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Session 4

Making the Record: Tips for Winning at the Trial and Appellate Courts

Moderator: *Nicholas C. Watt, Kramer, Elkins & Watt, LLC, Madison*
Panelists:
Hon. Brian W. Blanchard, Wisconsin Court of Appeals, District IV, Madison
Hon. Maria S. Lazar, Wisconsin Court of Appeals District II, Waukesha
Cole D. Ruby, Martinez & Ruby, LLP, Baraboo
Hon. John P. Zakowski, Brown County Circuit Court, Branch 6, Green Bay

About the Presenters...

Hon. Brian W. Blanchard was first elected to the Wisconsin Court of Appeals (District IV) in 2010 and reelected in 2016 and 2022. Before that, he was: Dane County District Attorney (four terms); an attorney in private practice, Madison; an Assistant U.S. Attorney, N.D. Illinois; Law Clerk, Hon. Walter Cummings, Jr., U.S. Court of Appeals for the 7th Circuit; reporter, The Miami Herald newspaper. His law-related activities have included: giving regular CLE presentations on criminal law and appellate practice topics; Presiding Judge - District IV, Court of Appeals; Vice Chair, Wisconsin Judicial Council; Chair, Judicial Council - Criminal Procedure Committee; board member, State Bar of Wisconsin Appellate Practice Section and Criminal Law Section; Co-Chair, Our Courts Committee of the State Bar of Wisconsin's Public Education Committee; member, Planning Subcommittee of the Planning and Policy Advisory Committee of the Wisconsin court system.

Hon. Maria S. Lazar, Wisconsin Court of Appeals, District II, August, 2022. Waukesha County Circuit Court Judge, August, 2015-July, 2022, rotations included Presiding Judge Juvenile Division; Criminal Division, Presiding Judge; Drug Treatment Court Judge; and Civil Division. Formerly a Wisconsin Assistant Attorney General, in the Special Litigation and Appeals unit and was in private practice for 20 years. Judge Lazar earned her B.A. degree, magna cum laude, from Mount Mary College and her J.D. from Georgetown University Law Center. Contact Information: maria.lazar@wicourts.gov

Cole D. Ruby is universally recognized as one of the leading appellate attorneys in the state of Wisconsin. Ruby focuses his practice on litigating appeals following convictions at jury trials. He has successfully litigated post-conviction issues in cases involving drug trafficking, sexual assault, possession of child pornography, arson and homicide. On several occasions, Attorney Ruby has been able to have convictions overturned and charges dismissed completely, following clients being convicted at jury trial while represented by other attorneys. Attorney Ruby is also an accomplished trial lawyer. Together with Andrew Martinez, he is a two-time recipient of the Wisconsin Association of Criminal Defense Lawyers' Hanson Award, which is presented to attorneys who win a not-guilty verdict in a homicide jury trial. Both of the trials for which Attorney Ruby won the Hanson award involved counts of first-degree intentional homicide, the most serious crime under Wisconsin law. Lawyers throughout Wisconsin frequently contact Attorney Ruby for guidance in handling matters both at the trial and post-conviction levels. He has repeatedly served as an educational source for other lawyers by presenting on both appellate and trial-level issues at the State Public Defender's annual conference as well as conferences sponsored by the Wisconsin Association of Criminal Defense Lawyers (WACDL). As a Wisconsin native, Attorney Ruby graduated from the University of Wisconsin-Madison with a Bachelor of Science degree. Following college, Ruby attended law school at the University of Wisconsin-Madison, graduating with a degree of Juris Doctor in 2007. He is a founding partner of Martinez & Ruby, LLP, which he started with Attorney Andrew Martinez in 2008.

Nicholas C. Watt is a Founding Partner of the Madison, Wisconsin law firm of Kramer, Elkins & Watt, LLC. He received his undergraduate degree from the University of Illinois at Urbana-Champaign majoring in Political Science and minoring in Mathematics. He received his law degree from the University of Wisconsin-Madison. Attorney Watt's practice is concentrated in the areas of family law and general civil litigation. Attorney Watt sits on the Board of Directors for the Solo Small Firm and General Practice Section of the State Bar of Wisconsin. He is also a member of the State Bar of Wisconsin, the Dane County Bar Association, and the James E. Doyle Inns of Court. Attorney Watt is also Chairman of the Board of Directors for The Badger Project, a non-profit, independent, non-partisan, investigative journalism organization focusing on Wisconsin politics and government.

