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, ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE JOHN F. MANYDEEDS, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Did the circuit court erroneously exercise its discretion when it ordered that the defendant-appellant, Danny L. Benford, Jr., must wear a stun belt during trial proceedings?[1]

The circuit court concluded it did not.

This Court should conclude the same.

2. Did the circuit court's order render Benford's express waiver of his right to be present at trial involuntary?

The circuit court concluded it did not.

This Court should conclude the same.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying established Wisconsin law to the facts.

INTRODUCTION

Benford severely beat another man after an argument erupted when Benford changed the television channel. The circuit court determined that it was appropriate that Benford be restrained during trial by wearing a stun belt. Relying primarily on cases from other jurisdictions, Benford argues that the circuit court erroneously exercised its discretion in determining the need for the stun belt and that the court's erroneous determination forced Benford to waive his right to be present at trial.

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[1] Benford presents one compound issue. The State has rephrased the issues for clarity.

This Court should reject Benford's arguments. The circuit court went above and beyond what is required by Wisconsin law in determining that it was appropriate for Benford to be restrained during trial, and Benford's decision to waive his right to be present was voluntary.

SUPPLEMENTAL STATEMENT OF THE CASE

The State initially charged Benford with one count of substantial battery and two counts of disorderly conduct. (R. 1:1.) The charges stemmed from a beating that occurred at Positive Avenues[2] after an argument broke out regarding who had the right to control the television set. (R. 1:2.) Benford was seen by multiple witnesses stomping on the victim's, DMR's, head. (R. 1:2.) When the police arrived, DMR was found face down on the floor. (R. 1:2.) DMR was breathing, but not moving, and there was a large amount of blood near his face. (R. 1:2.)

An officer asked Benford what had happened. (R. 1:2.) Benford said that DMR had struck Benford in the jaw, so Benford punched and kicked DMR in response. (R. 1:2.)

An officer also spoke with JL, who relayed that she heard a verbal argument between Benford and DMR. (R. 1:3.) JL looked over to where the argument was occurring and saw Benford stomping his foot down on DMR's head. (R. 1:3.) JL tried to push Benford away, but Benford grabbed her arm and told her to get away "or else." (R. 1:3.)

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[2] "Positive Avenues is a daytime resource center open to those experiencing mental health concerns or homelessness in Eau Claire, Wisconsin." *See Positive Avenues*, Lutheran Soc. Services of Wis. & Upper Mich., *https://www.lsswis.org/LSS/Programs-Services/Mental-Health/Resource-Centers/Positive-Avenues* (last visited May 4, 2018).

When the State filed the information, it added charges of first-degree reckless injury and aggravated battery. (R. 11.) After that occurred, Benford wrote a series of letters to the court expressing frustration. (R. 14; 15; 19; 23.) Benford expressed that he was frustrated with the investigation of the case by law enforcement and by defense counsel, the multitude of charges filed for one incident, and the treatment of African Americans by law enforcement and the judicial system. (*See generally*, R. 14; 15; 19; 23.) Additionally, Benford believed his best interest could be served by an African American lawyer and he was frustrated that he had not been appointed one. (*See generally*, R. 14; 15; 19; 23.) Benford explained that he was suffering from extreme stress and anxiety due to the fact that he believed he was facing a de facto life sentence. (*See generally*, R. 14; 15; 19; 23.) These letters, however, did not contain any threats or aggressive language.

After it was determined that Benford was competent to stand trial (R. 104:2–3), the case proceeded with trial preparation. On the first day of trial, before jury selection, the court was informed that Benford objected to wearing a stun belt during trial proceedings. (R. 106:21–22.) It was standard practice in Eau Claire County to require any defendant in custody to wear a stun belt during trial. (R. 106:21–22.)

In discussing the issue, the State informed the court that the State's witnesses were told that Benford would be wearing a stun belt during trial to ensure their safety. (R. 106:25–26.) The court inquired whether it would be appropriate to absent Benford from trial under these circumstances. (R. 106:26.) The court reasoned:

> You know, In Mr. Benford case, I think the Court's absolute preference is that he 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. He certainly can be brought down when it's his turn to testify and give his testimony.

(R. 106:27.)

