

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 18, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP251-CR

Cir. Ct. No. 2014CM2220

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICHA S. PRUITT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
JOSANN M. REYNOLDS, Judge. *Reversed and cause remanded for further proceedings.*

¶1 KLOPPENBURG, P.J.¹ The State of Wisconsin appeals a non-final order of the circuit court allowing a witness called by the defense to testify by

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

telephone at the criminal jury trial. This court granted the State's petition for leave to appeal the court's non-final order. *See* WIS. STAT. RULE 809.50(3). On appeal, the State argues that the court's order should be reversed because the presentation of testimony by telephone during a criminal jury trial is not permitted under WIS. STAT. § 967.08. I agree, and therefore reverse.

BACKGROUND

¶2 The State charged Pruitt with misdemeanor counts of battery and disorderly conduct arising from a fight outside a bar in Fitchburg. Trial was set for February 5, 2016. The jury was empaneled on February 1, 2016. On February 3, 2016, defense counsel informed the circuit court that a witness the defense had subpoenaed to appear at trial had on February 2, 2016, told counsel that the witness had some time ago booked a flight on February 5, 2016, and so would be out of the state that day.

¶3 Defense counsel asked the circuit court to consider adjourning the trial for one week, by which time the witness would have returned to Wisconsin. The court then asked if either party opposed the witness appearing by telephone. The prosecutor responded that the State opposed the witness appearing by telephone, asserting that testifying in person was necessary "so that the jury can determine his credibility and [the State could] conduct a proper cross-examination." The prosecutor cited WIS. STAT. § 967.08(2) as the statutory basis for its opposition.

¶4 The circuit court considered that: (1) the jury had been selected; (2) the case involved misdemeanor charges pending since August 2014; (3) Pruitt's confrontation rights were not implicated because Pruitt was calling the witness; (4) the State had included the witness on its witness list but decided not to call him,

thereby indicating that it could meet its burden of proof without him; and (5) the court has the discretion under WIS. STAT. § 906.11 to control court proceedings and the presentation of evidence in order to ensure a timely trial. Based on these considerations, the court ordered that Pruitt would be allowed to have the witness appear at trial by telephone. At a hearing on February 4, 2016, the court denied the State’s motion to reconsider. This appeal followed.

DISCUSSION

¶5 The State argues that the circuit court’s order should be reversed because the presentation of testimony by telephone during a criminal jury trial is not permitted under WIS. STAT. § 967.08.² I turn first to the construction of § 967.08 and conclude that the State is correct. I then address and reject Pruitt’s arguments to the contrary.

I. WIS. STAT. § 967.08

¶6 The construction of a statute presents a question of law, which this court reviews de novo. *State v. Vennemann*, 180 Wis. 2d 81, 93, 508 N.W.2d 404 (1993). “[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. In interpreting a statute, this court first looks to the plain language of the statute itself. *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 162, 558

² The State makes several other arguments in support of its opposition to the circuit court’s order allowing the defense witness to appear by telephone at trial, but I do not address them because the construction of WIS. STAT. § 967.08 is dispositive. See *Barrows v. American Family Ins. Co.*, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) (“An appellate court need not address every issue raised by the parties when one issue is dispositive.”).

N.W.2d 100 (1997). “If we conclude the statutory language is plain, then we apply its plain meaning.” *JP Morgan Chase Bank, NA v. Green*, 2008 WI App 78, ¶24, 311 Wis. 2d 715, 753 N.W.2d 536. “Under the doctrine of *expressio unius est exclusio alterius*, ‘the express mention of one matter excludes other similar matters [that are] not mentioned.’” *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287 (quoted source omitted).

¶7 WISCONSIN STAT. § 967.08 is a criminal procedure provision entitled “Telephone proceedings.” It states:

(1) Unless good cause to the contrary is shown, proceedings referred to in this section may be conducted by telephone or live audiovisual means, if available....