John P. Zakowski is a circuit court judge for the Brown County Circuit Court in Green Bay, Wisconsin. He was appointed to the position on December 21, 2011 by Governor Scott Walker and was elected in 2012 for a term of 6 years. He was re-elected for a second term in 2018. Judge Zakowski earned his Bachelor of Science in political science from the University of Wisconsin-Madison. He earned his Juris Doctorate from the University of Wisconsin-Madison Law School in 1983. Prior to be appointed Judge, Zakowski served as the Brown County District Attorney from August 1986 to December 2011. Prior to serving as District Attorney he worked as an associate with the Green Bay law firm Nelson and Schmelling. Noteworthy: In 2002, Judge Zakowski earned the E. Michael McCann Prosecutor of the Year Award

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Attorney Cole D. Ruby; Maritnez & Ruby, LLP

I. The Basics – Oral Testimony and how to keep it clean
   a. Cross-talk
      i. Whether deposition or trial, make sure your client and witnesses understand to wait to answer until the question is finished.
      ii. In preparation, tell the witness to gather themselves before answering, take a breath and think about the question – this allows the attorney time to object and avoid muddling the record with cross-talk from the witness.
   b. Clarify
      i. Spell any proper nouns or technical terms
      ii. Make sure numbers are clear – is it reference to dollars, percentage, time of day, dates, etc.
      iii. Clarify vague references to "that" exhibit, person, house, street, etc.
         1. "When you say that exhibit, you are referring to exhibit 1?"
         2. "When you say that John Doe was walking down the street, to which street are you referring?"
         3. Always be listening for "this," "that," "him," "her," etc.
   c. Note gestures or other vague references
      i. When asking a witness how big something was and they use hand gestures, have the record reflect that the witness is holding their hands up at a distance of two feet and get the witness to agree. Even use a tape measurer or ruler if you have the foresight to bring one.
      ii. "He was about as far away from me as you are now." Again, describe the distance (or measure the distance) and put it on the record.
   d. Helpful resourse from the National Court Reporters Association describing some of these basic tips, especially for young lawyers or associates just beginning trial work: https://www.ncra.org/docs/default-source/uploadedfiles/ncrf/making-the-record-booklet.pdf?sfvrsn=746322a6_4

II. Photographic and Demonstrative/Physical Evidence
   a. Pictures are worth 1000 words
      i. Describe where on the photograph you want the jury/judge to focus
         1. Middle of the photograph, foreground/background, corner (which), approximately one-third from the right edge of the photo in the foreground, etc.

2. If there are common objects that most people would understand, use those as reference points (between the curb and sidewalk, just before the stoplight, etc)

ii. Be as specific and descriptive as possible so that anyone reading the transcript can follow along

1. Describe the perspective of the photo and what is beyond the frame of the photo.
2. "This photo was taken facing east at the intersection of Frist and Main on June 1, 2022 at approximately 1:15 p.m. just outside of ABC Corporation at 123 Main Street."

iii. If the witness marks the photo or other exhibit, have them initial and mark separately from the unmarked version (Exhibit 1 v 1A)

b. Demonstrative/Physical evidence
   i. Take photos to include in the record
c. Audio/Visual
   i. Be Sure to clarify on the record the relevant time-stamps on the recording
d. Example: Photos underneath manufactured homes (See Attachments)
   i. Case involving the installation of water meters underneath manufactured homes. Contract required installation of meters "at the riser" (the vertical water supply pipe coming out of the ground) and it was to disable all access points prior to the meter.
   ii. Photos and Transcript review

III. Depositions
   a. Many of the above tips are relevant to effective deposition record-making
   b. Objections in deposition
      i. Objection to the qualifications of the report is waived unless made before the taking of the deposition. Wis. Stat. § 804.07(3)(b)
      ii. Objection to competency of the witness or competency, relevance, or materiality of testimony are not waived if there is no objection during the deposition unless the grounds for the objection could have been removed if presented at the time. Wis. Stat. § 804.07(3)(c)1.
         1. However, foundation (competency of the testimony) may be waived if not properly presented if needed for motions such as summary judgment
         2. Likely that at a hearing, the court would still ask for foundation to be established during court testimony.
      iii. Errors that can be promptly cured when presented - such as form of the question, in the oath, or the conduct of the parties – are waived if an objection is not timely made during the taking of the deposition. Wis. Stat. § 804.07(3)(c)2.
         1. How specific should objections to the form of the question be?
   c. Instructing witness not to answer
      i. Under Federal Rule of Civil Procedure 30 the only reason for refusal to answer a question is to claim privilege or protection against disclosure

unless the court has issued an order limiting the scope or length of the deposition. Fed. R. Civ. Pro. 30, 1993 advisory notes; Redwood v. Dobson, 476 F.3d 462 (7th Cir. 2007).

ii. Another option is to suspend the deposition and seek a protective order if the attorney feels the questions are harassing the witness. Fed. R. Civ. Pro. 30, 1993 advisory notes; Redwood v. Dobson, 476 F.3d 462 (7th Cir. 2007).

iii. Judges thoughts on applicability in Wisconsin for these.

d. When to call the court to decide a deposition objection

e. Use of deposition at trial for unavailable witness

i. Objection as to the admissibility of deposition testimony for any reason that would require the exclusion of the evidence if the testimony was being offered at trial or hearing is permissible. Wis. Stat. § 804.07(2)

IV. Objections at Trial

a. If you have a fair opportunity to object to evidence or other matters before the court rules, you must do so to avoid waiving the error. Objection is not necessary after a ruling is made. Wis. Stat. § 805.11(1)

i. What about Motions *in limine*? Even if objected to prior to trial, still a good idea to preserve this objection at trial although not absolutely necessary. See Section VI below on Motions *in limine.*

ii. Also, it is imperative that all objections are on the record.

