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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019AP1977-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY F. ATWATER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN DODGE COUNTY CIRCUIT COURT, THE HONORABLE MARTIN J. DE VRIES, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

Wisconsin Stat. § 807.13(2) allows a circuit court to exercise its discretion and admit oral testimony through audiovisual means in "civil actions and proceedings, including those under chs. 48, 51, 54, and 55." Does sec. 807.13 generally apply in criminal proceedings, including a plea withdrawal motion initiated under Wis. Stat. § (Rule) 809.30 and § 974.02?

The circuit court did not directly decide where sec. 807.13 applied, but it denied Gregory F. Atwater's request to allow trial counsel to appear by telephone at a *Machner*[1] hearing.

This Court should decide that sec. 807.13 does not allow testimony by audiovisual means in postconviction proceedings under Wis. Stat. § (Rule) 809.30 and § 974.02. While the circuit court could have allowed the testimony through videoconferencing under Wis. Stat. § 885.60, the circuit court reasonably exercised its discretion when it denied Atwater's request, and its decision is not appealable under Wis. Stat. § 885.56(2).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

Atwater pleaded no-contest to battery by a prisoner. After he was sentenced, Atwater moved for postconviction

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

relief. He asked to withdraw his plea, alleging that trial counsel was ineffective for failing to investigate his case.

Relying on sec. 807.13, Atwater asked the circuit court to allow trial counsel to appear at the *Machner* hearing by telephone and to allow three inmates to appear through videoconferencing. The State opposed Atwater's motion, identifying several reasons why trial counsel and the inmates should testify in person. The circuit court denied Atwater's request to have them testify by telephone or videoconferencing.

The circuit court denied Atwater's plea withdrawal motion because Atwater's motion did "not allege sufficient nonconclusory facts, that if true, would entitle [Atwater] to relief" and because he did "not bring trial counsel to the hearing." (R. 83.)

Atwater has not appealed the circuit court's determination that his motion did not allege sufficient nonconclusory facts that would have entitled him to relief. If the motion was insufficient, then the circuit court could have denied the motion without an evidentiary hearing. And if Atwater was not entitled to an evidentiary hearing, then this Court need not address whether the circuit court erred when it denied Atwater's request to allow trial counsel to appear telephonically.

Alternatively, contrary to Atwater's position, sec. 807.13(2) does not allow a circuit court to take witness testimony through audiovisual means in criminal cases, including at a postconviction hearing under Wis. Stat. § (Rule) 809.30 and § 974.02. However, Wis. Stat. 885.60(1) allows a party in a criminal matter, including a "post-trial proceeding," to move to admit a witness's testimony via videoconferencing at an evidentiary hearing. A circuit court can exercise its discretion and allow the testimony based on consideration of several statutory factors. And here, several factors that the

State identified justified the circuit court's decision to decline Atwater's request to allow trial counsel to appear by telephone. Because the circuit court considered the factors the State identified to deny Atwater's request, the circuit court denial is not appealable under Wis. Stat. § 885.56(2).

STATEMENT OF THE CASE

The State charged Atwater with battery by a prisoner as a repeater, contrary to Wis. Stat. §§ 939.62(1)(b) and 940.20(1). (R. 1:1.) Atwater pleaded no contest. (R. 44:1.) The circuit court imposed and stayed a prison sentence consisting of an 18-month term of confinement followed by a 12-month term of extended supervision. (*Id.*) The circuit court ordered Atwater's probation to be served consecutively to any other sentence he was serving. (*Id.*)

Atwater filed a postconviction motion under Wis. Stat. § (Rule) 809.30(2)(h) seeking to withdraw his plea.[2] (R. 60:1.) He alleged that trial counsel was ineffective because she did not adequately investigate the case by identifying and interviewing eyewitnesses. (R. 60:3.) Atwater asserted he would have insisted on going to trial because an investigation would have supported his self-defense claim and undermined the credibility of the correctional officers' description of the incident. (*Id.*) The motion included detailed allegations supporting his claim. (R. 60:3–6.) Alternatively, the motion asked the circuit court to allow plea withdrawal in the interest of justice for reasons like those presented in support of Atwater's ineffective assistance claim. (R. 60:7.)

[2] Atwater also asked the circuit court to award an additional day of sentence credit and vacate his fines. (R. 60:8.) Atwater does not raise these issues on appeal and the State does not address them further.