(2) The court may permit the following proceedings to be conducted under sub. (1) on the request of either party. The request and the opposing party’s showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Initial appearance under s. 970.01.

(b) Waiver of preliminary examination under s. 970.03, competency hearing under s. 971.14(4) or jury trial under s. 972.02(1).

(c) Motions for extension of time under ss. 970.03(2), 971.10 or other statutes.

(d) Arraignment under s. 971.05, if the defendant intends to plead not guilty or to refuse to plead.

(3) Non-evidentiary proceedings on the following matters may be conducted under sub. (1) on request of either party. The request and the opposing party’s showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Setting, review and modification of bail and other conditions of release under ch. 969.

(b) Motions for severance under s. 971.12(3) or consolidation under s. 971.12(4).

(c) Motions for testing of physical evidence under s. 971.23(5) or for protective orders under s. 971.23(6).

(d) Motions under s. 971.31 directed to the sufficiency of the complaint or the affidavits supporting the issuance of a warrant for arrest or search.

(e) Motions in limine, including those under s. 972.11(2)(b).

(f) Motions to postpone, including those under s. 971.29.

¶8 The statute specifically enumerates the proceedings that are included within its parameters. *Vennemann*, 180 Wis. 2d at 96. Criminal jury trials are not among those enumerated proceedings. “[A] specific alternative in a statute is reflective of the legislative intent that any alternative not so enumerated is to be excluded.” *Id.* at 96. By its plain language, the statute makes no provision for permitting witnesses to testify by telephone at criminal jury trials.³

³ The evolution of WIS. STAT. § 967.08 is consistent with the doctrine of *expressio unius est exclusio alterius*. See *Kalal*, 271 Wis. 2d 633, ¶52 n.9 (recognizing statutory background as appropriate to confirm the plain language interpretation of a statute). The introductory language of subsec. (2) originally read: “The following proceedings may be conducted under sub. (1) with the consent of all parties. Consent may be given by telephone.” WIS. STAT. § 967.08(2) (1987-88). The supreme court amended the introductory language by Supreme Court Order on October 31, 1990, to read as follows: “The court may permit the following proceedings to be conducted under sub. (1) with the consent of the defendant. The defendant’s consent and any party’s showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.” WIS. STAT. § 967.08(2) (1991-92). At that time, the court adopted the Judicial Council’s opinion that the “appearances, motions and waivers listed in this subsection are rights of the defendant.” Judicial Council Committee Note, 1990, § 967.08. In 1995, the legislature amended the introductory portion of § 967.08(2) to state its current reading: “The court may permit the following proceedings to be conducted under sub. (1) on the request of either party. The request and the opposing party’s showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.” WIS. STAT. § 967.08(2) (1995-96).

Although the statute has been modified from requiring consent of all parties, to requiring only the defendant's consent, to permitting either the defendant or the State to request that the proceeding be conducted by telephone, the permitted proceedings listed in the subsection have not changed.

¶9 It is not difficult to discern why this is so. “[I]t is ordinarily the task of a jury to decide both the credibility of a witness and the weight to be given to his or her testimony.” *State v. Jenkins*, 2014 WI 59, ¶75, 355 Wis. 2d 180, 848 N.W.2d 786 (Crooks, J. concurring). As the State notes, juries make their credibility determinations in part by observing the witnesses, their demeanors, and their body language. Allowing a witness to testify by telephone takes these tools away. Nor can the prosecutor or the jury verify whether the witness is consulting notes or other written materials, which would not ordinarily be permitted during in-person testimony, during the witness’s telephone testimony.

¶10 In sum, I conclude that the presentation of testimony by telephone during a criminal jury trial is not permitted pursuant to a plain language reading of WIS. STAT. § 967.08(2).

II. Pruitt’s Arguments

¶11 Pruitt makes two arguments against the plain language reading of WIS. STAT. § 967.08 set forth above, but her arguments do not withstand scrutiny.

