2016 AP 000251-CR

WISCONSIN COURT OF APPEALS
DISTRICT IV
APPEAL FROM THE CIRCUIT COURT
OF DANE COUNTY
HONORABLE JOSANN M. REYNOLDS

STATE OF WISCONSIN,
PLAINTIFF-APPELLANT,

V. CIRCUIT COURT
CASE NO. 14CM2220

MICHA S. PRUITT,
DEFENDANT-RESPONDENT.

REPLY BRIEF AND ARGUMENT OF RESPONDENT

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ISSUE/QUESTION PRESENTED FOR REVIEW

Whether the circuit court erred in ruling that Ms. Pruitt's defense witness could appear and testify by telephone at her criminal jury trial.

Ms. Pruitt submits that the circuit court did not err, and properly concluded that Ms. Pruitt's witness could testify by telephone pursuant to Wis. Stats. § 906.11

STATEMENT OF REASONS FOR ORAL ARGUMENT AND PUBLICATION

Ms. Pruitt does not request oral argument. Ms. Pruitt recommends that the opinion be published in order to provide guidance for future trial courts in resolving the question presented.

QUESTION/ISSUE FOR REVIEW

I. Whether the circuit court erred in ruling that Ms. Pruitt's defense witness could testify by telephone in her criminal jury trial.

A. Summary of the Argument

The circuit court properly concluded that Ms. Pruitt's defense witness could testify by telephone at her criminal jury trial. The circuit court properly ruled that Wis. Stats. § 967.08 does not prohibit such testimony. The court properly concluded that permitting the witness to testify by telephone is within the court's discretion pursuant to Wis. Stats. § 906.11. The circuit court did not abuse its discretion in so ruling, and the State failed to demonstrate good cause why such testimony should not be allowed in this case.

B. Standard of Review

The interpretation and application of statutes are questions of law that the court of appeals reviews independently. Phelps v. Physicians Ins. Co. of

Wisconsin, 2009 WI 74, ¶36, 319 Wis.2d 1, 768 N.W.2d 615 (2009). Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meaning. State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (2004). The court of appeals must construe a statute in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and reasonably, to avoid absurd or unreasonable results. State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (2004).

C. Relevant Law

Fundamental fairness requires that criminal defendants be afforded a meaningful opportunity to present a complete defense. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d. 413

(1984). Few rights are more fundamental than that of an accused to present witnesses in her own defense. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d. 297 (1973). In the exercise of this right, the accused must comply 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, 648 N.W.2d 15 (Ct.App.2002).

D. Argument

1. Wis. Stats. § 967.08 is inapplicable to the question of whether a witness for the defense may appear and testify by telephone in a jury trial.

In its argument and brief, the State submits that Wis.Stats. § 967.08 prohibits telephonic testimony at a criminal jury trial. (Brief of Appellant, p.8). The State argues that the rules of statutory construction require the court to conclude, based on the plain language of the statute, that Wis. Stats. § 967.08 prohibits a witness

from testifying by telephone at a jury trial. (Brief of Appellant, p.22).

Ms. Pruitt would submit that the plain language of Wis. Stats. § 967.08 neither expressly authorizes nor prohibits a defense witness in a criminal jury trial from testifying by telephone. Further, Ms. Pruitt would respectfully submit that Wis. Stats. § 967.08 does not apply to the issue raised in this case, and accordingly does not prohibit telephone testimony in a criminal jury trial by its plain language or any other rule of statutory construction.

Wis. Stats. § 967.08 sets forth the standards/criteria for conducting certain *proceedings* by telephone. It is one section contained in Chapter 967, entitled "Criminal Procedure – General Provisions." The provisions range from those which describe the scope for court commissioners to act as judges to those setting forth requirements that counties provide waiting areas for victims during court hearings.

Sec. 967.08 provides that under certain circumstances, certain stages of criminal procedure may be conducted by telephone. Those include initial appearances, arraignments, waivers, and certain non-evidentiary motion hearings.

In contrast to the types of hearings and proceedings covered by the scope of Wis. Stats. § 967.08, the testimony of a witness at a criminal jury trial is not itself a proceeding. The testimony of a single witness at a trial is a singular, discrete part of the whole proceeding, but it is not itself a proceeding. As the State notes in its brief, language is to be given its common, ordinary, and accepted meaning. (Brief of Appellant, p.8). The common and ordinary meaning of 'proceeding' describes an entire event or happening, not the individual parts that comprise it.