With that said, the court asked the State to research the issue. (R. 106:27.) The court also advised defense counsel that if Benford continued to refuse to wear the stun belt, the court may limit Benford's opportunity to be present at trial for safety reasons. (R 106:27; 107:1.) The court explained:

> [I]f Mr. Benford continues to refuse to wear the stun belt . . . he will be allowed to be present for the preliminary instructions, voir dire, as well as opening statements, but once it comes time [for] the witnesses, you know, unless I hear otherwise in terms of argument, I'm not going to put in jeopardy any of the witnesses that testify. I'm not going to put a jeopardy to our safety.

(R. 107:1.)

In response, defense counsel brought up the potential prejudicial nature of shackles. (R. 107:1.) The court agreed and explained that was why the use of a stun belt was preferred. (R. 107:1.) A stun belt, as opposed to shackles, is hidden by clothing and would not be seen by the jury. (R. 107:1–2, 4.) The parties and the court then discussed other possible alternatives. (R. 107:2.) The court asked Scott Kuehn, the bailiff, to weigh in. (R. 107:2, 21.) Kuehn advised the court: "Practice has been he'll wear the stun belt for the entire trial or he's not present [in the courtroom] for any of it from start of it to the end [even if he chooses to testify]." (R. 107:2.)

After hearing this, Benford spoke up and asked: "How about I stay out of trial? . . . How about I don't testify. How

about you people do your job and do what you feel is right." (R. 107:3.) The court again explained the preference for the stun belt as opposed to shackles. (R. 107:4.) Benford then asked: "What if they shock me, I mean, for no reason?" (R. 107:4–5.) The court began to explain that there would be no reason to unnecessarily shock Benford. (R. 107:5.) Benford interrupted and said: "There wasn't any reason for the cops to be killing all those black people that they've been showing on TV for the past year neither, but they still did it." (R. 107:5.) After a short exchange, the court said: "I'm telling you, Mr. Benford, if you choose not to wear the stun belt, you may not appear personally in court for this trial." (R. 107:5.) The court reiterated:

> You understand that if you want to be present for your trial, you're going to be allowed to be in this courtroom, but you're going to have [to] wear the stun belt. If that's not something you're willing to do, then—then it will be Mr. Hillestad who is here in your place, and he will put on your case as he would otherwise do, but you're not going to be present. It's just that simple.

(R. 107:6–7.)

Benford refused to wear the stun belt and was removed from the courtroom. (R. 107:7.) The court then asked how the issue of Benford's absence should be addressed with the jury. (R. 107:7.) The parties agreed that some type of curative instruction would be necessary. (R. 107:7–8.) Defense counsel noted that Benford had "always been appropriate in court. His demeanor has never been violent or had any type of unusual outbursts or episodes." (R. 107:8.) Because of that, counsel was having difficulty thinking of how to word an instruction regarding Benford's absence. (R. 107:7–8.) The court then recessed for the State to consult with the Department of Justice. (R. 107:8–9.)

When the court reconvened, the State informed the court that what the court should do, and already did, was an on the record waiver of Benford's right to be present. (R. 107:10.) The court then noted that it did independent research during the recess and that it found cases from Illinois that concluded that a court cannot rely solely on jail policy to determine the need for the use of restraints. (R. 107:10–11.) The court noted that, in Illinois, before ordering the use of restraints a trial court must consider the seriousness of the charges, the defendant's prior record, the defendant's characteristics such as temperament, age, physical attributes, and self-destructive tendencies, any prior escapes or attempted or planned escapes, any threats to harm or to cause a disturbance, any risk posed by others in the court room or at large, the size and mood of the audience, the nature and physical security of the courtroom, and the availability of adequate alternatives. (R. 107:11–12.) The court concluded that "as a matter of precaution" it was going to hold an evidentiary hearing to determine if it was appropriate to order Benford to wear a stun belt. (R. 107:12–14.)

Benford was returned to the courtroom for that hearing. (R. 107:14–15.) The court advised Benford that it was going to consider additional information before making its final determination on whether Benford would be required to wear a stun belt at trial. (R. 107:15.) The court explained:

> The information that was presented to me initially was that based on the sheriff's department policy in a case such as this, that a defendant, no matter who the defendant is, will be required to wear a stun belt and that really is the alternative to your being shackled in the presence of the jury. What I have determined is that I want to make a decision based on the specifics of this case, and I want to hear specific reasons for the need for the stun belt before I decide whether or not that should

> be a requirement for your appearing personally once we appear in front of the jury.