b. If an attorney objects then they must specify the grounds for the objection on which the claim of error is based. Wis. Stat. § 805.11(2)

c. Evidentiary objections

i. In the case of admitting evidence, an attorney must state a timely objection or motion to strike in the record stating the specific grounds for objection. Wis. Stat. 901.03(1)(a)

1. During jury trial just use one-word grounds such as "relevance," "hearsay," "foundation," etc. and avoid argument in front of a jury.
2. If further explanation is needed after the court's initial ruling, ask for a sidebar.
    a. Make sure sidebar is on the record, in Dane County sidebars are held on the record with white noise at the bench and all parties speak into one microphone with reporter putting on headphones.
    b. Some counties do not do this and have no good way to let the reporter hear what the parties are saying while the jury is still in the courtroom.
        i. In this case, make sure to raise the objection on the record while the jury is not present during a break, etc.

ii. Ask the judge to make a summary of the arguments and ruling and take the opportunity to add to that summary if necessary.

ii. In the case of excluding evidence, provide an offer of proof stating the substance of the evidence to the court by offer. Wis. Stat. § 901.03(1)(b)

1. An offer of proof "need not be stated with complete precision or in unnecessary detail but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt." State v. Pulizzano, 155 Wis. 2d, 633, 652, 456 N.W.2d 325 (1990), quoting Milenkovic v. State, 86 Wis.2d 272, 284, 272 N.W.2d 320 (Ct.App.1978).
2. An offer of proof "ought to enable a reviewing court to act with reasonable confidence that the evidentiary hypothesis can be sustained and is not merely an enthusiastic advocate's overstated assumption." Pulizzano, 155 Wis. 2d at 653, quoting Milenkovic, 86 Wis.2d at 284.
3. In most instances the trial court should permit an offer of proof either in question and answer form or by a statement of counsel, in the record, of what he believes the testimony would show. The obvious reasons for this rule are (1) to give the trial court a more adequate basis for its evidentiary ruling, and (2) to make a meaningful record for appellate review. State ex rel. Schlehlein v. Duris, 54 Wis. 2d 34, 39, 194 N.W.2d 613 (1972)

V. Court discretionary decisions/motion practice

a. Many rulings are left to the trial court's discretion such as evidentiary rulings, motions related to discovery, sanctions, reopen defaults or other judgments/orders, leave to amend pleadings, etc.
b. With discretionary decisions the trial court must examine the relevant facts related to the issue at hand and apply the proper legal standard to articulate a "rational process" to come to a "reasonable conclusion." Dalka v. Wisconsin Cent., Ltd., 2012 WI App 22, ¶51, 339 Wis. 2d 361, 811 N.W.2d 834.
c. If the trial court fails to provide an adequate reasoning the appellate court ***may*** search the record to determine if it supports the trial court decision. Dalka v. Wisconsin Cent., Ltd., 2012 WI App 22, ¶51, 339 Wis. 2d 361, 811 N.W.2d 834.
d. As a practitioner, how to politely ask the Court for a more detailed explanation if you feel it may not survive an appeal?
    i. Offer to draft order with findings that the court can then simply edit for reasons it feels led to decision?
    ii. How does this affect the other party if the court did not articulate these reasons on the record? They should be able to object to the form of the order.
e. When given the opportunity to make oral arguments in addition to briefing be careful to not simply lean on the briefing

i. There may be additional legal support for the argument that was not in the brief
ii. At least refer to all arguments contained in the brief even if it would not be efficient to include all the detailed arguments
iii. If court asks "is that all" – how best to respond, but make sure to state you incorporate your briefs at the very least.

f. Motion to Dismiss and the Summary Judgment trap
   i. A Motion to Dismiss is not a discretionary matter for the court, however whether a Motion to Dismiss turns into a Motion for Summary Judgment is discretionary.
   ii. Motion to Dismiss
      1. Tests the legal sufficiency of the Complaint – does the Complaint identify enough facts, transactions or occurrences that entitles the plaintiff to relief? Wis. Stat. § 802.02(1)(a); Data Key Partners v. Premira Advisers, LLC, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693.
      2. All allegations in the Complaint are deemed true. Peterson v. Volkswagen of America, Inc., 2004 WI App 76, ¶2, 272 Wis. 2d 676, 679 N.W.2d 840.
      3. If matters outside the pleadings are presented on a motion to dismiss and not excluded by the court then the motion shall be treated as one for summary judgment – giving all parties reasonable opportunity to present all material pertinent to such a motion. Wis. Stat. § 802.06(2)(b)
      4. One exception is the incorporation-by-reference doctrine; if a document is referenced in the complaint (whether or not attached) and that document is central to the claim and authentic, then it may be considered in a motion to dismiss without turning it into a motion for summary judgment. Sonderlund v. Zibolski, 2016 WI App 6, ¶37, 366 Wis. 2d 579, 874 N.W.2d 561
   iii. Dangers of converting motion to dismiss into one for summary judgment
      1. Sometimes the court or parties will begin to talk about evidence extrinsic to the Complaint and the record can get muddled.
      2. If the circuit court is too permissive of talk of evidence outside the pleadings it can be difficult to parse the record on appeal and what was being decided.
      3. Also, too much talk may inadvertently turn the motion to dismiss into one for summary judgment and often times courts will only allow one attempt at summary judgment. Thus, taking your shot at an early stage may not be in the interest of your client.
      4. Try to help steer the argument only to what is in the Complaint or referenced by the Complaint and nothing else. If other evidence is discussed in argument then clarify on the record the specific findings for the trial court's determination on the motion.