As the State further notes in its brief, context and purpose are important in discerning the meaning of a statute. (Brief of Appellant, p.9). The context and

purpose of Wis. Stats. § 967.08 indicates that its scope encompasses entire hearings. As part of a chapter on general criminal procedure, the purpose of Wis. Stats. § 967.08 is aimed at certain events in the conduct of criminal procedure that may be conducted by telephone absent good cause to the contrary. That provision, however, arguably has no application to resolving a narrower, more discrete question as to how the testimony of a defense witness at a criminal trial may be received.

The State raises the argument that the principle of *expressio unius est exclusio alterius* requires that Wis. Stats. § 967.08 be construed to prohibit telephone testimony at a jury trial. The argument goes that since the statute enumerates certain proceedings that may be conducted by telephone and does not include telephone testimony at a jury trial as one of the enumerated proceedings, the statute must be construed to prohibit such testimony. (Brief of Appellant, p.11-13).

However, if that principle is applied logically, the conclusion would be that *entire jury trials* cannot be conducted over the telephone, not that telephone testimony from a single trial witness is prohibited. Since Wis. Stats. § 967.08 discusses whether certain entire proceedings may be conducted by telephone, the only alternatives that need be excluded from consideration under the principle of *expressio unius est exclusio alterius* would likewise be entire proceedings.

Ms. Pruitt agrees that *expressio unius est exclusio alterius* functions to prohibit entire jury trials from being conducted by telephone under Wis. Stats. § 967.08. It does not, however, have any bearing on narrower question of whether a defense witness at a jury trial can appear and testify by telephone.

The court's decision in State v.Vennemann, 108 Wis.2d 81, 508 N.W.2d 404 (1993), is consistent with the argument that Wis. Stats. § 967.08 applies to whole proceedings rather than their component parts. The issue

in Vennemman involved an entire proceeding – a postconviction motion hearing. The pressing issue in Vennemann was whether the defendant had the right to be personally/physically present at a postconvction hearing. The court's conclusion that Vennemann had a right to be present and that Wis. Stats. § 967.08 did not authorize his telephonic appearance is in no way contrary to the proposition that it was proper to determine that Ms. Pruitt's defense witness could testify be telephone at the jury trial in this case. The issue presented here was not discussed or contemplated in Vennemann.

For the reasons set forth, Ms. Pruitt would respectfully submit that neither the plain reading of Wis. Stats. § 967.08 nor the case(s) cited by the State prohibit a defense witness from testifying by telephone at a criminal jury trial.

2. The trial court properly relied on the more specific statute, Wis. Stats. § 906.11, in resolving the question presented in this case.

The circuit court properly relied on the more specific Wis. Stats. § 906.11 in reaching the decision to allow Ms. Pruitt's witness to testify by telephone.

Ms. Pruitt would respectfully submit that § 967.08 is not the more specific statue, despite containing the word "telephone" in its title. As discussed *supra,* the scope and application of § 967.08 covers entire proceedings that may be conducted by telephone as part of criminal procedure.

In contrast, Wis. Stats. § 906.11 specifically refers to the mode/manner in which interrogations of witnesses occur. As a part of the Rules of Evidence, there is no dispute that § 906.11 applies to criminal jury trials.

Wis. Stats. § 906.11 specifically addresses the question raised in this case – the appropriate manner/mode for the interrogation of a witness;

specifically whether the interrogation may be conducted in a telephonic manner.

The State argues that § 906.11 does not resolve the question because it is the less specific statute, merely giving the trial court "broad, but general, discretion over the presentation of evidence in criminal proceedings." (Brief of Appellant, p.23). Ms. Pruitt would respectfully submit that § 906.11 reaches more narrowly than that - to specifically provide the court with discretion in determining the manner in which interrogations of witnesses, such as the cross-examination of a defense witness, are conducted.

In this case, the court properly applied the correct statutory provision in resolving the question presented – the appropriate mode of interrogation of a defense witness in a criminal jury trial. The State asserts that the trial court erred and "disregarded that the more specific statute controls." (Brief of Appellant, p.23).

For the reasons set forth, Ms. Pruitt would submit that the trial court did in fact follow the principle that the more specific statute controls when two statutes are in conflict. Wis. Stats. § 906.11 is the more specific statute, and the court properly relied on it in resolving the question presented.

3. The trial court did not erroneously exercise its discretion in permitting the defnse witness to testify by telephone pursuant to Wis. Stats. § 906.11.