(R. 107:15.)

The court then heard testimony from a woman who was working at Positive Avenues on the day of the incident. (R. 107:16.) The woman testified that Benford had stomped on the victim's head. (R. 107:17.)[3] As a result of the incident, Positive Avenues had counselors come in to talk to anyone who was present. (R. 107:19.) She further testified that the incident left her feeling scared and she would not want to be in Benford's presence if he was not restrained in some way. (R. 107:18.)

The bailiff, Kuehn, then testified. (R. 107:21.) Kuehn testified that it was standard policy to require anyone in jail to wear a stun belt during trial. (R. 107:22.) The type of stun belt used is not visible to the jury. (R. 107:22.) Kuehn asserted that there was no alternative to the stun belt that would not be visible to the jury. (R. 107:23.) He further testified that jail staff had "concerns" about Benford's inability or unwillingness to follow directions and to get along with other inmates. (R. 107:23.) Kuehn, however, did not know the specifics of what precipitated those concerns. (R. 107:26–27.) There was some question whether the concerns were due to Benford's mental health issues, as opposed to any outbursts or violent tendencies. (R. 107:28.)

Kuehn acknowledged that Benford had not presented any security concerns at prior court appearances and that Benford had never tried to escape. (R. 107:27–28.) Kuehn, however, did not believe that simply staffing the courtroom with additional bailiffs would be an appropriate alternative

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[3] The State introduced a photograph of the victim to establish the extent of the victim's injuries. (R. 107:20–21.)

to the stun belt due to the defiant tone that Benford had taken with the court earlier that day. (R. 107:30.)

Defense counsel argued against the need for a stun belt because Benford had been compliant at all court appearances. (R. 107:32.) Counsel explained that Benford was afraid that he would be shocked accidentally, or for trying to communicate with counsel. (R. 107:32.) Counsel informed the court that Benford was "scared to death of having a stun belt on. But I really don't want to see him in shackles either."(R. 107:32.)

The court concluded that it was appropriate for Benford to wear a stun belt at trial for the following reasons:

1. The charges against Benford were the result of "violent and extremely dangerous behavior." (R. 107:32.)
2. Based on Benford's physical attributes, it would be difficult to respond effectively if Benford exhibited similar violent conduct in the courtroom. (R. 107:33.)
3. There was no alternative as effective as a stun belt. (R. 107:33.)
4. Based on the layout of the courtroom, a stun belt would more quickly deter or stop a violent outburst than a bailiff could. (R. 107:33.)
5. The letters sent to the court by Benford "indicate a high level of defiance or high level of potential disruption" if Benford became dissatisfied with what was happening at trial. (R. 107:33–34.)
6. Shackles, as opposed to a stun belt, would be unduly prejudicial because shackles would be visible to the jury. (R. 107:34.)

The court then asked if Benford was still "voluntarily deciding not to be present in the courtroom" if he had to wear a stun belt. (R. 107:34.) Benford asked: "And what

would cause me to be . . . shocked like that?" (R. 107:34.) The court asked the bailiff to retake the stand for additional testimony about when the stun belt would be activated. (R. 107.34.)

Kuehn testified that the stun belt would not be activated unless Benford had an outburst, tried to escape, or displayed hostile actions or aggression. (R. 107:35.) Kuehn further testified that when Benford was brought to and from jail, Benford would have to specifically follow directions "in order to not have the stun belt activated." (R. 107:35.) It would not be used if Benford spoke out of turn; the stun belt would only be activated if Benford was physically aggressive. (R. 107:35–36.)

Benford was still concerned about improper activation of the stun belt. He advised the court that he was "worried . . . they [might] electrocute [him] in front of the jury just to make [him] look like [he] was having some sort of seizure [or] just to make [him] look bad." (R. 107:39.)

Ultimately, Benford decided he would wear the stun belt (R. 108:1), the jury was selected, and the State presented witnesses.

The stun belt did not prevent Benford from being an active participant in his defense on the first day of trial. (R. 110:22–23.) The circuit court noted that it had observed that Benford "interjected a number of times during the trial." (R. 110:22–23.) The court also observed that defense counsel provided Benford with the opportunity to write down questions for counsel's review. (R. 110:23.)