VI. Motions *in limine* (MILs)

a. Valuable tools, particularly with a jury trial, to streamline evidentiary issues prior to trial
    i. Thoughts on importance in jury trials?
    ii. Thoughts on uses in bench trials?

b. Motions *in limine* are useful when (1) the trial court has directed that the evidentiary issue be resolved before trial; (2) the evidentiary material is highly prejudicial or inflammatory and would risk a mistrial if not previously addressed by the trial court, *see id.;* (3) the evidentiary issue is significant and unresolved under existing law; (4) the evidentiary issue involves a significant number of witnesses or a substantial volume of material making it more economical to have the issue resolved in advance of trial so as to save the time and resources of all concerned; or (5) a party does not wish to object to the evidence in the presence of the jury and thereby preserves the issue for appellate review by obtaining an unfavorable ruling via a pretrial motion in limine. State v. Wright, 2003 WI App 252, ¶40, 268 Wis. 2d 694, 673 N.W.2d 386.

c. Again, be specific!
    i. Identify specific evidence to be excluded and the legal, evidentiary basis for the exclusion.
    ii. Do not simply file an MIL that requests the court to follow the rules of evidence and not admit evidence that is inadmissible.
    iii. See Matter of Commitment of T.W., 2021 WI App 74, 966 N.W.2d 278, 2021 WL 4205163 (unpublished)
        1. T.W. filed an "otherwise inadmissible" MIL which the trial court found vague and circular. Id. at ¶24
        2. On appeal, T.W. objected to some evidence of an expert at trial was hearsay and that his "otherwise admissible" MIL supported this exclusion. But the MIL made no reference to hearsay. Id. at ¶39

d. As noted above with respect to section 805.11(1) of the Wisconsin Statutes, generally once an opportunity to object has been provided, there is no need to object again after a ruling.
    i. This is generally true with MILs, raising an evidentiary issue through an MIL can be good enough to preserve the objection for appeal without need to raise it again at trial. State v. Bergeron, 162 Wis. 2d 521, 825-29, 470 N.W.2d 322 (Ct. App. 1991)
    ii. However, this is not true if the objection on appeal is based on a different law or a different fact than that presented by the MIL. In other words, with an MIL an attorney only preserved an objection on the same issue of law or fact as stated in the motion, if there is any other reason to object at trial, it must be raised then. State v. Bergeron, 162 Wis. 2d 521, 825-29, 470 N.W.2d 322 (Ct. App. 1991)
    iii. When Court holds open a ruling on a MIL, then a lawyer should still object at trial or risk waiving the issue on appeal. State v. Chambers, 207 Wis. 2d 644, 559 N.W.2d 924, 1996 WL 731243 (Ct. App. 1996)

(unpublished) (citing Wis. Stat. 901.03(1); State v. Gove, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989)

iv. The best prepared lawyers need to anticipate that not everything will go as planned at trial and the legal reasons for excluding one piece of evidence or another may change as the trial progresses. Thus, it is good practice to object on the record at trial even if you believe the objection is covered by an MIL or previous objection.

VII. Jury Instructions

a. After the close of evidence and before closing arguments, the court must hold a conference outside the jury's presence regarding jury instructions. At the conference, or earlier if the court directs, the parties may submit proposed instructions and verdicts by motion. At the conference an attorney should object to any proposed instructions or verdicts with particularity on the record. If no objection is made it constitutes a waiver of error in the instructions or verdict. Wis. Stat. § 805.13(3)

b. Start with pattern instructions, but an attorney can fine tune and make revisions/additions if necessary depending on the facts and circumstances of the case.

c. Raise objections on the record – some courts may hold an informal conference off the record prior to the official conference.