The State informed the circuit court that it agreed with Atwater's request for an evidentiary hearing to address his ineffective assistance claim. (R. 68.)

Atwater asked the court to allow trial counsel to appear by telephone because she lived in Missouri and to allow inmate witnesses to appear by telephone or videoconferencing. (R. 69.) The State objected at a scheduling conference. (R. 71:1.) Atwater subsequently moved the circuit court to allow trial counsel to appear by telephone and the inmates to appear through videoconferencing. (R. 71.) The circuit court ordered the parties to brief whether trial counsel could appear by telephone and the other witnesses could appear by videoconferencing or telephone. (R. 72.)

Atwater asked the circuit court to allow testimony by telephone under sec. 807.13. (R. 76:1.) While recognizing that sec. 807.13 applies to civil cases, Atwater argued that this section authorized the circuit court to allow trial counsel's and the inmates' testimony through telephone or audiovisual means at a postconviction hearing. (R. 76:1, 5.)

Relying on sec. 807.13, Atwater identified several reasons why the circuit court should allow trial counsel to appear by phone. He noted that trial counsel lived in Missouri and that the state public defender would not reimburse her travel expenses. (R. 76:2–3.) In addition, trial counsel said that she would miss several days of work to travel to Wisconsin and there would be significant challenges scheduling transportation and childcare. (R. 76:3.)[3]

The State opposed Atwater's request. (R. 77:1.) It emphasized the importance of trial counsel's testimony at the

[3] Alternatively, Atwater asked the circuit court to permit trial counsel's telephonic testimony under Wis. Stat. § 906.11. (R. 76:4–5.) On appeal, Atwater does not advance an argument based on Wis. Stat. § 906.11. The State does not address it further.

hearing, noting the challenges of refreshing her testimony with file documents from a case that she handled five years earlier. (R. 77:1–2.) It also argued that the public defender's desire not to pay counsel's expense was not "upon balance, a compelling reason to allow [her] to appear by telephone." (R. 77:2.) The State objected to allowing the inmate witnesses to appear by telephone or video conferencing because it would not allow the court to observe their demeanor or impress upon them to testify truthfully. (R. 77:2.)

In June 2019, the circuit court agreed with the objections that the State raised and issued an order denying Atwater's motion to allow witnesses to appear by telephone. (R. 78.)

On September 25, 2019, Atwater filed an affidavit from trial counsel. (R. 82:2.) In her affidavit, trial counsel stated that she was available to appear by telephone or through audiovisual means. (R. 82:2.) She explained that travel would cause a severe hardship due to her family and work responsibilities. (R. 82:2.) In addition, she explained that since June 2019, she had been under medical care and been placed on restrictions related to sitting or standing for long time periods. (R. 82:3.)

On September 25, 2019, the circuit court issued an order denying Atwater's postconviction motion because he "will not bring trial counsel to the hearing." (R. 83:1.) The circuit court also denied the motion because it did "not allege sufficient nonconclusory facts, that if true, would entitle the defendant to relief." (R. 83:1.)

STANDARD OF REVIEW

Atwater asks this Court to interpret Wis. Stat. § 807.13, which the supreme court adopted by court order. *See* Sup. Ct. Order, 141 Wis. 2d xiii, xxiv–xxv (eff. Jan. 1, 1988). When this Court interprets supreme court rules, it relies on the rules of

statutory construction for guidance. *State v. Sorenson (In re Commitment of Sorenson)*, 2000 WI 43, ¶ 15, 234 Wis. 2d 648, 611 N.W.2d 240. Like a question of statutory interpretation and application, the interpretation and application of a supreme court rule presents a question of law. *State v. Henley*, 2010 WI 12, ¶ 9, 322 Wis. 2d 1, 778 N.W.2d 853. This Court reviews the interpretation of a supreme court rule independently without deference to the circuit court. *Sorenson*, 234 Wis. 2d 648, ¶ 15.

The decision to allow testimony by telephone or through other audiovisual means rests within the circuit court's sound discretion. *Welytok v. Ziolkowski*, 2008 WI App 67, ¶ 32, 312 Wis. 2d 435, 752 N.W.2d 359 (interpreting sec. 807.13). Ordinarily, this Court will not overturn a circuit court's exercise of discretion unless there is a clear showing that the circuit court exercised its discretion in an erroneous manner. *State v. Rocha-Mayo*, 2014 WI 57, ¶ 22, 355 Wis. 2d 85, 848 N.W.2d 832. However, this Court may not review a circuit court's decision declining to allow videoconferencing under sec. 885.60(2) because the "denial of the use of videoconferencing technology is not appealable." Wis. Stat. § 885.56(2)

ARGUMENT

The circuit court properly exercised its discretion when it denied Atwater's request to have his trial counsel testify by telephone at his postconviction hearing.