Determining that Wis. Stats. § 906.11 applies does not completely resolve the question presented in this case.

The State notes in its brief that although the trial court has broad discretion under the rules of evidence, that discretion is not unfettered. (Brief of Appellant, p.22, citing State v. Smith, 2002 WI App 118, ¶15, 254 Wis.2d 654, 648 N.W.2d 15 (Ct.App.2002)).
Ms. Pruitt submits that the trial court did not erroneously exercise its discretion in determining that the defense witness be permitted to testify by telephone.

In explaining the basis for its decision, the court noted that this case had been on the calendar since 2014. (DOC 41:9; Appendix B:9). The court further noted that a jury had already been impaneled. (DOC 41:9; Appendix B:9). The court explained that it did not believe that having the witness testify by telephone would have any impact on whether the state could satisfy its burden of proof. (DOC 41:9; Appendix B:9). The court further explained its belief that the state's objection to proceeding with the witness testifying by telephone was interfering with the overall question of determining guilt or innocence. (DOC 41:9-10; Appendix B:9-10).

The trial court properly exercised its discretion under Wis. Stats. § 906.11. In order to avoid needless consumption of time and inconvenience to the jury, the court ruled that the mode of interrogation for a single defense witness would be by telephone. The court explained why it did not believe that its ruling would

prevent an effective ascertainment of the truth, and further explained that a ruling to the contrary – barring the telephone testimony – would have such an effect by delaying the timely procedure of the trial.

An example of an appropriate exercise of discretion under Wis. Stats. § 906.11, is found in State v. Shanks, 2002 WI App 93, 253 Wis.2d 600, 644N.W.2d 275 (Ct. App.2002). In Shanks, the defendant was charged with first degree sexual assault of a child. At his jury trial, the trial court permitted the three year old child victim to testify in court while sitting on her grandmother's lap on the witness stand.

The court of appeals concluded that the trial court did not erroneously exercise its discretion under Wis. Stats. § 906.11 in permitting the child to testify in such a manner. State v. Shanks, 2002 WI App 93, ¶7, ¶12, 253 Wis.2d 600, 644N.W.2d 275 (Ct. App.2002).

Although the specific circumstances are distinguishable, the Shanks case provides some insight.

Despite the absence of a specific provision in the Wisconsin Statutes that expressly provides for a child witness to testify in a criminal jury trial from the lap of her grandmother, the court of appeals found that the scope of Wis. Stats. § 906.11 provides the trial court with the authority to allow such testimony.

Wis. Stats. § 906.11 provides the trial court with discretion in controlling the mode of interrogation of a witness. As Shanks illustrates, that specific grant of discretion permits the court to allow a mode of interrogation that is not expressly described by other statutory provisions. Depending on the particular facts of the case, an appropriate mode of testimony/interrogation might involve a witness testifying by telephone or from the comforting lap of a family member.

In the present case, the trial court applied the appropriate statute and did not erroneously exercise its discretion in ruing that Ms. Pruitt's witness can testify

by telephone. The trial court relied on a statutory grant of discretion, and properly explained the basis for its decision.

4. The court properly found that the state did not establish good cause for not allowing the defense witness to appear and testify by telephone in this case.

Although Wis. Stats. § 906.11 does not utilize the good cause standard for making determinations under its scope, Ms. Pruitt would further submit that he State did not establish good cause for the court to rule that the witness must testify in person.

The State raised two primary arguments to attempt to establish good cause why the witness should not be permitted to testify by telephone.

The State argued that in-person testimony is necessary so that the jury can assess the demeanor and credibility of the witness. (Brief of Appellant, p.15-16)(DOC 32:1); (DOC 40:5; Appendix A:5).

Ms. Pruitt would submit that the Wisconsin Statutes and Rules of Evidence provide for numerous instances in which in-person credibility determinations are not essential.

Although hearsay testimony is generally excluded, the rules of evidence provide for a number of exceptions that permit out of court statements to be admitted. For example, Wis. Stats. § 908.03 permits out of court statements that reflect a present sense impression, an excited utterance, or the then-existing emotional state of the declarant. Wis. Stats. § 908.03(24) further permits the court to admit out of court statements even when no specific exception to the prohibition applies.

Such admissible out of court statements are permitted despite the fact that they essentially function as testimony that is not subject to either in-court credibility determinations or cross-examination. The rules of evidence allow for additional types of out of

court statements to be admitted when there has been an opportunity for cross-examination on those statements.