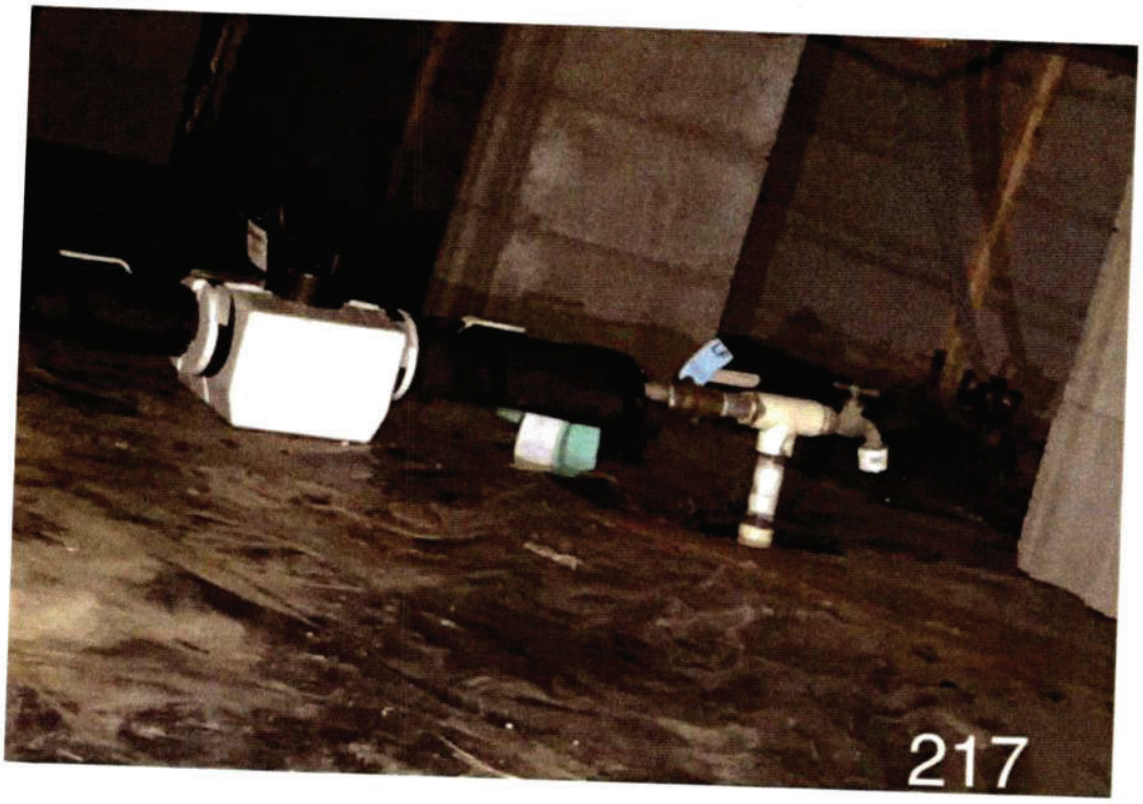
i. Section 805.13(3) requires the court to inform counsel on the record of its decisions regarding instructions and verdict forms.

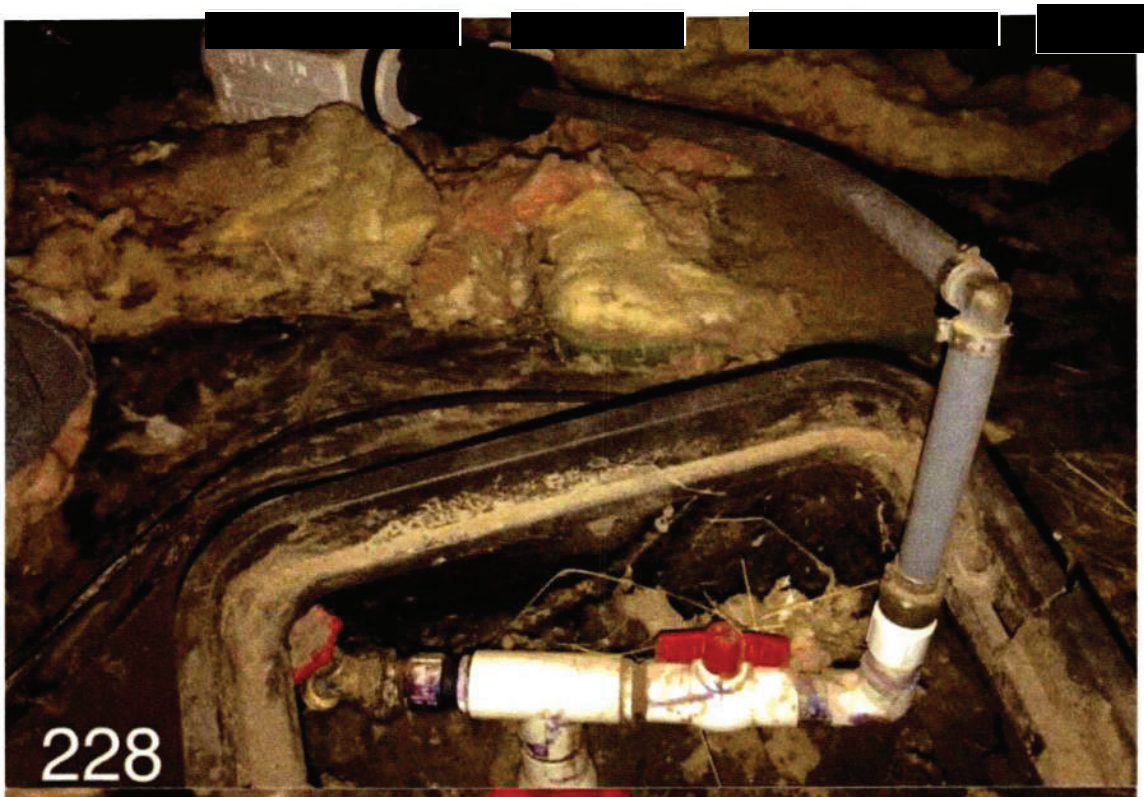
ii. This is the time to raise objections, even if you previously raised them off the record during an informal conference.

