STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2016AP251-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

MICHA S PRUITT,

Defendant-Respondent.

# REPLY BRIEF OF PLAINTIFF-APPELLANT

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

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## ARGUMENT

### I. Wisconsin Statute Section 967.08 controls

Pruitt's argument that Wis. Stat. § 967.08 does not apply to the issue in this case is contrary to the trial court's ruling and the law. The trial court considered Wis. Stat. § 967.08. (40:7; Plaintiff-Appellant's Appendix A-7) ("...I take into consideration 967.08."). The trial court, however, believed that Wis. Stat. § 906.11 controlled over § 967.08. (40:7; App. A-7; 41:10; App. A-26) ("But I think that you will find there is no case on point interpreting that statute (967.08) in conjunction with the Court's decision to control its proceedings…"; "…under 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.").

Pruitt argues that Wis. Stat. §967.08 applies only to entire proceedings, not to individual parts of each proceeding. (Pruitt's Brief, p. 9-11). Pruitt, however, fails to explain why individual portions of a proceeding should be allowed to be conducted over the telephone, if the entire proceeding is not allowed to be conducted by telephone. If the legislature and/or supreme court believed that the rules should not allow a proceeding to be

conducted by telephone, surely their reasoning and intent applies to the discrete parts of the proceeding, not just the sum of those parts.

Pruitt attempts to downplay the importance of Wis. Stat. § 967.08 by arguing that it is just one section, nestled between statutes that discuss court commissioners and waiting areas. (Pruitt's Brief, p. 8). However, Pruitt fails to recognize that according to Wis. Stat. § 967.01, chapters 967 through 979 of the Wisconsin Statutes are referred to as "the criminal procedure code" and "shall be interpreted as a unit." Wis. Stat. § 967.01.

Wisconsin Stat. § 967.08 applies to criminal proceedings and matters that may be conducted by telephone. It is part of the larger criminal procedure code.

Other statutes address telephone testimony in civil trial and proceedings. *See* Wis. Stat. § 807.13. Wisconsin Stat. § 807.13(2) addresses that telephone testimony can be taken in civil evidentiary proceedings, when certain considerations are met. The Judicial Council Note even addresses that the language in Wis. Stat. § 807.13(2)(c)(intro.) was changed to conform to the language used in other statutes relating to the use of telephonic procedures in judicial proceedings, including Wis. Stat. §

967.08. *See* Wis. Stat. § 807.13, Judicial Council Note, 1990. This is further proof that telephone testimony in a criminal jury trial was considered by the law-makers and was not included in Wis. Stat. § 967.08.

Wisconsin Stat. § 906.11 does give the court discretion in its control over the presentation of evidence at trial; it is an evidentiary rule. However, the discretion given to the court by Wis. Stat. § 906.11 is not unfettered, and must give way when the exercise of discretion runs afoul of other statutory provisions that are not discretionary. *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). The proceedings which are —and are not— allowed to be conducted by telephone are not discretionary, and thus the trial court's discretion under Wis. Stat. § 906.11 must give way because it runs afoul of Wis. Stat. § 967.08. Wisconsin Stat. § 967.08 is the more specific statute and is controlling.

## II. Even if Wisconsin Statute Section 906.11 applies, the trial court erroneously exercised its discretion.

The term "discretion" contemplates an exercise of judicial judgment based on three factors: (1) the facts of record, (2) logic and (3) the application of the proper legal standards. *See State v. Shanks*, 1002 WI App 93, ¶ 6, 253 Wis. 2d 600, 644 N.W.2d 275 (*citing Shuput v. Lauer*, 109 Wis. 2d 164, 177-78, 325 N.W.2d 321 (1982)). The Court of Appeals will affirm trial courts if the trial court has undertaken a reasonable inquiry and examination of the facts as the basis of its decision and has made a reasoned application of the appropriate legal standard to the relevant facts in the case. *See Shanks* at ¶ 6 (*citing Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982)).

Here, the court considered very few facts before making her determination. The trial court's logic appeared to be that she has the discretion, so she was going to use it. (40:6; App. A-6) ("And I find under 906.11 that I have the discretion and I am going to allow the defense to call (the witness) by telephone."). The facts the trial court did consider were that the jury was

selected, that the case arose from an August 2014 incident, it was a misdemeanor charge, and that the defendant's confrontation rights were not at issue. (40:6; App. A-6). The trial court did not consider that it was the defense who was not able to present their witness in court, gave no reasoning for not securing the presence of the witness ahead of the jury selection, and did not give the State or trial court notice of the unavailability of the witness until after the jury had been impaneled. (401:2-3; App. A-2,A-3).

*After* making the ruling, the court did say, "I'm sure that you can effectively cross-examine him…" but did not supply any reasoning as to how the State could effectively cross-examine a witness over the telephone about what the witness observed at the scene and did not mention how the State would be able to show the witness a video and cross-examine using the video. (40:8; App. A-8).

