STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2017AP2520-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY L. BENFORD, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Both Entered in the Eau Claire County Circuit Court the Honorable John F. Manydeeds, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

At the time of Mr. Benford's trial, an Eau Claire County Sheriff's Department policy required all defendants appearing for trial while in custody to wear a stun belt. After Mr. Benford expressed concerns with the use of the device and refused to wear it at trial, the circuit court ordered Mr. Benford to wear the device to attend his trial. Mr. Benford wore the device and attended the first day of trial without incident; however, when he declined to wear the stun belt on the second day of trial, he was removed from the courtroom and tried in absentia.

The question presented is whether Mr. Benford is entitled to a new trial because his constitutional and statutory rights to be present at trial were violated by the circuit court's erroneous determination that Mr. Benford was required to wear a stun belt to attend his trial.

The circuit court answered: No. (115:11-13; App. 102-04).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted to provide guidance for circuit courts resolving similar claims arising in other cases. Briefing should be adequate to present the issue for this court's decision, but Mr. Benford would welcome oral argument should the court deem it desirable.

STATEMENT OF THE CASE

On April 17, 2015, Eau Claire Police Officers responded to Positive Avenues[1] for a reported battery. (1:2). When police arrived several witnesses indicated that Mr. Benford had severely injured D.M.R. during a fight. (*Id.*). Mr. Benford told police that D.M.R. struck him, which dislocated his jaw, and that he had punched and kicked D.M.R. in return. (*Id.*). Two witnesses to the fight told police that they tried to intervene in the altercation, but that Mr. Benford yelled at them and pushed them away. (*Id.* at 3). As a result of this incident, the state initially charged Mr. Benford with substantial battery related to the fight with D.M.R. and two counts of disorderly conduct related to the witnesses who attempted to intervene. (*Id.* at 1). The state later filed additional charges of first degree reckless injury and aggravated battery against Mr. Benford in regard to the same incident. (11:2).

Mr. Benford proceeded to trial and the jury returned guilty verdicts on all five counts—substantial battery, first-degree reckless injury, aggravated battery, and two counts of disorderly conduct. (111:65-71).

On September 8, 2016, the court, the Honorable John F. Manydeeds presiding,[2] sentenced Mr. Benford. (114). The court sentenced Mr. Benford to two years imprisonment on the substantial battery conviction comprised of one year initial confinement and one year extended supervision. (*Id.* at 70). On both the first-degree reckless injury conviction and the aggravated battery conviction the

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[1] Positive Avenues provides resources for individuals experiencing mental health concerns or homelessness.

[2] The Honorable Brian H. Wright had presided over Mr. Benford's trial.

court sentenced Mr. Benford to ten years imprisonment comprised of six years initial confinement and four years extended supervision. (*Id.* at 71-72). The prison sentences are concurrent with one another. (63:2). On the two counts of disorderly conduct, the court imposed costs. (114:70).

Mr. Benford filed a timely notice of intent to pursue postconviction relief. (65). Undersigned counsel, on behalf of Mr. Benford, filed a postconviction motion requesting that the court: (1) order a new trial on the ground raised in this appeal, (2) vacate the substantial battery conviction as multiplicitous, (3) modify his sentence based on the existence of a new factor, and (4) order community service in lieu of costs. (70).

After a hearing, the court denied Mr. Benford's request for a new trial. (115:11-13; App. 102-104). However, the court vacated the substantial battery conviction and modified the concurrent sentences on the first-degree reckless injury and aggravated battery convictions by one year from six years initial confinement to five years initial confinement with the extended supervision remaining at four years. (*Id.* at 20; 89:1). In addition, the court ordered community service in lieu of the costs previously imposed. (115:11; 90:1).

Mr. Benford filed a timely notice of appeal from the judgment of conviction entered on September 8, 2016, amended on December 18, 2017, and the denial of the new trial relief requested in his postconviction motion. (92:1). The state did not cross-appeal.

STATEMENT OF FACTS

On the first day of the trial, the court informed the parties that Mr. Benford was refusing to wear a stun belt device under his clothing and that the device was required by jail policy. (106:21-22). The court instructed defense counsel to "impress upon Mr. Benford that in order to be present during the trial . . . he will need to wear that stun belt under his clothing." (*Id.* at 22). The court then allowed a brief recess for defense counsel to meet with Mr. Benford. (*Id.* at 24-25).