iii. If an attorney disagrees with an instruction that a judge decides to give during an off-the-record conference, the attorney must object to the instruction on the record to preserve the issue for appeal. Steinberg v. Jensen, 204 Wis. 2d 115, 120-21, 553 N.W.2d 820 (Ct. App. 1996)

iv. The court of appeals has no power to reach an unobjected-to jury instruction under sub. (3) because the court of appeals lacks a discretionary power of review. However, the supreme court possesses a discretionary power of review that the court may exercise when a matter is properly before the court. State v. Trammell, 2019 WI 59, ¶25, 387 Wis. 2d 156, 928 N.W.2d 564.

[redacted] [redacted] [redacted] [redacted]





[redacted]

D EXHIBIT R17
148
[redacted]

tabbies

[redacted]

whatnot, water would come straight through that pipe which would go through the meter. If they turn their outside faucet on which is what was connected to this perpendicular pipe, the water coming up through the riser would then come through this -- the tee that comes off of this pipe. There's -- I mean, there's multiple -- there can be multiple connections down the line of any piping similar to how [redacted] explained the piping that's inside the house that goes to the different fixtures inside the house; the faucets, the toilets, the bathtubs, the sinks. Anytime -- those are all off of tees. There's a tee in the pipe under those. So anytime you turn that fixture on.

THE COURT: All right. So the pipe that's perpendicular and angled went out to an outside spigot?

[redacted]: Correct.

THE COURT: All right. Thank you.

Go ahead, Mr. Watt.

BY MR. WATT:

Q All right. Ms. [redacted], going to exhibit, again, 147, WPV 365. Again, can you describe that photo -- those photographs at Exhibit 147 for the Court, please?

A 147, the top photo is the [redacted] install, and the bottom

photo is after the access to water prior to the meter was removed. On the upper photo, you can see the riser about two-thirds, three-quarters of the way to the right of the photo. A riser coming up out of the ground has a PVC tee on it. On the right side of the riser is a spigot with a cap on it, a threaded cap. On the left side of the riser is going to the meter. On the bottom photo shows the access with the spigot removed, an elbow at the top of the riser, and the meter installed.

Q And so looking at the top photo of Exhibit 147, was that spigot disabled?

A To me, no.

Q Why is that?

A Because it's still functional. I mean, if the purpose of the water meter is to gauge the amount of water that somebody is using, access -- easy access prior to that should be removed or the water meter is -- there's no purpose to it.

Q And so you're holding, again, another piece of pipe. What piece of pipe are you now holding?

MS. [redacted]: Your Honor --

MS. [redacted] This is the pipe that was removed from under the home.

THE COURT: One second, Ms. [redacted]

MS. [redacted]: I don't mean to interrupt the flow. Can I have a continuing objection to these demonstrative pieces of pipe?

THE COURT: You can.

MS. [redacted]: Thank you.

THE COURT: Any pipe that is being used by Mr. Watt is a continuing objection from Ms. [redacted].

Go ahead, Mr. Watt.

BY MR. WATT:

Q All right. Ms. [redacted] again, you are holding another piece of pipe; is that correct?

A Yes.

Q And how, if at all, does that relate to Exhibit 147?

A This is the pipe that was removed from under the home under Lot No. 217.

Q And that's the lot, again, from Exhibit 147?

A Correct.

Q And what portion -- what portion of the photograph corresponds with the piece of pipe you're holding?

A In the photograph, I have the PVC portion of the riser that comes up out of the ground with the PVC tee at the top, and to the right is a spigot with a cap on it, a threaded cap.

Q And how is that threaded cap on the -- placed on the

spigot?

A It was just threaded on there. There's no --

MR. WATT: Let the record reflect that Ms. Connolly removed the cap from the spigot.

THE COURT: She did.

BY MR. WATT:

Q And again, if you are removing that cap, is that spigot functional?

A Yes.

Q Did water pass through it when you turned it on?

A Yes.

Q So again, was that spigot disabled in your opinion?

A No.

Q If you could go to Exhibit 148, please. And do you recall testimony from Mr. [redacted]?

A I do.

Q Regarding Exhibit 148?

A Yes.

Q And do you recall that Mr. [redacted] was able to screw on a cap to the section of pipe that was taken from -- well, strike that.

Ms. [redacted], I've handed you another piece of pipe. How does this relate, if at all, to Exhibit 148?

