itself and released him from a subpoena, it was not important for the jury to see that witness (41:4; A-Ap. 20).

Pruitt also argued against the State's rationale that it would not be able to show the witness the video and effectively cross-examine him about it. Pruitt's attorney stated, "...I'm assuming the State factored that in to their decision not to call [the witness] in the first place, so I can't see how his testimony would be all that important as it relates to the video." (41:5; A-Ap. 21).

Pruitt argued that the statutory authority is not as clear as the State argued in its motion (41:5; A-Ap. 21). Pruitt stated that Wis. Stat. § 967.08 refers to criminal proceedings, and argued that allowing a witness to testify

by telephone is not the same as conducting an entire proceeding by telephone (41:5-6; A-Ap. 21-22). Pruitt argued that telephone testimony is permitted in civil cases and that Wis. Stat. § 972.11(1) "...states that the civil practice and rules of evidence apply in criminal proceedings except as where otherwise noted." (41:6; A-Ap. 22). Pruitt also cited the preliminary hearing statute, Wis. Stat. § 970.03(13) as allowing telephone testimony (41:6; A-Ap. 22).

During its brief rebuttal, the State reminded the court that credibility is not a factor in preliminary hearings and that the jury instructions clearly state that the jury's observations of a witness are important considerations of a witness's credibility (41:7; A-Ap. 23). The State reminded the court that the State carries the burden of proving the charges beyond a reasonable doubt and that it could not effectively cross-examine a witness who testified by telephone (41:7-8; A-Ap. 23-24). The State also articulated that while civil procedure allows for telephone testimony, criminal statutes do not (41:8; A-Ap. 24). The State argued legislative intent. Wis. Stat. § 967.08 considered jury trials, but did not allow for telephone testimony at jury trials beyond the limited

exception of allowing the waiver of a jury trial to occur by telephone under Wis. Stat. § 972.02(1)⁴ (41:8; A-Ap. 24).

In making its ruling, the trial court noted that the case is a 2014 misdemeanor and that a jury had been impaneled (41:9; A-Ap. 25). The court also placed some import on the witness originally being on the State's witness list (41:9; A-Ap. 25).

The court stated, "I cannot find any authority on point as to this issue in terms of telephone testimony in a criminal trial." (41:9; A-Ap. 25). The court repeated that confrontation clause implications are not triggered (41:9; A-Ap. 25). The court stated that the "tangential" witness was asked to appear by telephone by the defense⁵ (41:9; A-Ap. 25). The court continued, stating that the State's objection to telephone testimony had "obstreperously interfered with our ability to proceed..." (41:10; A-Ap. 26).

The court concluded,

[U]nder 906.11 I am of the view that the Court has some latitude in controlling the proceedings in the court and the presentation of evidence and witnesses. So I am not changing my mind... I have spoken

⁴ The transcript has the State citing Wis. Stat. § 972.01(1), but since the subsection does not exist, it is clearly a mistake. The proper authority is Wis. Stat. § 972.02(1), which directly refers to § 967.08(2)(b).

⁵ This is factually incorrect. The trial court was the first to suggest that Pruitt's witness should appear by telephone; Pruitt asked for an adjournment (40:2-4; A-Ap. 2-4). Further, while the court refers to the witness as "tangential," Pruitt's attorney referred to the witness as "important" (40:2; A-Ap. 2).

with more than one judge on the issue, and we're all of the same view that nobody has any controlling authority. And if I'm the one to make the law in the higher court, so be it, but we're going to proceed... We have a jury impaneled. I'm not going to call them all off... It's time to move on.

(41:10; A-Ap. 26).

The court signed a written order, showing that it reconsidered its ruling, but was still allowing the defendant's witness to testify by telephone (35; A-Ap. 29).

The State filed a Petition for Leave to Appeal Nonfinal Order and for Immediate Stay of Proceedings in the Circuit Court; the stay of the criminal jury trial was granted by the Court of Appeals on February 5, 2016. (37; A-Ap. 30). On March 11, the Court of Appeals granted the Petition for Leave to Appeal. (39:2; A-Ap. 31).