After conferring with Mr. Benford, defense counsel informed the court that Mr. Benford continued to refuse to wear the stun belt device. (*Id.* at 25). The state then expressed concerns with Mr. Benford's refusal to wear the device considering the violent nature of the allegations and the fact that the state had already advised its witnesses that Mr. Benford would be wearing the device during the trial. (*Id.* at 26). The court then indicated that allowing Mr. Benford to attend the trial by video was not an option because the equipment would be needed for other purposes. (*Id.*). Additionally, the court rejected utilizing shackles and inquired of the bailiff as to whether any other form of restraint was possible. (*Id.* at 26; 107:1-2). The bailiff responded: "Practice has been he'll wear the stun belt for the entire trial or he's not present for any of it from start of it to the end." (107:2). The court stated:

> [T]he Court's absolute preference is that [Mr. Benford] be here personally for his trial. He has a right to do so but not at the risk of creating undo-safety risks for potential witnesses. And, again, this policy of his wearing a stun belt under these circumstances is not anything unusual. So if he chooses not to wear a stun belt, I don't think it leaves the Court with any real

> alternative but that he not be allowed to personally be present for his trial; well, at least that portion of his trial where there are others testifying.

(106:26).

Mr. Benford then stated: "How about I stay out of the trial?" (107:3). The court advised Mr. Benford that he has a constitutional right to be present at trial, but this right had to be weighed against the safety and security needs of the courtroom. (*Id.*). Mr. Benford then expressed a fear of receiving a shock from the device and his mistrust of law enforcement officials who would be operating the device.[3] (*Id.* at 4-5). The court then reiterated that for Mr. Benford to be present during the trial he would have to wear the stun belt device. (*Id.* at 6). Mr. Benford continued to refuse to wear the device and was taken back to the jail. (*Id.* at 7).

In discussing whether a curative instruction should be given to the jury to explain Mr. Benford's absence, defense counsel noted that Mr. Benford had never acted inappropriately in court, that he had never been violent in court, and that he never had any outbursts in the courtroom. (*Id*. at 8). The court then granted a short recess for the parties to draft a curative instruction in regard to Mr. Benford's absence. (*Id.* at 9).

Following this recess, the court informed the parties of ***People v. Martinez***, 808 N.W.2d 1089 (Ill. Ct. App. 2004),

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[3] Specially, Mr. Benford's fear of the stun belt and mistrust of law enforcement operating the belt stemmed from his recent exposure to television news coverage of issues of police and race relations as well as coverage of police brutality and police use of Tasers. (*See* 59:10, 12). In addition, Mr. Benford expressed fear of the belt being placed around his midsection because of the risk of a possible shock and the fact that his aunt had died of kidney failure. (*Id.* at 12).

which held that a trial court's failure to consider certain factors before determining whether an defendant was required to wear a stun belt device violated the defendant's right to a fair trial. (107:10-12). Due to the holding of this case, the court asked the parties to present testimony as to why the stun belt should be required for Mr. Benford. (*Id.* at 12-13). Before doing so, the court took judicial notice that Mr. Benford had sent a series of letters[4] to the court and that he had previously undergone a competency evaluation. (*Id.* at 13). In addition, the state informed the court that it was aware of a very recent incident in Green Lake County where a different defendant has refused to wear the stun belt and had attacked the prosecutors in the courtroom. (*Id.*).

Mr. Benford was returned to the courtroom and the state presented testimony regarding whether he would be required to wear the stun belt from Whitney Lex, a volunteer at Positive Avenues who witnessed the fight between Mr. Benford and D.M.R. (*Id.* at 16-17). Ms. Lex testified that she saw Mr. Benford stomping and kicking D.M.R.'s head and that she was very scared and would not want to be in Mr. Benford's presence if he was not restrained during the trial. (*Id.* at 17-18). Following Ms. Lex's testimony, the state introduced a photo of D.M.R. taken shortly after the fight to indicate the severity of his injuries. (*Id.* at 20-21).

The state then called the bailiff, Deputy Scott Kuehn, who testified that the jail policy requires anyone in custody who appears for trial to wear the stun belt device. (*Id.* at 21-22). Deputy Kuehn also testified that the only possible alternative available to ensure courtroom safety would be to allow Mr. Benford to testify by video-conferencing. (*Id.* at

[4] The record includes four letters Mr. Benford wrote to the court prior to trial. (14; 15; 19; 23). As will be addressed, none of the letters contain threats of violence. *See infra* p. 16.