A This is the part of the riser. The PVC tee to the

left of that is a spigot. To the right of it is another ball valve along with additional fittings. So this -- what I'm holding is in the picture, the top picture and the middle picture of Exhibit 148.

Q And so again, precisely what are you -- what portion -- if you're looking at the top picture of Exhibit 148, what portion of the pipe are you holding?

A I'm holding the -- the tee that's in the middle of the page. There's some pipe and fittings below that in the middle of the top picture. To the left of that is a fitting that has some purple primer on it. To the left of that is connected a brass spigot.

Q What color is the handle on the brass spigot?

A Red.

Q And what's to the right?

A To the right of the tee is a PVC ball valve with a red handle, a small -- very small piece of PVC pipe, PVC elbow, another section of pipe, and then a slip male thread fitting which that's the end of what I'm holding which then connected to the pipe shown in the top picture of 148.

Q And who installed -- well, strike that. Why was the pipe that you're holding removed from Lot 228?

A Because there was access to water prior -- easy access with the nondisabled spigot on the opposite side of

the tee.

Q And again, why do you say it's nondisabled?

A Because, well, for one, we turned it on, and water easily came right through it. But two, you can thread another cap on and off easily.

MR. WATT: And again, I'd have the record reflect that Ms. [redacted] screwed a cap onto the end of the spigot.

THE COURT: She did.

BY MR. WATT:

Q And again, you were here for Mr. [redacted]s testimony yesterday -- or I guess Monday; correct?

A Yes.

Q And what is the black box surrounding the riser and tee and spigot on the top photo of Exhibit 228?

A It's an irrigation box.

Q And is that box removable?

A Yes.

Q How easily is it removable?

A Fairly easily. I mean, you can take a sawzall and just cut the side off.

Q What's the material made of?

A Plastic.

Q Regardless of whether it's there or not, were you able to connect any kind of hose to that spigot?

Criminal law supplement – AMC presentation

II. Photographic and Demonstrative/Physical Evidence

b. Demonstrative/Physical evidence

- Charts and timelines can provide simple, effective way for factfinder to process information in visual format
    - Caselaw supports usage in trial
        - Demonstrative evidence, in the form of visual aids, is admissible for pedagogical purposes to organize and summarize information that has been admitted into evidence. ***State v. Olson***, 217 Wis. 2d 730, 739, 579 N.W.2d 802, 806 (Ct. App. 1998); sec. 906.11(1). Examples of visual aids that are admissible include, but are not limited to, blackboards, charts, and graphic illustrations. See ***id;*** see also ***Affett v. Milwaukee & Suburban Transp. Corp.,*** 11 Wis. 2d 604, 106 N.W.2d 274 (1960) (finding the use of a blackboard as an aid to illustrate or demonstrate the course of argument to the jury is not objectionable).
    - Most reliable form = demonstrative aids prepared in the jury's presence
        - ***Olson***, 217 Wis.2d at 741 ("The preparation of a chart in the jury's presence (and in [opposing] counsel's and the trial court's presence) reduces the potential for substantial inaccuracies going unnoticed or unchallenged")
        - Can be created during opening statements (factual information only), or during a witness's testimony
    - Mark as exhibit, offer into evidence, and show to factfinder to ensure complete record for appellate purposes
        - *See* Wisconsin Practice Series, WI Evidence Third Series § 401.2
- Examples of use at trial
    - Timeline of events
    - Chart of witness statements
    - Map of location
    - Diagrams
    - PowerPoint presentation – can combine photos, audio recordings, witness statements, legal principles
        - Caution: cannot cite facts not in evidence, cannot misstate the law, cannot use unduly prejudicial imagery
            - ***State v. Walker***, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (conviction overturned based on prosecutorial misconduct where closing argument PowerPoint presentation mischaracterized the evidence by altering exhibits to include inflammatory captions and superimposed text).
            - ***State v. Salas***, 1 Wn.App. 2d 931, 945, 408 P.3d 383 (2018) (conviction overturned based on prosecutorial misconduct, holding

that "PowerPoint slides should not be used to communicate to the jury a covert message that would be improper if spoken aloud").

- ***Watters v. State***, 129 Nev. 886, 891, 313 P.3d 243, 247-48 (2013) (holding that the use of a PowerPoint presentation during opening statement that includes a slide of the defendant's booking photograph with the word "GUILTY" written across it is error as it undermines the presumption of innocence).