ARGUMENT

I. SECTION 967.08 OF THE WISCONSIN STATUTES PROHIBITS TELEPHONIC TESTIMONY AT A CRIMINAL JURY TRIAL

A. The standard of review

Whether Wis. Stat. § 967.08 prohibits telephonic testimony at a criminal jury trial is a question of law that appellate courts consider de novo. *See, e.g., Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 36, 319 Wis. 2d 1, 768 N.W.2d 615. (The interpretation and application of statutes are reviewed independently).

B. Under the plain language of the relevant statute, telephonic testimony is not allowed at a jury trial.

1. Law governing statutory construction

Statutory construction begins with the statute's language, and if the language is unambiguous, a court applies the plain language to the facts of the case. *See State v. Hemp*, 2014 WI 129, ¶ 13, 359 Wis. 2d 320, 856 N.W.2d 811. Statutory language is examined in the context it is used. *Id.* Language is given its common, ordinary and accepted meaning, though technical or specifically defined words are given their technical or defined

meanings. See *State v. Hanson*, 2012 WI 4, ¶ 16, 338 Wis. 2d 243, 808 N.W.2d 390.

Further, “words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature’s purpose.” *Hemp*, 359 Wis. 2d 320, ¶ 13 (quoting *State v. Matasek*, 2014 WI 27, ¶ 12, 353 Wis. 2d 601, 846 N.W.2d 811). Courts favor an interpretation that fulfills the statute’s purpose. See *Hanson*, 338 Wis. 2d 243, ¶ 17. Context and purpose are important in discerning the plain meaning of the statute. See *id.*

The Wisconsin Supreme Court has often applied the principle of statutory construction, *expressio unius est exclusio alterius*, which provides that when specific alternatives are enumerated in a statute, other alternatives which are not enumerated are excluded from its scope. See *State v. Vennemann*, 180 Wis. 2d 81, 96, 508 N.W.2d 404 (1993) (citing *In Interest of C.A.K.*, 154 Wis. 2d 612, 621, 453 N.W.2d 897 (1990)).

2. Relevant Statute

Wisconsin Stat. § 967.08, was created by Wisconsin Supreme Court Order in October 1987. 141 Wis. 2d xiii,

xxvii-xxviii (1987). The rule was developed by the Judicial Council and the Committee on Electronic Technology, as one of several which would allow certain judicial hearings and conferences to be conducted by telephone. See *Vennemann*, 180 Wis. 2d at 96 n. 11.

Section 967.08 states:

967.08 Telephone proceedings. (1)

Unless good cause to the contrary is shown, proceedings referred to in this section may be conducted by telephone or live audiovisual means, if available. If the proceeding is required to be reported under SCR 71.01(2), the proceeding shall be reported by a court reporter who is in simultaneous voice communication with all parties to the proceeding. Regardless of the physical location of any party to the call, any plea, waiver, stipulation, motion, objection, decision, order or other action taken by the court or any party shall have the same effect as if made in open court. With the exceptions of scheduling conferences, pretrial conferences, and, during hours the court is not in session, setting review, modification of bail and other conditions of release under ch. 969, the proceeding shall be conducted in a courtroom or other place reasonably accessible to the public. Simultaneous access to the proceeding shall be provided to persons entitled to attend by means of a loudspeaker or, upon request to the court, by making a person party to the telephone call without a charge.

(2) The court may permit the following proceedings to be conducted under sub. (1) on the request of either party. The request and the opposing party's showing of good

cause for not conducting the proceedings under sub. (1) may be made by telephone.

(a) Initial appearance under s. 970.01.

(b) Waiver of preliminary examination under s. 970.03, competency hearing under s. 971.14(4) or jury trial under s. 972.02(1).

(c) Motions for extension of time under ss. 970.03(2), 971.10 or other statutes.