22-23). He further testified that courtroom security personnel alone would not be sufficient and that Mr. Benford had "given staff in the jail security concerns about his ability to follow direction, keep direction, and his ability to get along with other inmates." (*Id.* at 23). He concluded his direct testimony by indicating that "there would be potential for a huge problem" if Mr. Benford did not wear the device. (*Id.* at 25).

In response to questions from the court, Deputy Kuehn could not specifically describe any incident involving Mr. Benford in the jail or why Mr. Benford had "given staff in the jail security concerns about his ability to follow direction, keep direction, and his ability to get along with other inmates." (*See id.* at 25, 27). When asked whether Mr. Benford had acted aggressively or had confrontations in the jail, Deputy Kuehn testified: "I don't know specifically. I can't say – I can't give specific information, but I know through conversations that I had with other deputies and staff in the jail, that he is a concern when he's being transported and moved throughout the facility." (*Id*. at 27).

On cross-examination, Deputy Kuehn testified that Mr. Benford had never caused any problems in the courtroom during prior appearances, that Mr. Benford had never tried to escape, and that he was not aware of any specific violent behavior that had taken place in the jail. (*Id.* at 27-28).

The state then argued that the violent nature of the allegations demonstrated a need for the stun belt. (*Id.* at 30). The state further asserted that the bailiff's concerns, Ms. Lex's fear of Mr. Benford, and the recent incident in another Wisconsin courtroom required Mr. Benford to wear the stun belt. (*Id.* at 31). Defense counsel reiterated that Mr. Benford had been compliant at all prior court

appearances and that he was terrified of wearing the stun belt because he feared the risk of an accidental shock. (*Id.* at 32).

The court then found Mr. Benford would be required to wear the stun belt to attend his trial. (*Id*; App. 106). Specifically, the court relied on the seriousness of the charges against Mr. Benford, the injuries sustained by D.M.R., and Mr. Benford's young age and "physical attributes." (107:32-33; App. 106-07). The court also remarked that there were no alternatives to the stun belt to maintain courtroom security. (107:33-34; App. 107-08). Finally, the court's determination was based upon the letters Mr. Benford has previously sent to the court, which the court stated "indicate a high level of defiance or a high level of potential disruption of the trial in the event that Mr. Benford does not agree . . . with testimony that he hears . . .". (107:33-34; App. 107-08).

Following this finding, Mr. Benford inquired as to the circumstances under which the stun belt would be activated. (*Id.* 34). Deputy Kuehn testified that the device would be used if Mr. Benford displayed hostile actions, had loud outbursts, acted aggressively toward others in the courtroom, or if he attempted to escape. (*Id.* at 35). The deputy also indicated that if Mr. Benford failed to follow directions while being transported to the courtroom that the device would be used. (*Id.*). The Deputy further explained that the device is activated by remote and clarified that the device would be used only if Mr. Benford acted aggressively. (*Id.* at 36). Following this testimony, Mr. Benford continued to express his concern about being "electrocute[d]" by the device in front of the jury. (*Id.* at 39). Ultimately, Mr. Benford decided to wear the stun belt during the first day of the trial and he remained present in the courtroom during the first day. (108:1).

However, on the second day of the trial, Mr. Benford refused to wear the stun belt. (110:1, 9-10). As a result, Mr. Benford was removed from the courtroom. (*Id.* at 13). The court then made the finding that Mr. Benford was asked directly whether he wished to be present at trial and that he indicated he did not want to be present. (*Id.* at 15). Later in the day, the court addressed Mr. Benford, who had returned to court to waive his right to testify, and stated: "Given your decision to not appear personally for this trial, I have made, I think, accommodations to allow you to do so, the minimal restraint being that stun belt." (*Id.* at 98).

After the close of evidence and outside the presence of the jury, the court again remarked about Mr. Benford's absence from the second day of the trial. (*Id.* at 122). First, the court indicated its decision to not allow Mr. Benford to attend trial or represent himself unless he wore the stun belt was based on its "discretionary authority to preserve the good order of the Court . . .". (*Id.* at 123). Second, the court stated that Mr. Benford "voluntarily absenced himself[]" and that the court gave him several opportunities to personally attend and participate in the trial with the stun belt." (*Id.*).