¶12 First, Pruitt concedes that WIS. STAT. § 967.08 does not permit criminal jury trials to be conducted by telephone, but she argues that the statute “applies to whole proceedings rather than their component parts.” Therefore, according to Pruitt, while an entire criminal jury trial may not be conducted by telephone under the statute, the statute has no bearing on the individual parts that comprise a jury trial, such as the testimony of a defense witness. I understand Pruitt to be arguing that by its plain language, the term “proceeding” applies only to an entire “happening,” in Pruitt’s words, but not to the parts that make up that “happening.” Pruitt provides no authority to support her interpretation, and I am not persuaded.

¶13 The dictionary definition of “proceeding” is “[a] course of action,” and the dictionary definition of “proceedings” is “[a] sequence of events occurring at a particular place or occasion.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 1090 (3d ed. 1993). See *Lemmer v. Schunk*, 2008 WI App 157, ¶10, 314 Wis. 2d 483, 760 N.W.2d 446 (“We may use a dictionary to establish the common meaning of a word.”). Pruitt does not explain how the steps that make up the course of action, or the events that make up the sequence—here, the components of a criminal jury trial—may be conducted by telephone when the course or action or sequence itself—here, the trial—may not. In sum, Pruitt’s argument is contrary to the statute’s plain language.⁴

¶14 Second, Pruitt argues that the circuit court properly exercised its discretion, pursuant to WIS. STAT. § 906.11, to permit the defense witness to testify by telephone. WISCONSIN STAT. § 906.11 is an evidentiary provision entitled “Mode and order of interrogation and presentation” which states:

(1) CONTROL BY JUDGE. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:

- (a) Make the interrogation and presentation effective for the ascertainment of the truth.
- (b) Avoid needless consumption of time.
- (c) Protect witnesses from harassment or undue embarrassment.

⁴ Because I conclude that a criminal jury trial is not a proceeding that may be conducted by telephone under WIS. STAT. § 967.08, I do not reach Pruitt’s argument that the State failed to satisfy the good cause standard that that statute sets for a party that opposes conducting a proceeding by telephone.

¶15 In an apparent extension of her first argument, which I have rejected, Pruitt argues that WIS. STAT. § 906.11 is more specific because, while WIS. STAT. § 967.08 applies to entire proceedings, § 906.11 specifically refers to the proceedings' components, namely "the mode/manner in which interrogations of witnesses occur." As above, Pruitt fails to explain how the circuit court retains its general discretion to permit testimony by telephone in a proceeding that, as Pruitt concedes, the legislature has barred from being conducted by telephone.

¶16 "[W]hile we agree that the evidentiary rule § 906.11(1) provides the circuit court with broad discretion in its control over the presentation of evidence at trial, that discretion is not unfettered.' Rather, WIS. STAT. § 906.11 'must give way where the exercise of discretion runs afoul of other statutory provisions that are not discretionary.'" *State v. Smith*, 2002 WI App 118, ¶15, 254 Wis. 2d 654, 648 N.W.2d 15 (quoting *Waters v. Pertzborn*, 2001 WI 62, ¶31, 243 Wis. 2d 703, 627 N.W.2d 497).

¶17 WISCONSIN STAT. § 906.11 does not, in the words of *Smith*, 254 Wis. 2d 654, ¶15, "trump" WIS. STAT. § 967.08, because § 967.08 limits the circuit court's discretion with respect to the presentation of testimony by telephone. Accordingly, the circuit court here incorrectly invoked § 906.11 to permit telephone testimony in a proceeding that as a whole may not be conducted by telephone under § 967.08.⁵

⁵ Because I conclude that the circuit court erroneously relied on WIS. STAT. § 906.11, I do not reach Pruitt's argument that the court properly exercised its discretion under that statute.

CONCLUSION

¶18 The presentation of testimony by telephone during a criminal jury trial is not permitted by the plain language of WIS. STAT. § 967.08. Therefore, the circuit court's order permitting a defense witness to testify by telephone in this criminal jury trial is reversed.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