(d) Arraignment under s. 971.05, if the defendant intends to plead not guilty or to refuse to plead.

(3) Non-evidentiary proceedings on the following matters may be conducted under sub. (1) on request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Setting, review and modification of bail and other conditions of release under ch. 969.

(b) Motions for severance under s. 971.12(3) consolidation under s. 971.12(4).

(c) Motions for testing of physical evidence under s. 971.23 (5) or for protective orders under s. 971.23(6).

(d) Motions under s. 971.31 directed to the sufficiency of the complaint or the affidavits supporting the issuance of a warrant for arrest or search.

(e) Motions in limine, including those under s. 972.11(2)(b).

(f) Motions to postpone, including those under s. 971.29.

Wisconsin Stat. § 967.08.

Subsection (2) specifically enumerates proceedings included within its parameters. *See Vennemann*, 180 Wis. 2d at 96. Subsection (1) of the statute states that "proceedings referred to in this section may be conducted by telephone" unless good cause to the contrary is shown.

Neither subsection (2) nor subsection (3) lists testimony at a jury trial as a proceeding which can be conducted by telephone in a criminal proceeding.⁶ In *Vennemann*, the Wisconsin Supreme Court applied the principle of statutory construction, that a specific alternative in a statute is reflective of the legislative intent that any alternative not so enumerated is to be excluded, and concluded that, since a postconviction evidentiary hearing was not specifically mentioned in the statute, it could not be conducted by telephone. See *id.* This court should apply the same reasoning in concluding that testimony cannot be admitted by telephone in a jury trial in criminal cases.⁷ This result is logical because, traditionally, juries are given the opportunity to view witnesses, to study their demeanor on the stand, to observe their body language and to make judgments as to their credibility based on those observations. See Wis. JI-Criminal 300 (2015).

When applying the well-established principle of statutory construction—that a specific alternative in a statute is reflective of the legislative intent that any

⁶ There is, however, allowance for *waiver* of a jury trial by telephone. See Wis. Stat. Sec. 967.08 (2)(b). (emphasis added).

⁷ The State is not arguing that telephone testimony can never be allowed at a criminal jury trial. Stipulations and waivers by the parties may make telephone testimony possible, but Wis. Stats. § 967.08 does not allow a judge to sua sponte allow telephone testimony, especially over the objection of one of the parties.

alternative not so enumerated is to be excluded—Wis. Stat. Sec. 967.08(2) simply does not allow for telephone testimony in a jury trial. The defendant does not have an unfettered right to offer testimony that is otherwise inadmissible under standard rules of evidence. See *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646 (1988).

C. Legislative Intent and Separation of Powers

As stated previously, Wis. Stat. § 967.08 was created by Supreme Court Order. Wisconsin Stat. § 751.12 describes the Supreme Court's rulemaking authority. When the Supreme Court exercises its rulemaking authority, the result is a statute that binds litigants. A rule adopted by the Wisconsin Supreme Court in accordance with Wis. Stat. § 751.12 is numbered as a statute, is printed in the Wisconsin Statutes, may be amended by both the Court and the legislature, has been described by the Wisconsin Supreme Court as "a statute promulgated under this court's rulemaking authority," and has the force of law. See *Rao v. WMA Securities, Inc.*, 2008 WI 73, ¶ 35, 310 Wis. 2d 623, 639, 752 N.W.2d 220, 228 (citing *Trinity Petroleum, Inc. v. Scott Oil Co., Inc.*, 2007 WI 88, ¶¶ 32, 39, 302 Wis. 2d

299, 735 N.W.2d 1). Thus, trial courts are bound by what is—and isn't—in Wis. Stat. § 967.08.