Atwater contends that sec. 807.13 allows a circuit court to take testimony in criminal cases, including postconviction proceedings. (Atwater's Br. 1.) The State disagrees. First, the State explains why this Court need not decide whether a circuit court may take testimony by telephone under sec. 807.13(2) in criminal cases because Atwater did not appeal the circuit court's decision that his postconviction motion was

insufficient. Second, the State addresses why sec. 807.13(2) does not permit a witness's testimony by telephone in a criminal case. Third, the State explains that sec. 885.60(2) confers discretion on circuit courts to allow testimony through videoconferencing in criminal cases. Fourth, the State demonstrates why the circuit court properly denied Atwater's request for trial counsel's telephonic testimony based on sec. 885.56's criteria for deciding whether to allow testimony by videoconferencing.

A. This Court need not decide if the circuit court erred when denying telephonic testimony because Atwater did not appeal its determination that his motion alleged insufficient facts for relief.

The circuit court denied Atwater's postconviction motion for two reasons. First, Atwater's plea withdrawal motion did not "allege sufficient nonconlusory facts, that if true, would entitle [Atwater] to relief." (R. 83:1.) Second, Atwater did "not bring trial counsel to the hearing." (*Id*.)

On appeal, Atwater incorrectly contends that the circuit court denied his postconviction motion without a *Machner* hearing "solely on the basis that the 'defendant will not bring trial counsel to the hearing.'" (Atwater's Br. 1, 8.) Atwater's appeal does not address the circuit court's second determination that his motion did not allege a sufficient basis for granting plea withdrawal. (R. 83:1.) And if his pleading did not allege sufficient nonconclusory facts to entitle him to plea withdrawal, the circuit court could have denied Atwater's postconviction motion without an evidentiary hearing. *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659.

The principles of forfeiture and abandonment should foreclose this Court's consideration of whether the circuit court erred when it determined that Atwater's plea withdrawal motion did not allege sufficient nonconclusory

facts entitling him to relief. (R. 83:1.) Under the forfeiture doctrine, "a party who does not raise an appealable issue before the appropriate appellate tribunal forfeits it." *Tikalsky v. Friedman*, 2019 WI 56, ¶ 38, 386 Wis. 2d 757, 928 N.W.2d 502, *reconsideration denied*, 2019 WI 89, 388 Wis. 2d 656, 933 N.W.2d 32; *see also State v. Beamon*, 2013 WI 47, ¶ 49, 347 Wis. 2d 559, 830 N.W.2d 681 (recognizing that the rule of forfeiture is a rule of administration). Under the abandonment doctrine, "issues raised but not briefed or argued are deemed abandoned." *State v. Johnson*, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994).

Atwater has forfeited and abandoned any challenge he had to the circuit court's determination that his postconviction motion did "not allege sufficient nonconclusory facts, that if true, would entitle the defendant to relief." (R. 83:1.) Further, this Court should decline to make Atwater's argument for him because this Court does not ordinarily develop arguments for appellants and does not "ordinarily consider arguments that are not specifically raised on appeal." *State v. Goetz*, 2001 WI App 294, ¶ 18, 249 Wis. 2d 380, 638 N.W.2d 386. Therefore, Atwater's failure to appeal the circuit court's finding that his plea withdrawal motion did not allege sufficient, nonconclusory facts amounts to forfeiture and abandonment of this claim.[4]

Based on Atwater's failure to appeal the circuit court's decision concerning the sufficiency of his plea withdrawal motion, this Court should conclude that the circuit court

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[4] In reply, Atwater may assert that the State's position on appeal regarding the insufficiency of his pleading is inconsistent with the State's concession before the circuit court that Atwater should receive an evidentiary hearing. (R. 60:3–6; 68:1.) But as this Court has recognized, the "respondent may raise any defense to an appeal even if that defense is inconsistent with the stand taken at trial." *State v. Baeza*, 156 Wis. 2d 651, 657–58, 457 N.W.2d 522 (Ct. App. 1990).

properly decided it. And if Atwater was not entitled to plea withdrawal because his motion did not allege sufficient nonconclusory facts entitling him to relief, he was not entitled to an evidentiary hearing. *Sulla*, 369 Wis. 2d 225, ¶ 23. Therefore, this Court need not address whether the circuit court erred when it declined to allow trial counsel to appear by telephone under sec. 807.13.