On the third day of Mr. Benford's trial, in Mr. Benford's absence, the court instructed the jury and the jury heard closing arguments. (111:3-54). After the jury began deliberations, the parties addressed the issue of whether Mr. Benford would be returned to the courtroom at the time of the verdict. (*Id.* at 55-56). The court indicated that Mr. Benford would have to wear the stun belt to be present in the courtroom and that if he did not wear the device he could appear by video. (*Id.* at 56). However, the court was later informed by the bailiff that due to "elevated security concerns" Mr. Benford would need to be shackled during the reading of the verdict "opposed to having simply the stun

belt." (*Id.* at 59-60). The court agreed that due to "the security concerns" Mr. Benford would be shackled during the reading of the verdict. (*Id.* at 60). Ultimately, Mr. Benford appeared by video for the jury's verdicts. (*Id.* at 63-64).

Postconviction Ruling

The court denied Mr. Benford's request for a new trial after a hearing and after consideration of the written submissions of the parties. (115:11-13; App. 102-04; 70; 79; 80). In denying Mr. Benford a new trial, the court pointed to the security concerns presented by the Sheriff's Department and that state as well as the nature of the charges and Mr. Benford's pre-trial letters to the court. (115:11-12; App. 102-03). The court also commented that Judge Wright had also taken into consideration the prejudicial nature of increasing security personnel in the courtroom. (*Id.* at 12). The court concluded: "So as far as the request for a new jury trial is concerned concerning the issue of the stun belt, I'm gonna deny that." (*Id.* at 13). This appeal follows. (92).

ARGUMENT

Mr. Benford is Entitled to a New Trial Because His Constitutional and Statutory Rights to Be Present at His Trial Were Violated When the Circuit Court Erroneously Ordered Him to Wear a Stun Belt to Attend Trial.

As he did in his postconviction motion, Mr. Benford submits that the circuit court erroneously exercised its discretion when it ordered him to wear a stun belt to attend his trial. This error resulted in a violation of Mr. Benford's constitutional and statutory right to be present at his trial. His absence from days two and three of trial cannot be construed

as a voluntary waiver of his right to be present at trial because his absence was a direct consequence of the circuit court's erroneous determination regarding the stun belt.

A. The circuit court erroneously exercised its discretion in ordering Mr. Benford to wear a stun belt to attend his trial.

The Sixth Amendment to the United States Constitution and the Wisconsin Constitution both guarantee a defendant's right to confront witnesses against him. U.S. Const. amend. VI; Wis. Const. art. I, § 7. The right of confrontation contained in both our State and Federal Constitutions "are 'generally' coterminous." ***State v. Rhodes***, 2011 WI 73, ¶28, 336 Wis. 2d 64, 799 N.W.2d 850. The United States Supreme Court has explained: "One of the most basic of rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." ***Illinois v. Allen***, 397 U.S. 337, 338 (1970).

In Wisconsin, with few exceptions, a defendant also has a statutory right to be present at various proceedings, including trial and at the time the jury returns its verdict. Wis. Stat. § 971.04(1)(b) & (f). In interpreting the statutory right to be present at trial this court explained: "The language of section 971.04, Stats., is clear: a defendant must be present at the trial unless he or she voluntarily does not appear 'during the progress of the trial' provided that he or she was 'present at the beginning of the trial.'" ***State v. Dwyer***, 181 Wis. 2d 826, 836, 512 N.W.2d 233 (1994) (quoting Wis. Stat. § 971.04(1)(b) & (3)).

Courtroom decorum and security concerns must be balanced alongside a defendant's statutory and constitutional right to be present at trial. For example, "a defendant can lose his right to be present at trial if, after he has been warned

by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." ***Allen***, 397 U.S. at 343. Aside from removal of the defendant from the courtroom to ensure safety or maintain order in the courtroom, trial judges have discretion to order the use of restraints. ***Id.*** at 343-44.

Although a circuit court may make a discretionary determination as to the use of a particular restraint, freedom from restraint in the courtroom "'is an important component of a fair and impartial trial.'" ***Sparkman v. State***, 27 Wis. 2d 92, 96-97, 133 N.W.2d 776 (1965) (quoting ***Way v. United States***, 285 F.2d 253, 254 (10th Cir. 1960)). For example, courts have long held that the use of shackles during trial must occur only after the court has "carefully exercise[d] its discretion . . . and . . . set forth its reasons justifying the need for restraints in that particular case." ***State v. Grinder***, 190 Wis. 2d 541, 552, 527 N.W.2d 326 (1995).