Courts have a duty to fulfill legislative intent and that duty ensures that courts "...uphold the separation of powers by not substituting judicial policy views for the views of the legislature." *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 7, 245 Wis. 2d 607, 629 N.W.2d 686 (quoting *State ex rel. Cramer v. Court of Appeals*, 2000 WI 86, ¶ 17, 236 Wis. 2d 473, 613 N.W.2d 591). Where the language of the statute is clear, the reviewing court does not look beyond the language of the statute to discern legislative intent. See *State ex rel. Hensley*, 245 Wis. 2d at ¶ 8 (citing *State v. Sprosty*, 227 Wis. 2d 316, 324, 595 N.W.2d 692). The plain language of Wis. Stat. § 967.08 contains no allowance for telephone testimony at a criminal jury trial.

In 1990, the Wisconsin Supreme Court had the opportunity to consider amendments to the rules of pleading, practice and procedure regarding the use of the telephone in judicial proceedings. See *Vennemann*, 180 Wis. 2d at 96, n. 11. Jury trials were not added to the existing list of proceedings which may be conducted by telephone. 158 Wis. 2d xvii (1990). Thus, even though

Wis. Stat. § 967.08 was studied and could have been changed, it was not. Jury trials remained outside the scope of § 967.08.

It is not within the judicial function of the trial court to insert the words "jury trial" into the listed proceedings in § 967.08, especially when those who write the laws chose not to do so.

D. Even if § 967.08 allowed for telephone testimony at a jury trial, the State objected and showed good cause.

The trial court mentioned the confrontation clause and Pruitt's confrontation rights several times (40:5-6; A-Ap. 5-6; 40:7; A-Ap. 7; 41:9; A-Ap. 25). This seems to indicate that the court would have ordered a State's witness to be present in the courtroom, but did not feel it necessary to have Pruitt's witness present. This ruling, but for the stay of the jury trial, would have resulted in the deprivation of meaningful cross-examination by the State.

When the trial court first suggested that Pruitt's witness appear by telephone, the State immediately objected (40:4; A-Ap. 4). The State informed the court that the witness should be present in the courtroom so that the jury

could assess the witness's credibility and so that it could conduct a proper cross-examination (40:5; A-Ap. 5). The State again emphasized that its ability to cross-examine the witness would be impaired and that the fairness of the proceedings would be impacted (32:1-2; A-Ap. 11-12).

Although the trial court and Pruitt placed some emphasis on the witness originally being on the State's witness list, that is not an indication that the State does not need the opportunity to effectively cross-examine the witness—in fact, it could mean exactly the opposite. An even more vigorous cross-examination may be necessary. The State argued it would be prevented from full and effective cross-examination because it would be prevented from utilizing a video of the incident during cross-examination of the witness (32:2; A-Ap. 12). The State reminded the trial court that because of its burden in proving a criminal case, it could not effectively cross-examine a witness by telephone (41:7-8; A-Ap. 23-24). Even if the trial court was reading Wis. Stats. § 967.08 to allow a witness in a criminal jury trial to appear by telephone, the State objected and made a showing of good cause as to why the witness's testimony should not proceed by telephone. See Wis. Stat. § 967.08(1) and (2).

The confrontation and compulsory process clauses of the Sixth Amendment of the U.S. Constitution and Article 1, Section 7 of the Wisconsin Constitution "grant defendants a constitutional right to present evidence." *State v. St. George*, 2002 WI 50, ¶ 14, 252 Wis. 2d 499, 643 N.W.2d 777 (quoting *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990) (further citations omitted)). The Wisconsin Supreme Court has stated that "[t]he rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial." *Id.*

Despite these constitutional guarantees, a defendant's right to present evidence is not absolute. See *St. George*, 252 Wis. 2d 499, ¶ 15 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). The defendant's right to present witnesses on his or her behalf is, as said in *Chambers v. Mississippi*, qualified by the necessity of compliance with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. *State v. Smith*, 2002 WI App 118, ¶ 6, 254 Wis. 2d 654, 661, 648 N.W.2d 15, 18 (quoting *Chambers*, 410 U. S. at 302).