B. Section 807.13(2) does not authorize a circuit court to allow testimony by telephone or other audiovisual means at postconviction hearing under Wis. Stat. § (Rule) 809.30 and § 974.02.

Atwater contends that Wis. Stat. § 807.13(2) authorizes telephone testimony in criminal cases and that the circuit court erred when it did not allow trial counsel to testify by telephone at the *Machner* hearing. (Atwater's Br. 9–19.) The State disagrees.

Wisconsin Stat. § 807.13(2) permits a court to admit telephonic and audiovisual testimony in civil actions and proceedings:

> *In civil actions and proceedings, including those under chs. 48, 51, 54, and 55*, the court may admit oral testimony communicated to the court on the record by telephone or live audiovisual means, subject to cross-examination, when:
>
> (a) The applicable statutes or rules permit;
>
> (b) The parties so stipulate; or
>
> (c) The proponent shows good cause to the court.

Wis. Stat. § 807.13(2). Section 807.13(2)(c) identifies several considerations that a circuit court may consider in assessing good cause for a witness's telephonic or other audiovisual testimony.

Section 807.13(2) does not broadly authorize circuit courts to allow telephonic testimony in *any* case. Rather it

expressly limits telephonic testimony to "*civil actions and proceedings*, including those under chs. 48, 51, 54, and 55." A criminal action, including a postconviction proceeding, is unlike a "civil action" or a proceeding "under chs. 48, 51, 54, and 55." Section 807.13(2) is unambiguous, and based on its plain meaning, this section does not confer authority on circuit courts to take witness testimony in criminal proceedings—before, during, or after trial. *State v. Grunke*, 2008 WI 82, ¶ 22, 311 Wis. 2d 439, 752 N.W.2d 769 (unambiguous statutes are applied according to plain meaning of its terms).

Despite sec. 807.13(2)'s limitations to civil actions and specifically designated proceedings, Atwater nonetheless asks this Court to hold that sec. 807.13(2) allows telephonic witness testimony at a postconviction hearing in a criminal case. Atwater correctly notes that sec. 967.08 allows circuit courts to conduct certain proceedings in criminal cases by telephone. But recognizing that this section does not provide for telephonic testimony, Atwater argues that sec. 967.08 identifies what proceedings a circuit court can conduct *entirely* by telephone or other audiovisual means. (Atwater's Br. 10.) Relying on *State v. Vennemann*, 180 Wis. 2d 81, 508 N.W.2d 404 (1993), Atwater contends that sec. 967.08 does not limit a circuit court from conducting part of a criminal proceeding, including taking a witness's testimony, by telephone or video under sec. 807.13(2). (Atwater's Br. 10–11, 14.)

Atwater reads *Vennemann* too narrowly. In *Vennemann*, the supreme court stated, "We conclude that when a defendant must be physically present, sec. 967.08 does not authorize the use of a telephone in a postconviction evidentiary hearing pursuant to secs. 974.02 and 809.30(2)(h)." *Vennemann*, 180 Wis. 2d at 96. As the court explained, "In the design and implementation of sec. 967.08, an evidentiary hearing pursuant to secs. 974.02 and

809.30(2)(h) is not included in the list of judicial proceedings which may be conducted by phone." *Id*. at 96 n. 11. In reaching its conclusion, the court also "noted that sec. 967.08 applies to criminal proceedings such as the one at issue. It is *distinguished from sec. 807.13, Stats., which applies to telephone proceedings in civil cases*." *Id*. (emphasis added). Thus, while *Vennemann* concerned the requirements for a defendant's physical appearance at certain hearings, its analysis recognized that sec. 807.13 applied exclusively to civil actions and sec. 967.08 applied to criminal actions.