As such, a reviewing court must determine whether the circuit court erroneously exercised its discretion in ordering a particular restraint. *See* ***State v. Ziegler***, 2012 WI 73, ¶40, 342 Wis. 2d 256, 816 N.W.2d 238.

Even when shackles placed on the defendant were hidden from the jury's view, the Wisconsin Supreme Court stated that the use of shackles should not be ordered unless "'necessary to maintain order, decorum, and safety in the courtroom . . .". ***Id.*** at 545, 552 (quoting ***Flowers v. State***, 43 Wis. 2d 352, 362, 168 N.W.2d 843 (1969)). In fact, before ordering the use of shackles the court must consider factors beyond local law enforcement policy on the use of restraints and consider factors "such as the nature of the charges, the

background of the defendant, and possible security risks in the courtroom." ***Id.***

In ***State v. Champlain***, this court applied the principles regarding restraints such as shackles to the use of stun belt devices in the courtroom. ***Id.***, 2008 WI App 5, ¶¶22, 26, 33, 307 Wis. 2d 232, 744 N.W.2d 889. This court held that trial counsel's failure to object to the use of an arm-band device, not covered by the defendant's clothing, constituted ineffective assistance of counsel. ***Id.***, ¶2. ***Champlain*** further held that the circuit court had a sua sponte duty to inquire into the necessity of the device. ***Id.***, ¶32. This court explained "[i]t is an erroneous exercise of discretion to rely primarily upon law enforcement department procedures instead of considering the risk of a particular defendant poses for violence or escape." ***Id.***, ¶33.

Following ***Champlain***, this court addressed whether the circuit court has a sua sponte duty to inquire into the necessity of a stun belt when the device is not visible to the jury. ***State v. Miller***, 2011 WI app 34, ¶11, 331 Wis. 2d 732, 797 N.W.2d 528. In ***Miller***, law enforcement placed a stun belt underneath Miller's clothing prior to trial. ***Id.***, ¶2. Miller testified at trial while wearing the device and no objection was made at any point during trial in regard to the use of the device. ***Id.*** Postconviction Miller argued that he was entitled to a new trial because the trial court had not made any specific findings as to the necessity of the stun belt. ***Id.***, ¶3. This court held that a circuit court's sua sponte duty to inquire into the necessity of a stun belt device is limited to cases where the device is visible. ***Id.***, ¶11. In so holding, the court clarified that Miller had not raised any constitutional issue in regard to the use of the stun belt at his trial. ***Id.***, ¶13.

In ***Ziegler***, the Wisconsin Supreme Court cited approvingly of both ***Champlain*** and ***Miller*** and upheld the circuit court's determination that the defendant would wear a stun belt at trial. ***Ziegler***, 342 Wis. 2d 256, ¶¶11, 84-86. In doing so, the court indicated that because the restraint was not visible, the court had no sua sponte duty to inquire into its use. ***Id.***, ¶86. Moreover, the court indicated that "once Ziegler was wearing the stun belt, neither Ziegler nor his counsel expressed any concerns relating to the restraint." ***Id.***

Here, at the time of Mr. Benford's trial, the Eau Claire County Sheriff's department required the use of a stun belt for anyone on trial who was also in the custody of the jail. (107:22). Unlike the device at issue in ***Champlain***, the device used for Mr. Benford was not visible. (*Id.*). As a result, under ***Champlain***, ***Miller***, and ***Ziegler*** the trial court had no sua sponte duty to inquire as to the necessity of the non-visible restraint.

However, in Mr. Benford's case, the circuit court was required to make necessity findings as to the use of the stun belt due to two critical distinctions between this case and the prior case law addressing the use of electronic restraints. First, unlike the defendants in ***Champlain***, ***Miller***, and ***Ziegler***, Mr. Benford forged a contemporaneous objection to the use of the stun belt by initially refusing to wear it at the start of trial. (106:21-22). Second, unlike the defendants in prior stun belt cases, Mr. Benford asserts that his constitutional and statutory rights to be present at trial were violated when the court required him to wear the stun belt device.