- Examples of use in postconviction motions/appellate briefs
    - Chart comparing multiple statements describing sexual assault, with increasing frequency, changing locations, types of conduct over time
    - Chart comparing trial evidence against newly-discovered/***Brady*** evidence
    - Chart comparing facts in applicable caselaw
    - Timeline emphasizing important sequence of events
    - Table organizing text message conversations, cell phone/computer activity
    - Table comparing suspect descriptions and photographs
    - Table comparing other acts similarity/dissimilarity

c. Audio/Visual

- Make sure important recordings are transcribed
    - Applies to:
        - Child forensic statements, sec. 908.08
        - Defendant's interviews with law enforcement
        - Witness interviews with law enforcement/investigator
        - Surveillance or wire recordings
        - Any other important recorded statements
    - Court reporters not required to transcribe a recording played in court
        - ***State v. Ruiz-Velez***, 2008 WI App 169, 314 Wis. 2d 724, 762 N.W.2d 449, used to require transcription
        - In response to ***Ruiz-Velez***, the Wisconsin Supreme Court amended sec. 885.42 and SCR 71.01(2), which no longer requires that video statements played during trial be recorded. See ***State v. Marinez***, 2010 WI App 34, ¶19 n.4., 324 Wis. 2d 282, 781 N.W.2d 511.
    - Without a transcript, appellate court won't have written record to reference, would have to play the recording
        - Citation to transcript vs citation to time stamp of recording
        - If nothing written in record, can be just attorney's interpretation
- Impeaching with audio or video recording
    - If a witness's testimony is contradicted by prior statements that were audio or video-recorded, and the attorney plays the recording in court, follow the recording by asking a question that quotes or summarizes the substance of the recorded statement, and if the witness agrees to having made that statement
        - If they agree, you've got a written record of the impeaching statement

        - If they disagree, that is additional fodder for continued impeachment, and you can eventually present testimony from the witness who took the statement to acknowledge that statement was made
- Describing events in a video recording
    - Video records cannot be easily transcribed, as important events are often occurring without words or commentary
    - To make a written record of what occurs on video, a witness may be permitted to offer lay opinion testimony rationally based on the witness's perception under sec. 907.01. ***State v. Small***, 2013 WI App 117, 351 Wis. 2d 46, 839 N.W.2d 160 (deeming admissible a police officer's testimony about his conclusions as to what Small appeared to be saying on surveillance video of an armed robbery)
        - Cases usually involve law enforcement witnesses offering this testimony for the State, but should be admissible for both State and defense if foundational requirements are met

<u>IV. Objections at Trial</u>

c. Evidentiary objections

- Consider preparing short trial memorandum analyzing admissibility of key evidence, to be given to judge during trial if an objection occurs
    - Some attorneys have these ready in advance for recurring legal questions (e.g. when out-of-court statements are not "for the truth of the matter asserted;" admissibility of evidence challenging the quality of police investigation; scope of permissible impeachment for a witness charged with crimes)
    - Not filed in advance of trial, because would tip off opposition to potential legal issue, anticipated witness testimony, or theory of the case
    - Permits a more robust, organized discussion of the legal analysis than may be permissible in mid-trial oral arguments
- Constitutional grounds for objection—defendants in criminal cases have additional grounds for admitting or excluding evidence based upon the 6th amendment, and these constitutional grounds must be cited in order to preserve constitutional arguments for appeal, including the potential for federal habeas litigation
    - When an evidentiary ruling infringes upon a weighty interest of the accused and is arbitrary or disproportionate to the purposes the rule is designed to serve, then the applicable state evidentiary rules must yield to the defendant's fundamental due-process right to present a defense. ***United States v. Scheffer***, 523 U.S. 303 (1998)
    - Right to present evidence in support of defense— ***Chambers v. Mississippi***, 410 U.S. 284 (1973); ***Holmes v. South Carolina***, 547 U.S. 319 (2006); ***Harris v. Thompson***, 698 F.3d 609 (7th Cir. 2012); ***State v. St. George***, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777
    - Confrontation— ***Crawford v. Washington***, 541 U.S. 36 (2004); ***Davis v. Alaska***, 415 U.S. 308 (1974); ***Rhodes v. Dittmann***, 903 F.3d 646 (7th Cir. 2018); ***State v. Seymer,*** 2005 WI App 93, 81 Wis. 2d 739, 699 N.W.2d 628.

VI. Motions in Limine

- Some defensive evidence or arguments cannot be raised at trial unless the defense first files a pretrial motion seeking a ruling on admissibility. Examples:
    - Prior false allegation of sexual assault
        - ***State v. Ringer***, 2010 WI 69, 326 Wis. 2d 351, 785 N.W.2d 448—evidence of a prior false allegation of sexual assault may be admitted if it satisfies sec. 972.11(2)(b)3, the evidence is material to a fact at issue in the case, and the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature.
    - Prior specific acts of violence known to the defendant
        - ***McMorris v. State***, 58 Wis.2d 144, 205 N.W.2d 559 (1973)—when there is a factual basis to raise self-defense or defense of others, the defendant may present evidence of the victim's violent and turbulent character by proving prior specific instances of violence within the defendant's knowledge at the time of the incident, as relevant to the defendant's state of mind.
    - Third-party motive evidence
        - ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984)— the defendant present evidence demonstrating the motive of other suspects to commit the crime if such evidence "creates 'a "legitimate tendency" that the third person could have committed the crime," by showing motive, opportunity, and a direct connection between the suspect and the crime.

VII. Jury Instructions

- Theory of the defense instruction
    - A defendant is entitled to a jury instruction on his or her theory of defense if: (1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) the defense is supported by sufficient evidence. ***State v. Coleman***, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996)