In its analysis, the supreme court noted that it created sec. 967.08 through a court order. *Vennemann*, 180 Wis. 2d at 96 n.11. In fact, both secs. 807.13 and 967.08 were originally promulgated together through a Wisconsin Supreme Court order in October 1987. Sup. Ct. Order, 141 Wis. 2d xiii, xiii–xxxiii (eff. Jan. 1, 1988). Under the canon of statutory construction *in pari materia*, "statutes passed in the same legislative act on the same subject must be construed together." *Waranka v. Wadena Ins. Co*., 2014 WI 28, ¶ 17, 353 Wis. 2d 619, 847 N.W.2d 324. That is, where "statutes of such direct and immediate linkage are passed under identical circumstances, they must be considered *in pari materia* and harmonized if possible." *State v. DILHR*, 101 Wis. 2d 396, 403, 304 N.W.2d 758 (1981). The supreme court's recognition that sec. 807.14 applies exclusively to civil cases and 967.08 applies exclusively to criminal cases harmonizes the two statutes.

Subsequent amendments to the rules of criminal procedure incorporating sec. 807.13 by reference into specific criminal proceedings confirm the interpretation that sec. 807.13 does not generally apply to criminal proceedings. For example, a circuit court may receive telephone testimony under sec. 807.13(2)(c) from witnesses in competency hearings under Wis. Stat. § 971.14(1r)(c) and (4)(b), and in post-commitment proceedings following a determination that

a defendant is not guilty by reason of mental disease or defect under Wis. Stat. § 971.17(7)(d). With respect to a restitution hearing under Wis. Stat. § 973.20(13) and a postconviction hearing under Wis. Stat. § 974.06, a court may order the defendant's appearance under sec. 807.13 in lieu of an in-person appearance.

Nonetheless, relying on sec. 972.11(1), Atwater argues the circuit court had the authority to take trial counsel's testimony in his postconviction proceeding under sec. 807.13. (Atwater's Br. 14.) Section 972.11(1) provides that the rules of civil practice apply to criminal proceedings "unless the context of a section or rule manifestly requires a different construction." Section 807.13(2)'s language limiting telephone and audiovisual testimony to civil cases and certain proceedings, none of which encompass criminal cases, manifestly requires a different construction than Atwater advocates, i.e., that telephonic testimony is allowed under sec. 807.13(2). Atwater's interpretation renders meaningless the supreme court's language limiting sec. 807.13(2) to civil actions. *Belding v. Demoulin*, 2014 WI 8, ¶ 17, 352 Wis. 2d 359, 843 N.W.2d 373 ("Statutory interpretations that render provisions meaningless should be avoided."). And Atwater's interpretation renders as surplusage the subsequent amendments to the rules of criminal procedure that incorporated sec. 807.13 by reference into specific criminal proceedings. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (avoid surplusage).

As the State discusses, *infra* Section C., Atwater's interpretation of sec. 807.13(2) would render meaningless sec. 885.60(1), which expressly authorizes circuit courts to permit testimony through videoconferencing in criminal cases, including postconviction proceedings.

C. With certain restrictions, Wis. Stat. § 885.60(1) authorizes the circuit court to take a witness's testimony through videoconferencing in criminal cases.

Before the circuit court and this Court, Atwater has overlooked Wis. Stat. § 885.60, which provides for videoconferencing subject to certain "standards," "criteria," and "limitations" in criminal cases. Wisconsin Stat. § 885.52(3) defines "videoconferencing" as "an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video monitors." Videoconferencing does not include testimony by telephone since the later does not involve sending video signals by "simultaneously using video monitors." *Id.*

Wisconsin Stat. § 885.60(1) provides, in part, that "a circuit court may, on its own motion or at the request of any party, in any criminal case . . . permit the use of videoconferencing technology in *any pre-trial, trial or fact-finding, or post-trial proceeding*." Under section 885.60(2)(b), the "proponent of a witness via videoconferencing technology at *any evidentiary hearing, trial, or fact-finding hearing*" must notify the opposing party 20 days before the hearing.

If the State objects to the defendant's motion for a witness's testimony via videoconferencing, "the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56." Wis. Stat. § 885.60(2)(c).

Wisconsin Stat. § 885.56(1) provides that "the circuit court may consider one or more" criteria listed in sec. 885.56(1)(a)–(k). As argued, *infra* Section D., several of these statutory factors apply in Atwater's case:

> (b) Whether the proponent of the use of videoconferencing technology has been unable, after a diligent effort, to procure the physical presence of a witness.

> (c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.
>
> (d) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.
>
> (e) The importance of the witness being personally present in the courtroom where the dignity, solemnity, and decorum of the surroundings will impress upon the witness the duty to testify truthfully.