Here, the circuit court ordered Mr. Benford to wear the stun belt concluding that the belt was required because of the seriousness and violent nature of the charges, Mr. Benford's

young age and "physical attributes,"[5] and because of defiance demonstrated through Mr. Benford's prior letters to the court. (107:32-34; App. 106-08). The court further indicated that bailiffs in the courtroom would not be able to react as quickly as the stun belt if Mr. Benford acted violently. (107:33; App. 107). The court also indicated that it had taken the nature of the courtroom into its consideration. (*Id.*). Finally, the court commented that it had "considered the adequacy and the availability of any of the alternative remedies that would be available." (107:34; App. 108). It concluded that shackling would be unduly prejudicial. (*Id.*).

These findings, however, are not sufficient to require Mr. Benford to wear a stun belt at trial especially considering that the stun belt requirement prevented Mr. Benford from attending days two and three of his trial. Specifically, the court's determination that Mr. Benford would be required to wear the device to attend trial is clearly erroneous considering Mr. Benford's history of appropriate behavior in the courtroom, his lack of prior violent convictions, the lack of any specific instances of violence in the jail, the lack of any evidence that he had tried to escape, and a lack of anything problematic in his letters to the court.

In addressing the use of restraints in the courtroom, Wisconsin courts have repeatedly indicated that there must be consideration as to whether the restraints are necessary to prevent violence or escape. ***Champlain***, 307 Wis. 2d 232, ¶33; ***Grinder***, 190 Wis. 2d at 551; ***Sparkman***, 27 Wis. 2d at 96. It follows that considerations of violence or escape should be at the heart of a court's evaluation of the necessity

[5] The circuit court did not expound on what it meant by Mr. Benford's "physical attributes." However, the criminal complaint indicates Mr. Benford is African American, with a height of 6'2", and a weight of 165 pounds. (1:1).

of a stun belt in a case like Mr. Benford's where (1) a defendant objects to the use of the stun belt and (2) the stun belt requirement prevents the defendant from attending trial.[6]

Here, the court did properly consider the violent nature of the charged offenses; however, this alone is not sufficient to require the use of a stun belt. Other jurisdictions have aptly recognized that the violent nature of the alleged crimes is insufficient alone to justify the use of a stun belt. ***State v. Leonard***, 813 N.E.2d 50, 64 (Ohio Ct. App. 2004). As the Florida District Court of Appeals has explained allowing a defendant to appear before the jury in restraints based on the violent nature of the alleged crime presents "circular reasoning that offends the presumption of innocence . . .". ***Miller v. State***, 852 So.2d 904, 906 (Fla. Dist. Ct. App. 2003).

Moreover, reliance on the underlying nature of the alleged crime itself to justify the use of electronic restraints could result in an inordinate number of criminal defendants being required to wear stun belts in Wisconsin courtrooms.[7]

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[6] Mr. Benford does not suggest that a circuit court's findings as to the necessity of the use of a stun belt at the time the defendant objects must be limited to consideration of violence and escape. Rather, a circuit court may wish to consider a variety of other factors, many of which have been adopted by other jurisdictions, such as the use of alternative security measures, the psychological and physical health of the defendant, the activation criteria, law enforcement training on use of the device, the risk of accidental activation, the defendant's criminal history, the defendant's behavior while in custody and in the courtroom, and any other factor the circuit court may deem appropriate.

[7] For some perspective consider that the National Center for State Courts reported that Wisconsin Courts handled 111,422 felony cases in 2015. Richard Y. Schauffler, et al., *Examining the Work of State Courts: An Overview of 2015 State Court Caseloads* 14 (National Center for State Courts 2016),

The court also considered Mr. Benford's prior letters to the court to be indicative of Mr. Benford's defiant attitude and his potential for disruption. Mr. Benford's letters, however, contain no threats, no inappropriate language, and no indication that he would become aggressive in court. Rather, the letters, generally speaking, convey Mr. Benford's version of events, his dissatisfaction with the investigation, his sincerely held belief that he acted in self-defense, and his concerns about racial inequalities in the justice system. (*See* 14; 15; 19; 23).

Moreover, the mere possibility that Mr. Benford would "disrupt" the courtroom does not rise to the level of requiring the use of the stun belt at the start of the trial. Mr. Benford's past actions in court are more predictive of his behavior at trial and there was no dispute that Mr. Benford had acted appropriately in court on prior occasions. Additionally, the court's other considerations—Mr. Benford's age and "physical attributes"— are not relevant to the necessity of the stun belt to prevent violence or escape without some indication that Mr. Benford would likely act violently in the courtroom or attempt to escape.