The next day, the court was informed that Benford had changed his mind about wearing the stun belt and that he wanted to fire his attorney. (R. 110:4.) It was unclear whether Benford's objection to wearing the stun belt on the second day of trial was motivated by the same fears as his original objection. Rather, based upon the context in which

the objection arose, it appeared that Benford was objecting on grounds that he believed he was being treated unfairly because he was African American. (R. 110:8, 11–12.)

Benford wished to be represented by an African American attorney and did not want to represent himself. (R. 110:5.) The court explained that a new attorney would not be appointed in the middle of trial; a lively exchange followed. (R. 110:5–11.) In the middle of that exchange, Benford was asked if he wanted to represent himself and, if not, if he was willing to wear a stun belt to be present for trial. (R. 110:9.) Benford responded: "No." (R. 110:10.) At the end of the exchange, the court again asked Benford to clarify that it was his intention to not be present for the remainder of trial. (R. 110:12.) Benford responded: "Yes. That's all right. . . . Yeah. That sounds right." (R. 110:12–13.) At that point, Benford was removed from the courtroom. (R. 110:13.)

Counsel and the court then discussed the best way to inform the jury of Benford's absence. (R. 110:13–14.) When the jury was brought in, the court advised: "Mr. Benford is not present. The jury should make no inferences from his lack of attendance at trial today." (R. 110:28.)

Trial continued and before the close of the State's evidence, the court conducted a colloquy with Benford regarding his decision not to testify. (R. 110:95–97.) At that time, the court again asked: "And is your position still the same that you do not want to appear further for the remainder of the testimony in this case?" (R. 110:98.) Benford responded: "That's correct." (R. 110:98.) The remainder of evidence was presented that afternoon.

The next day, Benford appeared by video conference for the verdict. (R. 111:63–64.) He was found guilty on all counts. (R. 111:64–71.)

Benford challenged his conviction on multiple grounds. Benford sought a new trial, arguing that his constitutional

and statutory right to be present at trial was violated when the court erroneously required Benford to wear a stun belt to attend trial. (R. 70:3–15.) Alternatively, Benford argued that his convictions for substantial battery and aggravated battery were multiplicitous, and that his sentence should be modified based upon new factors. (R. 70:15–25.) Benford also sought a court order for community service in lieu of monetary court costs. (R. 70:26.)

The postconviction court[4] did not grant Benford a new trial, but it did grant the alternative relief requested. (*See generally*, R. 115.) On the stun belt issue, the postconviction court concluded that the trial court properly exercised its discretion in determining that it was appropriate to require Benford to wear the stun belt for the duration of trial. (R. 115:11–13.) Benford appeals.

STANDARDS OF REVIEW

This Court "will not disturb the circuit court's decision to order [Benford] to wear a stun belt at trial unless the circuit court erroneously exercised its discretion." *State v. Ziegler*, 2012 WI 73, ¶ 40, 342 Wis. 2d 256, 816 N.W.2d 238.

Whether Benford's waiver of his right to be present at trial was voluntary is a question of constitutional fact reviewed by independently applying facts to constitutional principles. *State v. Divanovic*, 200 Wis. 2d 210, 220, 546 N.W.2d 501 (Ct. App. 1996).

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[4] The Honorable John F. Manydeeds presided over the postconviction proceedings.

ARGUMENT

I. The circuit court did not erroneously exercise its discretion when it ordered that Benford must wear a stun belt during trial proceedings.

A. The circuit court's inquiry into the necessity of the stun belt was sufficient in this case because the stun belt would not be visible to the jury.

"Generally, a criminal defendant should not be restrained during trial." *Ziegler*, 342 Wis. 2d 256, ¶ 84. "At the same time, the general rule against restraining a criminal defendant may give way when necessary to protect the public." *Id.* Thus, a circuit court can order the use of restraints when restraints "are necessary to maintain order, decorum, and safety in the courtroom." *Id.*

In Wisconsin, the use of a restraint device that is not visible to the jury is not subject to the same scrutiny as one that is. *See Ziegler*, 342 Wis. 2d 256, ¶¶ 85–86. (explaining the distinction between the *State v. Champlain*, 2008 WI App 5, 307 Wis. 2d 232, 744 N.W.2d 889 and *State v. Miller*, 2011 WI App 34, 331 Wis. 2d 732, 797 N.W.2d 528 holdings regarding a circuit court's duty to inquire into the necessity of restraints). Wisconsin has made the distinction between visible and non-visible restraints because "the no-restraint rule is designed to prevent the jury from forming an opinion about the defendant's guilt based solely on the fact that the defendant is restrained." *Miller*, 331 Wis. 2d 732, ¶ 10.