Wis. Stat. § 885.56(1). In addition, the circuit court may consider "[a]ny other factors that the court may in each individual case determine to be relevant." Wis. Stat. § 885.56(1)(L).

However, a party has no right to appeal the circuit court's decision denying the use of video technology. Wisconsin Stat. § 885.56(2) unequivocally provides, "The *denial* of the use of videoconferencing technology is *not appealable*."

While sec. 885.60(2) confers discretion on a circuit court to receive testimony through videoconferencing, Atwater might still argue that the circuit court could have allowed trial counsel's testimony under sec. 807.13(2) based on sec. 972.11(1). (Atwater's Br. 14–15.) Atwater's analysis of sec. 972.11(1) ignores its last sentence: "*Chapters 885* to 895 and 995, except ss. 804.02 to 804.07 and 887.23 to 887.26, *shall apply in all criminal proceedings*." Wis. Stat. § 972.11(1).

In *State v. Wilson*, 2017 WI 63, 376 Wis. 2d 92, 896 N.W.2d 682, the supreme court provided guidance on how to interpret sec. 972.11(1) when the more general rules of civil procedure and a provision in ch. 885 conflict. In *Wilson*, the court addressed whether Wis. Stat. §§ 801.11 and 805.07 or Wis. Stat. § 885.03, which concern procedures for substitute

service of subpoenas, applied in criminal cases. *Wilson*, 376 Wis. 2d 92, ¶¶ 25–29. The supreme court determined that sec. 972.11(1)'s explicit reference to ch. 885 makes "the more specific textual provision. In contrast, the rules of civil procedure are only generally applied to criminal cases through Wis. Stat. § 972.11(1). Thus, service of a witness subpoena in a criminal proceeding is controlled by Wis. Stat. § 885.03, rather than by the rules of civil procedure." *Wilson*, 376 Wis. 2d 92, ¶ 36.

Similarly, by operation of 972.11(1), sec. 885.60(2) is more specific than sec. 807.13(2), a rule of civil procedure. Therefore, sec. 885.60(2), and not sec. 807.13(2), guides a circuit court's determination of whether to allow a witness to appear other than in person in a criminal case.

D. Even if this Court construed Atwater's motion as a request for videoconferencing technology under Wis. Stat. § 885.60, the circuit court properly denied Atwater's request, and its decision is not appealable.

Because sec. 885.60 applies to "any pre-trial, trial or fact-finding, or post-trial proceeding" in a criminal case, Atwater could have moved the circuit court to allow videoconferencing to facilitate the litigation of his postconviction motion under Wis. Stat. § (Rule) 809.30(2)(h) and § 974.02. Wis. Stat. § 885.60(1). And further, because sec. 885.60(2) allows a party to present a witness's testimony through videoconferencing "at any evidentiary hearing" in a criminal case, Atwater could have asked to present trial counsel's testimony through videoconferencing at his *Machner* hearing.

But even if Atwater had properly invoked sec. 885.60(2)(b) when he requested that trial counsel be allowed to appear by telephone, Atwater cannot prevail on appeal.

The circuit court's decision to deny the use of videoconferencing for trial counsel's testimony "is not appealable." Wis. Stat. § 885.56(2). Atwater might suggest that this sanction should not apply because the motion was not litigated under sec. 885.60(2). But this was Atwater's fault because he moved to admit trial counsel's testimony under sec. 807.13, a provision that does not generally apply to criminal cases. And under the invited error doctrine, this Court generally does not review an issue on appeal when the appellant invited error in the circuit court. *In re Support of C.L.F.*, 2007 WI App 6, ¶ 15, 298 Wis. 2d 333, 727 N.W.2d 334.