In addition, there was no evidence presented that Mr. Benford had acted violently or aggressively in the jail or that he had ever tried to escape during the 417 days he spent in custody between the date of his arrest and the first day of trial. Mr. Benford does not have any criminal history involving violence.

In reaching its determination on the use of the stun belt, the circuit court started from the position that Mr. Benford was required to wear the device to attend trial

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http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC%202015.ashx.

due to jail policy. (106:21-22). In fact, Mr. Benford was initially removed from the courtroom after refusing to wear the stun belt prior to any findings as to the necessity of the device other than the existence of the jail policy. (107:2, 4-5, 7).

That the court started from this presumption based on the jail policy invaded its ability to consider the availability of other alternatives. For example, when the state inquired about the use of another device, such as a "leg hobble," defense counsel and the court further inquired of the bailiff in regard to safety procedures. (107:2). The bailiff responded: "Practice has been he'll wear the stun belt for the entire trial or he's not present for any of it from start of it to the end." (*Id.*). Deputy Kuehn later testified that no other restraints were available and that additional law enforcement presence in the court room would not be sufficient. (*Id.* at 23). The court later clarified with Deputy Kuehn that the only available options were the stun belt or more law enforcement personnel. (*Id.* at 29-30). Finally, although defense counsel and the court expressed opposition to the use of shackles for fear that they would be visible to the jury and thus prejudicial, there was never a full discussion of whether shackles could be used and also be hidden from the jury. (*See id.* at 2, 4). Mr. Benford was not consulted as to the use of an alternative form of restraint.

In addition, the court's determination that Mr. Benford must wear the stun belt to attend trial appeared to be based on its erroneous belief that the device was a "minimal restraint" and not unusual in practice. (106:27; 110:98). However, other jurisdictions have determined that stun belts are anything but minimal restraints and that compelling circumstances or a manifest need is required before such a device is required. *See e.g.*, ***Gonzalez v. Pliler***, 341 F.3d 897,

901-02 (9th Cir. 2003) (requiring compelling circumstances); ***People v. Allen***, 856 N.E. 349, 347-48 (Ill. 2006) (requiring a "manifest need" and detailing twelve factors a circuit court may consider); ***State v. Leonard***, 813 N.E.2d 50, 63-64 (Ohio Ct. App. 2004) (requiring close judicial scrutiny).

Specifically, in Nevada, the use of a stun belt at trial must undergo "close judicial scrutiny." ***Hymon v. State***, 111 P.3d 1092, 1099 (Nev. 2005). This requires a court to consider several factors including the operation of the device, the activation criteria, the possibility of accidental discharge, the potential for adverse psychological effects, the health of the defendant, as well as the special security needs that require the device and whether less restrictive restraint is available. ***Id.***

In California, a defendant cannot be compelled to wear a stun belt unless there is a manifest need for the device after consideration of a number of factors including the psychological and physical risks of requiring an individual to wear the device. ***People v. Mar***, 52 P.3d 95, 111-15 (Cal. 2002). In reaching this conclusion, the California Supreme Court stated that "[t]he potential for accidental activation provides a strong reason to proceed with great caution in approving the use of this device." ***Id.*** at 97.

Even more telling, the Indiana Supreme Court categorically prohibited the use of stun belts on defendants in 2001. ***Wrinkles v. State***, 749 N.E.2d 1179, 1194 (Ind. 2001). It did so after considering that when activated a typical stun belt delivers a non-stop eight-second 50,000 volt shock that travels through an individual's blood channels and nerve pathways. ***Id.*** at 1193. The court further explained that if shocked by the device, an individual will typically shake uncontrollably and remain incapacitated for forty-five

minutes and that uncontrolled urination and defecation may occur. ***Id.*** at 1194. In banning the device, the Indiana Supreme Court also stated: "Manufacturers of the stun belt emphasize that the belt relies on the continuous fear of what might happen if the belt is activated for its effectiveness." ***Id.***

An Amnesty International report further explains:

> On activation, the belt delivers a 50,000 volt, three to four milliampere shock which lasts eight seconds. This high-pulsed current enters the wearer's body at the site of the electrodes, near the kidneys, and passes through the body, causing a rapid electric shock. The shock causes incapacitation in the first few seconds and severe pain rising during the eight seconds. The electro-shock cannot be stopped once activated.[8]

Before ordering the stun belt, the circuit court did not consider the debilitating nature of the stun belt, the activation criteria, the risk of accidental discharge, or the effect of the device on Mr. Benford's physical and psychological wellbeing.