If the trial court concludes that such a statement is reliable/trustworthy, the court can exercise its discretion and permit the statement to be introduced as evidence. Thus, the rules of evidence recognize that in some instances out of court testimonial statements may be admitted at the trial court's discretion, even though the declarant is not subjected to an in-person credibility assessment by the jury.

Accordingly, the State's general argument about credibility is insufficient to establish specific good cause against the telephone testimony in this case.

The State also asserted that witness telephone testimony should not be allowed because it would not afford the State an opportunity for effective cross-examination. Specifically, the State would not be able to have the telephone witness observe a video played in the

courtroom during the witness testimony. (Brief of Appellant, p.16)(DOC 32:2).

However, the State does not explain why the ability to effectively cross-examine the witness hinges on the ability to show the video to the witness during his testimony. Presumably if the witness had telephonically testified in a manner inconsistent with whatever is depicted in the video, the State could have effectively made that point to the jury without having shown the video to the witness during his testimony.

Although not dispositive of the question, the trial court properly noted that the question presented in this case raises no confrontation implication with respect to the defendant. Such an observation does not suggest one-sided fairness (see Brief of Appellant, p.18), but simply makes it clear that the only potential bar to allowing a defense witness to testify by telephone at a criminal trial is the statutes/rules of evidence. There is no underlying constitutional or due process requirement

that the State be allowed in-person confrontation of the witnesses for the defense.

The arguments raised by the State do not show good cause as to why the witness for the defense should not be permitted to testify by telephone at Ms. Pruitt's criminal jury trial. The State could effectively cross-examine such a witness, and would be free to point out to the jury any deviations between the testimony and the video record. Statutory provisions which allow for the admission of hearsay testimony in certain instances reflect the fact that the law does not always require that a person giving testimony be physically present so the jury can assess his demeanor. Ms. Pruitt would submit that there are more guarantees of trustworthiness in telephone testimony that can be compared to a video record and subjected to cross-examination than in some of the exceptions to the hearsay rule.

Accordingly, the State's argument does not show good cause for the court to refuse to allow the witness to testify by telephone.

5. The remaining arguments submitted by the State are unconvincing.

One of the other arguments raised by the State appears to arise from the principle of separation of powers. The argument appears to be that the legislature has had ample opportunity to amend the statutes to expressly permit telephone testimony at jury trials, and the absence of such amendments reflects a legislative intent to bar telephone testimony in jury trials. It is not up to the court, goes the argument, to rewrite the Wisconsin statutes. (Brief of Appellant, p.14-15).

However, the flipside of the argument is that despite ample opportunity to do so, the legislature has not acted to amend the statutes and expressly prohibit telephone testimony at jury trials. Accordingly, the absence of explicit action to the contrary is reflective of

a legislative intent that telephone testimony at jury trials is not expressly prohibited, and within the trial court's discretion.

The State also notes the existence of the videoconferencing statute and other statutes that assist with witnesses who are not available to testify in person. (Brief of Appellant, p.19). The State argues that the trial court erred in relying on Wis. Stats. § 906.11 when other provisions provide mechanisms for dealing with witnesses who cannot appear at the trial. (Brief of Appellant, p.19).

None of those statutes are relevant to the question presented in this case. There is no indication that the defense witness would have been able to appear by videoconferencing while out of town. The video deposition statute appears to deal with witness absences that are evident in advance of the trial and allow time for the deposition to be taken prior to the trial, in contrast to the circumstances of this case.

The trial court was correct in not looking to these provisions to resolve the question presented because neither of them offered feasible solutions. The trial court properly looked to the rules of evidence for guidance in determining something within the scope of those rules – the manner in which interrogations of witnesses are conducted.

CONCLUSION

Ms. Pruitt respectfully requests that this court affirm the decision of the circuit court, permitting Ms. Pruitt's defense witness to testify by telephone at her criminal jury trial.

Dated this 22nd day of June, 2016.

Respectfully submitted,

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Certification of Brief Compliance with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3349 words.

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Certification of Appendix Compliance with Wis. Stats. § Wis. Stats. 809.19(2)(a).

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 Wis. Stats. § 809.19(2)(a) and contains: (1) a table of content; (2) the findings or opinions of the trial court; (3) a copy of any unpublished opinion cited under Wis. Stats. § 809.23(3)(a) or (b); and (4) portions of the record essential to the 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 final decision of the administrative agency.

I further certify that if required by law to be confidential, the portions of the record included in the Appendix are reproduced using first names and last

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