"[D]enial of prosecutorial cross-examination of relevant and material matters would detract substantially from the reliability of the testimony in question and from the accurate determination of guilt or innocence." *State v. Wedgeworth*, 100 Wis. 2d 514, 536, 302 N.W.2d 810, 822 (1981) (quoting *Peters v. State*, 70 Wis. 2d 22, 37, 233 N.W.2d 420 (1975)).

Therefore, although Pruitt's constitutional rights may not have been violated by allowing her witness to testify by telephone, the court cannot allow a manner of testimony in a criminal jury trial that is not otherwise admissible in the Wisconsin statutes or rules of evidence merely because it does not implicate a defendant's constitutional rights. The fairness of a trial is not so one-sided. The deprivation of meaningful cross-examination would detract substantially from the reliability of the testimony and from the accurate determination of guilt or innocence. The judge's allowance of telephone testimony by Pruitt's witness over the objection and good cause showing was error, even if such testimony was allowable under Wis. Stat. § 967.08.

E. Other statutory provisions exist that provide for unavailable witness's testimony to be received

Pruitt and the trial court seemed to believe that Wis. Stat. § 967.08 was a means with which to deal with a witness who was not available to appear at a jury trial. However, other statutes exist to deal with this issue. For example, Wis. Stat. § 967.04 specifically deals with depositions in criminal proceedings, for prospective witnesses that may be unable to attend a criminal trial. See Wis. Stat. § 967.04(1).

Another statutory provision that assists with witnesses who are not available to testify in person is Wis. Stat. §§ 885.50-885.64, the videoconferencing statutes. The intent of that subchapter is to promote videoconferencing, while maintaining the rights of litigants and other participants, and preserving the fairness, dignity, solemnity and decorum of court proceedings. See Wis. Stat. § 885.50(1). Circuit court judges are given discretion to determine the manner and extent of videoconferencing, within the parameters of the subchapter. See *id.* The statute also gives the circuit court specific, written criteria from which to exercise its discretion. See Wis. Stat. § 885.56. In the videoconferencing subchapter, emphasis is placed on:

allowing participants of videoconferencing to "observe the demeanor and non-verbal communications of other participants;" "the proceeding. . . [being]visible and audible to the jury and the public, including crime victims. . .;" and, whether the procedure would "allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits." Wis. Stat. §§ 885.54(1)(c), 885.54(1)(h), and 885.56(1)(d).

These criteria which guide the court's exercise of discretion were not only *not* addressed by the trial court in the present case, but are simply not addressed by § 967.08. The safeguards in place to protect the fairness of court proceedings for videoconferencing do not exist to protect telephone proceedings because the statutes do not contemplate a jury trial, or any portion thereof, to be conducted by telephone.

Section 885.64(3) specifically announces that the videoconferencing statutes do not affect "[t]he use of non-video telephone communications otherwise permitted by specific statutes and rules..." and that telephone communications "...shall remain available as provided in those specific statutes and rules." Wis. Stat. §

885.64(3). Thus, Wis. Stat. § 967.08 is not affected by the videoconference statutes and is undoubtedly controlling over telephonic testimony. Because no statutory provision exists for telephone testimony at a jury trial, it should not have been allowed by the trial court.

II. THE CIRCUIT COURT ERRED WHEN IT INVOKED THE GENERAL STATUTE 906.11, DESPITE THE MORE SPECIFIC STATUTORY PROVISIONS IN 967.08 WHICH DOES NOT ALLOW FOR TELEPHONE TESTIMONY AT A CRIMINAL JURY TRIAL.

A. The Standard of Review

Whether the circuit court erred when it invoked Wis. Stat. § 906.11 despite the more specific statutory provision in Wis. Stat. § 967.08 is a question of law that appellate courts will consider de novo. *See, e.g., Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 36, 319 Wis. 2d 1, 768 N.W.2d 615. (The interpretation and application of statutes are reviewed independently).