Second, even if the circuit court's denial were appealable, this Court would affirm. Atwater's request and the prosecutor's response were consistent with sec. 885.60(2)'s framework.[5] Atwater identified several reasons, consistent with sec. 885.56(1)'s criteria, for allowing trial counsel's and the inmates' testimony, including trial counsel's convenience, the costs of producing the witness associated with her travel expenses, and the court's ability to adequately assess trial counsel's credibility by telephone. (R. 71:1–2.) In a supporting brief, Atwater again identified several factors that supported taking trial counsel's testimony by telephone, including the absence of surprise, the logistics and costs of procuring trial counsel's appearance, the convenience to trial counsel, and

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[5] On appeal, Atwater asserts that his counsel should have been allowed to appear by telephone or through video. (Atwater's Br. 1.) But in his motion and supporting brief, he asked that counsel be allowed to appear telephonically and the inmates by video or telephone. (R. 71:2; 76:4–5.) Atwater's request to allow counsel to appear telephonically would not have satisfied sec. 885.60's videoconferencing requirements because it does not involve simultaneous use of broadcast monitors. Wis. Stat. § 885.52(3). For analysis, even assuming Atwater had asked the circuit court to present counsel's testimony through videoconferencing, the circuit court could have denied this request for the reasons the State articulated in its objection.

the State's ability to adequately cross-examine trial counsel. (R. 76:2–3.) While Atwater relied on the factors listed in sec. 807.13 to advance his argument, these factors are identical in many respects to sec. 885.56(1)'s criteria. *Compare* Wis. Stat. § 807.13(2)(c) with Wis. Stat. § 885.56(1)(a)–(j).

In his brief, Atwater references trial counsel's September 17, 2019, affidavit noting medical limitations on her travel. (Atwater's Br. 1, 7; R. 82:2–3.) But Atwater did not file this affidavit until September 25, 2019, (R. 82), three months after the circuit court denied the motion for telephonic testimony (R. 78), and on the same day the circuit court denied the postconviction motion (R. 83). Based on the untimeliness of the submission of the information about trial counsel's medical condition, Atwater should not fault the circuit court for not considering it.

The State objected to taking trial counsel's testimony by telephone. (R. 77:1–2.) The State did not argue that the circuit court lacked the authority to take trial counsel's testimony by telephone. (*Id*.) Rather, consistent with sec. 885.56(1)'s criteria, the State identified reasons why the circuit court should deny Atwater's request for telephonic or audiovisual testimony. (*Id*.) First, it highlighted the legal importance of trial counsel's testimony at a *Machner* hearing. (R. 77:1); Wis. Stat. § 885.56(1)(e). Second, the State disagreed with Atwater's assessment that it could meaningfully cross-examine trial counsel by telephone, specifically noting the challenge of showing trial counsel documents and the likely need to refresh trial counsel's recollection based on the case's age. (R. 77:1–2); Wis. Stat. § 885.56(1)(d). Third, it argued in-person testimony was necessary because Atwater's liberty interest was at stake. (R. 77:2); Wis. Stat. § 885.56(1)(f). Fourth, the State asserted that Atwater's desire not to pay the trial counsel's expenses was not a compelling reason to allow her to appear telephonically. (R. 77:2); Wis. Stat. § 885:56(1)(c). Fifth, with respect to the inmate witnesses, the

State argued that their presence was necessary because it would allow the circuit court to observe their demeanor and "the solemnity of the surroundings" would impress on them their "duty to testify truthfully." (R. 77:2); Wis. Stat. § 885.56(1)(e).

Finally, in response to Atwater's argument that doctors are regularly afforded the courtesy of testifying by telephone, the State noted Atwater's case was different. (R. 77:2.) In contrast to doctors who typically testify about a recent examination documented in a report provided to the parties, trial counsel's testimony related to events that were not recent and for which no report was prepared. (*Id*.) Atwater's argument also ignores specific statutes that expressly authorize circuit courts to take a medical professional's testimony by phone. Wis. Stat. §§ 971.14(1r)(c), (4)(b) (competency proceedings), and 971.17(7)(d) (mental responsibility proceedings).

The circuit court denied Atwater's motion for telephonic testimony. (R. 78.) It did not do so because it determined that telephonic testimony was not generally allowed. (*Id*.) Rather, it denied the motion based on its review of the parties' submissions and its agreement with the objections that the State raised. (*Id*.) The State's objections were consistent with the criteria identified in sec. 885.56(1). (R. 77:1–2.) And the circuit court was entitled to decide whether to allow videoconferencing under sec. 885.56(1)'s criteria.

The circuit court reasonably exercised its discretion when it denied Atwater's request to allow trial counsel to appear by telephone at a *Machner* hearing, and its decision is not subject to this Court's review.

CONCLUSION

This Court should affirm Atwater's judgment of conviction and order denying postconviction relief.

Dated this 6th day of May 2020.

Respectfully submitted,

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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 4935 words.

Dated this 6th day of May 2020.

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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 6th day of May 2020.

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