In *Ziegler*, the defendant objected to the use of a stun belt and the circuit court did not inquire into its necessity. *Ziegler*, 342 Wis. 2d 256, ¶ 23. Rather, the circuit court relied on the common practice of requiring defendants in custody to wear a stun belt at trial to avoid any problems. *Id.* The Wisconsin Supreme Court concluded that the circuit

court did not have to inquire into the necessity of the device so long as the device was not visible to the jury. *Id.* ¶¶ 83–86. This Court is bound by *Ziegler*.

Benford attempts to distinguish *Ziegler* on the grounds that Ziegler did not object to the court's determination that he would be required to wear a stun belt and that the claim raised by Benford on appeal is of a different type than that raised in *Ziegler*. (Benford's Br. 14.) This Court should reject those distinctions for two reasons. First, counsel for Ziegler did object when initially advised that Ziegler would be required to wear a stun belt at trial. *Ziegler*, 342 Wis. 2d 256, ¶ 23. Second, the holding of *Ziegler* is clear that when the issue is whether a defendant should wear a restraint that will not be visible to the jury, the circuit court's exercise of discretion will be upheld even if the court does not do a full inquiry into the necessity of the restraint. *Id.* ¶¶ 83–86.

In this case, the circuit court conducted an evidentiary hearing before determining that Benford would be required to wear a stun belt at trial. The court concluded that the use of a restraint device was necessary because Benford's crime involved a violent, physical altercation, and Benford had exhibited a "high level of defiance or a high level of potential disruption." (R. 107:32–34.) The court also considered a variety of non-binding factors and determined that it was appropriate for Benford to wear the stun belt because it was the least prejudicial and most effective way to secure the courtroom. (R. 107:32–34.)

The circuit court's determination was specific to Benford and not predicated solely on policy, as it was in *Ziegler*. The circuit court here made an individualized determination regarding the necessity of a restraint device, and thus, the circuit court went above and beyond what is required in Wisconsin before ordering that Benford must wear a stun belt at trial. There are simply no grounds to

conclude that the circuit court erroneously exercised its discretion under existing law.

This Court would have to overrule *Ziegler* for there to be any merit to Benford's claim that the circuit court erroneously exercised its discretion. This Court can do no such thing. The court is bound by *Ziegler* and lacks the authority to "overrule, modify or withdraw language" from prior supreme court decisions. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). Only the supreme court has the power to overrule, modify, or withdraw language from prior Wisconsin cases. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 54, 324 Wis. 2d 325, 782 N.W.2d 682. There is no way around *Ziegler* because, like Benford, Ziegler objected to the use of the stun belt. Thus, if this Court believes that *Ziegler* was wrongly decided or that its reasoning was flawed, it may certify the case to the supreme court or "decide the appeal, adhering to a prior case but stating its belief that the prior case was wrongly decided." *Cook*, 208 Wis. 2d at 190. What this Court cannot do is adopt Benford's position that a circuit court must make particular findings before it can order a defendant to wear a stun belt at trial.

B. Even if this Court concludes that *Ziegler* does not control, the circuit court properly concluded that Benford must wear a stun belt to be present at trial.

If this Court disagrees that *Ziegler* controls, the Court should nonetheless reject Benford's argument that the circuit court erroneously exercised its discretion. The circuit court conducted an evidentiary hearing before concluding that it was necessary for Benford to wear a stun belt at trial to maintain order, decorum, and safety in the courtroom.

Benford asserts that the circuit court started from the presumption that Benford would be required to wear the

stun belt at trial and did not meaningfully assess the need for the use of restraints. (Benford's Br. 18.) Benford further argues that the circuit court erroneously exercised its discretion because Benford did not have a history of inappropriate behavior in the court room, prior violent convictions, or incidents of violent conduct while in custody, nor had he attempted or planned to escape, and Benford's letters to the court did not contain anything problematic. (Benford's Br. 15.) In other words, Benford's argument is that restraints cannot be ordered unless his past behavior clearly established that Benford would be violent at trial.