At the reconsideration hearing, the trial court upheld its prior decision to allow the witness to testify by telephone. (41:9-10; App. A-9-10). The only facts considered by the trial court in reaffirming its decision were the year the incident occurred, the jury being

impaneled, the witness being on the State's witness list, and the State deciding not to call the witness. (41:9; App. A-9). The trial court seemed to take issue with the fact that this was "the second time in recent history" that the State objected to a defense witness appearing by telephone. (41:9; App. A-9). However, the court did not recite the underlying facts and reasoning of that case or the reasoning of why it applied to this case.[1]

The State also believes that the trial court did not apply the proper legal standards when it chose to ignore Wis. Stat. § 967.08. The trial court also failed to address other statutory provisions that are available for unavailable witness's testimony to be received. *See*, e.g., Wis. Stat. § 967.04 and §§ 885.50-885.64. The trial court also failed to consider exclusion of the witness.

For all of the above reasons, the State believes that even if Wis. Stat. § 906.11 is the controlling authority, the trial court erroneously exercised its discretion.

[1] Pruitt's brief states that "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." (Pruitt's Brief 16). However, the trial court actually said was "…the State has instead of allowing a timely trial to proceed when everybody is ready and the jury has been drawn…has in my opinion obstreperously interfered with our ability to proceed on a minor witness to the overall hearing and determination of guilt or innocence." (41:9-10; App. A-25, A-26). The State asserts that the trial court was describing that the witness was minor to the overall hearing and determination of the jury, not that the State was interfering with the determination of guilt or innocence.

## III. Pruitt's reliance on Shanks is misplaced

Pruitt relies on *State v. Shanks* as an example of an appropriate exercise of discretion under Wis. Stat. § 906.11. (Pruitt's Brief, p. 17). Pruitt agrees that the specific circumstances of the cases are distinguishable, but Pruitt overlooks that while *Shanks* allows the court to allow a mode of interrogation that is not expressly described by other statutory provisions (a child sitting on a grandmother's lap while testifying), it differs from our case because the mode of interrogation (telephone testimony)is prohibited by a statutory provision. Telephone testimony during a jury trial is prohibited by Wis. Stat. § 967.08 since it is not among the specific alternatives listed. *See State v. Vennemann*, 180 Wis. 2d 81, 96, 508 N.W.,2d 404 (1993).

Further, *Shanks* is distinguishable because the court was attempting to protect the emotional well-being of a child witness. *See Shanks*, 253 Wis. 2d 600, ¶ 10. The *Shanks* court noted that courts have fashioned rules to protect a child, taking into effect the traumatic effect of testifying, of facing a defendant and of being subject to cross-examination. *See id.* (citation omitted). The trial

court in *Shanks*, used its discretion in allowing the child victim to sit on her grandmother's lap, while specifically noting that the jury could still see the witness. *See id.* at ¶ 11. Other statutes give special deference to child victims. *See* Wis. Stat. §§ 971.105 and 972.11(2m). No such statutes exist that give special deference to defense witnesses that the defense failed to secure for trial. In our case, the trial court allowed a different mode of interrogation, telephone testimony, despite failing to make any findings of why it was necessary; certainly there was no discussion about the defense witness needing protection.

Throughout *Shanks*, mention is made of the jury being able to determine the credibility of the witness by their viewing of the witness. *See id.*, e.g., at ¶ 8, 9, 11. Mention is also made of the trial court affording the victim as much protection as was consistent with the defendant's constitutional rights. *See id.* at ¶ 12 (citation omitted). *Shanks* thus underscores the State's position that juries should be given the opportunity to view witnesses and to make judgments as to their credibility based on those observations. *See* Wis. JI-Criminal 300 (2015). Consideration of the rights of the victim in *Shanks* is of equal import as protecting the

rights of the victim in our case and protecting the importance of prosecutorial cross-examination of the testimony of a defense witness. *See State v. Wedgeworth*, 100 Wis. 2d 514, 536, 302 N.W.2d 810 (1981) (citation omitted).

## IV. A hearsay statement is not equivalent to telephonic testimony

Pruitt uses hearsay statements as an example of when in-person credibility determinations are not essential. (Pruitt's Brief, p. 20). However, this is basically a comparison of apples to oranges. Allowing for a singular statement, that fits well-established exceptions to the hearsay rules, is not comparable to allowing the full testimony of a defense witness to be taken by telephone, outside the visual observations of the jury. The hearsay rule is designed to protect against the four testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory. *See State v. Kandutsch*, 2011 WI 78, ¶ 60, 336 Wis. 2d 478, 799 N.W.2d 865. The allowable hearsay exceptions have guarantees of trustworthiness, and, in fact, often require a judge to rule on whether there are indicia of reliability before they are

admitted. Some exceptions even require authentication witnesses before they are permitted.

The proposed telephonic testimony, not just a single statement, by an out-of-court defense witness has no such comparable indicia of reliability and has no inherent guarantees of trustworthiness. The trial court did not make any findings of guarantees of trustworthiness of the witness's proposed testimony. Indeed, the jurors are "the sole judges of the credibility...of the witnesses..." Wis. JI-Criminal 300 (2015). The trial court's ruling in Pruitt's case prevents the jurors from performing their function as the sole judges of credibility, and thus should be overturned.

## CONCLUSION

For the reasons offered in the State's principal brief and in this reply brief, this court should reverse the circuit court's order allowing for telephonic testimony at a criminal jury trial, over the objection of the State.

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## CERTIFICATION

I certify that this reply brief conforms to the rules contained in sec. 809.19(8)(d) 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 11 pages.

Dated: June 30, 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 reply 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 reply brief filed as of this date.

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

Dated this 30th day of June, 2016.

_____

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