In sum, the circuit court started from the presumption that Mr. Benford would wear the stun belt in accordance with jail policy. This presumption and the jail policy itself prevented meaningful consideration of alternatives to the stun belt. More importantly, the court erroneously exercised its discretion in ordering the use of the stun belt considering Mr. Benford's history of appropriate courtroom behavior, his

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8 Amnesty International, *United States of America Cruelty in Control? The Stun Belt and other Electro-Shock Equipment in Law Enforcement*, 3 (June 1999), https://www.amnesty.org/en/documents/document/?indexNumber=AMR51%2F054%2F1999&language=en.

lack of prior violence, his lack of any attempts to escape, and the lack of any specific violent or disruptive conduct occurring in the jail. As a result of this erroneous determination, Mr. Benford's constitutional and statutory right to be present at his trial was violated.

B. Mr. Benford did not voluntarily waive his right to be present at trial due to the direct connection between his absence and the circuit court erroneous exercise of discretion.

A defendant may lose his or her right to be present at trial through misconduct or by consent. ***State v. Haynes***, 118 Wis. 2d 21, 25, 345 N.W.2d 892 (Ct. App. 1984). A waiver of a defendant's right to be present at trial requires "an intentional relinquishment or abandonment of a known right or privilege." ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938). "[W]hen a defendant is voluntarily absent from the trial proceedings, a defendant's failure to assert the right to be present can constitute an adequate waiver and an express waiver on the record is not essential." ***State v. Divanovic***, 200 Wis. 2d 210, 220, 546 N.W.2d 501 (Ct. App. 1996).

Here, Mr. Benford did not engage in any violent or disruptive behavior as to lose his right to be present at trial. Nor was his absence from days two and three of his trial voluntary. This is because Mr. Benford's absence from trial was a direct result of the court's erroneous determination that Mr. Benford be required to wear the stun belt to attend trial.

The record indicates that the court repeatedly told Mr. Benford that he could not attend trial if he refused to wear the stun belt. (106:22, 27). It was only after the discussion between the court and the parties in regard to the stun belt that Mr. Benford remarked: "How about I stay out of the trial?" (107:3, 5, 6-7). Ultimately, after Mr. Benford

himself inquired about the activation criteria for the stun belt, he decided to wear the device and he attended the first day of trial. (107:34-42; 108:1).

However, on the second day of trial Mr. Benford refused to wear the stun belt and he was removed from the courtroom. (110:4, 9-10, 13). The circuit court later remarked that Mr. Benford "decided to not appear personally for this trial" and that he "voluntarily absenced" himself. (110:98, 123). However, the record indicates that Mr. Benford's absence from days two and three of trial was the direct result of the circuit court's erroneous ruling he be required to wear the stun belt to attend trial. (*See* 101:9-10).

The Eleventh Circuit has considered the implications that the stun belt has on a defendant's constitutional right to counsel, to be present at trial, and to participate in his or her defense:

> A stun belt seemingly poses a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles. The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial-including those movements necessary for effective communication with counsel.
>
> Another problem with this device is the adverse impact it can have on a defendant's Sixth Amendment and due process rights to be present at trial and to participate in his defense. Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant's focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to

> concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial. We have noted that the presence of shackles may significantly affect the trial strategy [the defendant] chooses to follow. A stun belt is far more likely to have an impact on a defendant's trial strategy than are shackles, as a belt may interfere with the defendant's ability to direct his own defense.

United States v. Durham, 287 F.3d 1297, 1305-06 (11th Cir. 2010)(internal citations, footnotes, and quotation marks omitted).

The constitutional implications discussed by the Eleventh Circuit are evident in Mr. Benford's case—Mr. Benford was not just preoccupied during trial due to the psychological effect of the stun belt, but rather, he was completely absent from days two and three of his trial.

As a result of the circuit court's erroneous exercise of discretion in ordering the use of the stun belt, Mr. Benford's statutory and constitutional rights to be present at trial were violated and he is entitled to a new trial.

CONCLUSION

For the foregoing reasons, Mr. Benford respectfully requests that this court vacate his convictions and sentences and remand with directions that he receive a new trial.

Dated this 27th day of February, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,071 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 27th day of February, 2018.

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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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