Benford's argument should be rejected for two primary reasons. First, the circuit court's final decision did not start from the presumption that Benford would be required to wear a stun belt at trial. To the contrary, the court concluded that it should not rely on jail policy and that it should make an individualized determination of the need for restraints. (R. 107:15.) The court was clear: "I want to make a decision based on the specifics of this case, and I want to hear specific reasons for the need for the stun belt *before* I decide whether or not that should be a requirement for your appearing personally once we appear in front of the jury." (R. 107:15 (emphasis added).) Benford's assertion that the circuit court started from the presumption that Benford should be required to wear a stun belt should be rejected as plainly contrary to the record.

Second, the circuit court did not rely on law enforcement policy but instead conducted a hearing, considered proper factors, and reached a reasonable conclusion that the use of restraints was appropriate in this specific case. That is what is required for a proper exercise of discretion before determining the need for visible restraints. *Champlain*, 307 Wis. 2d 232, ¶ 33. The only way for Benford's claim to have any merit would be for this Court to conclude, contrary to established precedent, that the use of a

non-visible restraint is subject to a higher scrutiny than the use of visible restraints.

To reiterate, the circuit court concluded that it was appropriate for Benford to wear a stun belt at trial for the following reasons:

1. The charges against Benford were the result of "violent and extremely dangerous behavior." (R. 107:32.)
2. Based on Benford's physical attributes, it would be difficult to respond effectively if Benford exhibited similar violent conduct in the courtroom. (R. 107:33.)
3. There was no alternative as effective as a stun belt. (R. 107:33.)
4. Based on the layout of the courtroom, a stun belt would more quickly deter or stop a violent outburst than a bailiff could. (R. 107:33.)
5. The letters sent to the court by Benford "indicate a high level of defiance or a high level of potential disruption" if Benford became dissatisfied with what was happening at trial. (R. 107:33–34.)
6. Shackles, as opposed to a stun belt, would be unduly prejudicial because shackles would be visible to the jury. (R. 107:34.)
7. The stun belt would not be used if Benford spoke out of turn; it would be activated only if Benford was physically aggressive. (R. 107:35–36.)

Benford takes issue with the circuit court's reliance on the violent nature of the charges and relies on *State v. Leonard*, 813 N.E.2d 50 (Ohio Ct. App. 2004), and *Miller v. State*, 852 So.2d 904 (Fla. Dist. Ct. App. 2003), for the proposition that the violent nature of the alleged crimes is insufficient to justify the need for a defendant to wear a stun

belt at trial. (Benford's Br. 16.) Both of those cases are distinguishable.

Leonard is distinguishable because there the jury could ascertain that Leonard was wearing a stun belt, the trial court had made no on-the-record determination of the need for restraints, the stun belt would be activated for reasons other than physical aggression, and the only issue was whether Leonard was entitled to a postconviction hearing on his claim. *Leonard*, 813 N.E.2d at 62–63. The Ohio court concluded that "[i]n the absence of a hearing on the need for restraints," "the violent nature of the crimes" alone was insufficient to justify the need for restraints. *Id.* at 64. Here the court conducted a hearing and relied on a multitude of factors in addition to the violent nature of the crime.

Miller is distinguishable because of the extreme measures taken to restrain Miller at trial. Benford fails to note that "Miller appeared before the jury wearing handcuffs, a waist chain, leg irons, and a stun belt" that were all visible to the jury. *Miller*, 852 So.2d at 905. The issue was whether Miller was entitled to a hearing on his claim that counsel was ineffective for failing to object to the use of visible restraints. *Id.* The Florida court was concerned with "the extreme restraint measures that were used" and that no attempt was made to shield the use of restraints from the jury. *Id.* at 905–06. The court concluded that Miller's claim of ineffective assistance of counsel was facially sufficient under those circumstances. *Id.* at 906. Here, counsel did object, the court conducted a hearing, and concluded that Benford would be required to wear a stun belt at trial. The court considered a variety of factors, one of those factors being that the stun belt was the best option to shield the use of restraints from the jury's view. *Miller* is inapposite to this case.