B. Plain meaning of statute

Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, inquiry may be stopped. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633,

681 N.W.2d 110 (citation omitted). The State urges this court to decide the case based on the plain meaning of the language of Wis. Stat. § 967.08, which does not allow for telephone testimony at a criminal jury trial. However, because the trial court decided the issue by invoking Wis. Stat. § 906.11, it must be addressed.

Subsection (1) of Wis. Stat. § 906.11 states:

906.11 Mode and order of interrogation and presentation. (1) Control by the judge. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:

(a) Make the interrogation and presentation effective for the ascertainment of the truth.

(b) Avoid needless consumption of time.

(c) Protect witnesses from harassment or undue embarrassment.

This evidentiary rule provides the circuit court with broad discretion in its control over the presentation of evidence at trial; however, that discretion is not unfettered. See *State v. Smith*, 2002 WI App 118, ¶ 15, 254 Wis. 2d 654, 648 N.W.2d 15 (citing *Waters ex rel. Skow v. Pertzborn*, 2001 WI 62, ¶ 31, 243 Wis. 2d 703, 627 N.W.2d 497).

C. If statutes are in conflict, the more specific statute controls.

Wisconsin Stat. § 967.08 specifically enumerates criminal proceedings in which telephone testimony is allowable. Section 906.11 gives the trial court broad, but general, discretion over the presentation of evidence in criminal proceedings. Section 967.08 is therefore more specific and trumps § 906.11. See *State v. Smith*, 254 Wis. 2d 654, ¶ 15 (citing *State ex rel. S.M.O. v. Resheske*, 110 Wis. 2d 447, 453, 329 N.W.2d 275 (Ct. App. 1982) (acknowledging the rule that “where a general statute conflicts with a specific statute, the specific statute prevails”)).

The trial court clearly believed that the statutes involved the same subject matter and appeared to conflict. The trial court believed that § 906.11 trumped § 967.08 (40:7; A-App. 7; 41:10; A-App. 26). However, the court disregarded that the more specific statute controls. See *Clean Wis., Inc. v. Public Serv. Comm’n*, 2005 WI 93, ¶ 175, 282 Wis. 2d 250, 700 N.W.2d 768. “[T]his is especially true where the specific statute is enacted after the general statute.” *Martineau v. State Conservation Comm’n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970). Here, Wis. Stat. § 906.11 was enacted in 1973 and Wis. Stat. § 967.08

was enacted in 1987, with revisions in 1990. See Sup. Ct. Order, 59 Wis. 2d R1, R185 (1973); Sup. Ct. Order, 141 Wis. 2d xii (1987); Sup. Ct. Order, 158 Wis. 2d xvii (1990). Thus, the specific statute listing allowable telephonic proceedings in criminal cases was enacted after the general statute allowing the court discretion over evidence. The trial court erred when it used Wis. Stat. § 906.11 to trump the more specific and more recently enacted Wis. Stat. § 967.08. Section 967.08 thus controls and does not allow for telephone testimony at a criminal jury trial.

CONCLUSION

This Court should reverse the circuit court's order allowing for telephonic testimony at a criminal jury trial.

Dated this 24th day of May, 2016.

Respectfully submitted,

Erin Hanson
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Appellant
State Bar No. 1037939

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
(608)266-4211
erin.hanson@da.wi.gov

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 25 pages.

Dated: May 24, 2016.

Signed,

Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

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

Dated this 24th day of May, 2016.

Erin Hanson
Assistant District Attorney
Dane County, Wisconsin

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 24th day of May, 2016.

Erin Hanson
Dane County, Wisconsin
State Bar No. 1037939

INDEX TO APPENDIX

<u>ITEM DESCRIPTION</u>	<u>PAGE(s)</u>
Motion Hearing 2-3-16 Transcript	A 1
State's Motion to Reconsider	A 11
Motion Hearing 2-4-16 Transcript	A 17
Trial Court's Written Order	A 29
Court of Appeals Order to stay Jury Trial . .	A 30
Court of Appeals Order Granting Petition for Leave to Appeal	A 31