Benford also takes issue with the circuit court's consideration of the letters that Benford had sent to the court. (Benford's Br. 17.) He argues that it was inappropriate for the court to conclude that the letters supported the need for restraints because the letters did not contain any indication that he would be aggressive in court. (Benford's Br. 17.) That is not exactly true.

The letters established that Benford believed that his crime was a result of a nervous breakdown. (*See, e.g.*, R. 15:2.) The letters also established that Benford was growing increasingly stressed and was suffering panic attacks and nervous breakdowns leading up to trial. (*See, e.g.*, R. 23:2.) While there were no express threats in the letters, the letters indicated the possibility of a "high level of potential disruption" if Benford became dissatisfied with what was happening at trial. (R. 107:33–34.)

The letters were one factor in the totality of the circumstances that led the court to its conclusion. The court was tasked with determining whether restraints were needed to maintain order, decorum, and safety in the courtroom. That determination requires an assessment of past actions and statements as indicators of the need for restraints. The circuit court was not required to ignore indicators and to wait to see if Benford was violent at trial before ordering the use of restraints.

Benford next argues that his past actions in court and in jail should be viewed as most predictive of his behavior at trial. (Benford's Br. 17.) This argument ignores that pre-trial proceedings are inherently different than trial proceedings. Trial proceedings are emotionally charged events. There is no way for a court to predict with certainty whether a defendant will be violent at trial, nor is that required by law. Rather, restraints can be properly used as a reasonable *precaution* so long as the court exercised it discretion and set forth its reasons on the record. *Flowers v. State*, 43 Wis. 2d

352, 363–64, 168 N.W.2d 843 (1969). The court did so here, and the fact that Benford had not yet displayed physical aggression in the courtroom or in jail did not preclude the conclusion that the use of restraints at trial was warranted.

Benford challenges the court's conclusion that there were no reasonable alternatives to the use of the stun belt. (Benford's Br. 18.) Benford cites to no binding authority that would require the court to consider alternatives. That said, the circuit court rejected alternatives such as increased courtroom security and shackles because both of those alternatives would not be as effective as a stun belt if Benford were to become violent. Likewise, both alternatives would have been readily apparent to the jury. The court's exercise of discretion included a careful balancing of competing interests in the use of restraints and rejected alternatives as unduly prejudicial. The State fails to understand how a careful consideration of alternatives before the rejection of those alternatives amounts to an erroneous exercise of discretion.

At the heart of Benford's claim is his request that this Court should conclude that a stun belt is an extreme form of restraint that requires a different level of judicial scrutiny. (Benford's Br. 18–20.) This Court should reject that request as contrary to Wisconsin law and as unsupported by the cases upon which Benford relies. Rather, the cases cited by Benford all reach the conclusion that an order for the use of a stun belt as a restraint device is subject to the *same* level of scrutiny as other devices, such as shackles. *Gonzalez v. Pliler*, 341 F.3d 897, 901 (9th Cir. 2003) (citing *United States v. Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002)); *People v. Allen*, 856 N.E.2d 349, 353 (Ill. 2006); *Leonard*, 813 N.E.2d at 63 (citing *Durham*, 287 F.3d at 1306); *Hymon v. State*, 111 P.3d 1092, 1099 (Nev. 2005) (citing *Durham*, 287 F.3d at 1306). Those cases make clear that courts in those jurisdictions, not law enforcement, must make a

determination that the use of a stun belt is appropriate. *Gonzalez*, 341 F.3d at 902; *Allen*, 856 N.E.2d at 353–54; *Leonard*, 813 N.E.2d at 62; *Hymon*, 111 P.3d at 1099. That is exactly what occurred here, and there is no basis to conclude that the court erroneously exercised its discretion.

Finally, the fact that Indiana has banned the use of stun belts is inconsequential to this case. (*See* Benford's Br. 19–20.) Stun belts have not been banned in Wisconsin. The issue on review is whether the circuit court properly exercised its discretion before determining that Benford would be required to wear a stun belt at trial. The court did so.

II. Benford's decision to waive his constitutional and statutory right to be present at trial was voluntary.

A defendant's right to be present at trial is protected both in the federal and Wisconsin constitutions[5] and by statute.[6] A defendant has a constitutional right to be present in the courtroom at all stages of his trial. *Divanovic*, 200 Wis. 2d at 219–20.

A defendant may waive both the constitutional and statutory right to be present. *Divanovic*, 200 Wis. 2d at 221; *State v. Soto*, 2012 WI 93, ¶¶ 39–40, 343 Wis. 2d 43, 817 N.W.2d 848. As relevant here, waiver occurs when there is an intentional relinquishment or abandonment of a known right. *See State v. Ndina*, 2009 WI 21, ¶¶ 28–31, 315 Wis. 2d 653, 761 N.W.2d 612 (discussing waiver of a statutory right);

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[5] U.S. Const. amend. XIV; Wis. Const. art. 1, § 8; *State v. Divanovic*, 200 Wis. 2d 210, 219–20, 546 N.W.2d 501 (Ct. App. 1996).

[6] Wis. Stat. § 971.04.

State v. Suriano, 2017 WI 42, ¶¶ 22–24, 374 Wis. 2d 683, 893 N.W.2d 543 (discussing waiver of a constitutional right).

There is no dispute that Benford's wavier was knowing and intelligent. Benford was informed of his right to be present, and there was no indication that he did not understand that right. The question in this case is whether Benford's express waiver was voluntary. When it comes to the relinquishment of a right through express waiver, "[a] voluntary and intelligent choice always involves two or more alternatives, each having some compelling power of acceptance." *Rahhal v. State*, 52 Wis. 2d 144, 151, 187 N.W.2d 800 (1971). "The distinction between a motivation which induces and a force which compels the human mind to act must always be kept in focus." *Id.* "'[S]elf imposed coercive elements' . . . do not vitiate the voluntary nature" of a relinquishment of right. *Craker v. State*, 66 Wis. 2d 222, 229, 223 N.W.2d 872 (1974) (citation omitted).

Benford's argument that he did not voluntarily waive his right to be present turns on whether the circuit court erred in requiring him to wear a stun belt at trial. (Benford's Br. 21–23.) As addressed above, the court did not err. And Benford's decision to waive his right to be present on the second day of trial was voluntary even if it was motivated by factors related to the court's order. While Benford initially had fears related to the possibility of malicious activation of the stun belt, those fears appeared to be mitigated (to some extent), and Benford chose to wear the stun belt for the first day of trial. (R. 107:39–40; 108:1.) Benford wore the stun belt without incident, and the stun belt did not appear to hinder Benford's participation in his defense. (R. 110:22–23.) Thus the cases cited by Benford that note generically that wearing a stun belt might chill a defendant's participation at trial do not apply here.

Furthermore, when Benford objected to wearing the stun belt on the second day of trial, the primary factor at play was Benford's belief that he was being treated unfairly due to his race. While some level of fear was likely still in play, Benford's fear and his belief that he was being treated unfairly were self-imposed and motivated by extraneous sources. Benford's previously expressed fear of malicious activation of the stun belt was motivated by news reports about African Americans being mistreated or killed by law enforcement officers around the country. (R. 107:5.) Similarly, Benford's beliefs that the court was prejudiced against him and that he could not get a fair shake unless he was represented by an African American attorney were primarily motivated by outside sources telling him as much. (R. 14:3.)

To be sure, Benford did have complaints about his treatment specifically, but those complaints were related to the investigation of his case, his defense counsel's unwillingness to ask specific questions, and the State's charging decisions. (R. 110:5–11.) Keeping that context in mind, it is most likely that Benford chose to waive his right to be present because he was dissatisfied with his attorney and disappointed in the court's decision to deny his request for new counsel.

Trials are stressful and induce fear in defendants, especially when they are charged with crimes that may result in lengthy sentences. If that stress and fear invalidate a waiver of a statutory or constitutional right, then most waivers will be involuntary. That is not the law. "'[S]elf imposed coercive elements' . . . do not vitiate the voluntary nature" of the relinquishment of a right. *Craker*, 66 Wis. 2d at 229. Thus, this Court should conclude that Benford's waiver was voluntary.

CONCLUSION

For the foregoing reasons, this Court should affirm Benford's amended judgment of conviction.

Dated this 15th day of May, 2018

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,587 words.

Dated this 15th day of May, 2018.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 15th day of May, 2018.

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