

Evidence

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The rules of evidence were the topic of a number of interesting cases in the Wisconsin courts during 2009. The most significant cases addressed issues regarding the admissibility of intercepted communications under the Wisconsin Electronic Surveillance Control Law and whether the one-party-consent exception applies when both the intercepting person and the person consenting to the intercept are law-enforcement officers; whether a court could require a defendant to submit so-called McMorris evidence before trial for the court to determine relevance and admissibility; and whether other acts evidence, relating to a confidential informant’s observations on the day before the execution of a no-knock search warrant based on those observations, was nevertheless admissible at trial to combat the defendant’s claim that he acted in self-defense when he shot a police officer who entered his home while executing the warrant. The courts also considered cases regarding the admissibility of expert testimony, including whether expert testimony was required in a breach-of-contract action regarding a computer-services agreement; and whether the state’s expert at trial improperly relied on other acts evidence in determining that the subject of a commitment petition had an antisocial personality disorder that predisposed him to engage in sexual offenses. Additionally, the court of appeals addressed an issue regarding the admissibility of a computer-generated animation, which purported to illustrate the combined testimony of various witnesses regarding how the alleged crimes occurred, through the trial testimony of a nonexpert witness who had no personal knowledge of the underlying facts and had not visited the crime scene. In a civil action, the court of appeals also examined whether a defendant, who had invoked his Fifth Amendment privilege against self-incrimination and refused to testify regarding noncorporate liability exposure during the three-year discovery period before trial, should be permitted to withdraw the prior invocation and waive the privilege to testify during the last week of trial regarding issues that he had previously hidden from discovery. This chapter summarizes these decisions and others.¹

CASE LAW

Electronically Intercepted Evidence

The Wisconsin Court of Appeals decided a unique issue regarding the admissibility of intercepted communications in *State v. Ohlinger*, 2009 WI App 44, 317 Wis. 2d 445, 767 N.W.2d 336 (review denied). In this case, the court addressed whether the one-party-consent exception to the Wisconsin Electronic Surveillance Control Law (WESCL) under section 968.31(2)(b) applies when the intercepting person is a law-enforcement officer and the party to the

¹ Textual references to the Wisconsin Statutes are indicated as “chapter xxx” or “section xxx.xx,” without the designation “of the Wisconsin Statutes.”

communication consenting to the intercept is also a law-enforcement officer. The defendant in *Ohlinger* created a Web page indicating an interest in sexual activities with young girls. He engaged in Internet communication with a person he thought was a mother willing to let him engage in sexual conduct with her 12-year-old daughter. *Id.* ¶¶ 1, 3. Unknown to Ohlinger, he was communicating with a law-enforcement officer. A telephone conversation eventually occurred between Ohlinger and two female police officers, posing as the mother and daughter Ohlinger thought he had found through the Web site. *Id.* Another law-enforcement officer intercepted and recorded the telephone conversation between the parties without a warrant. Ohlinger expressed his intent to engage in sex acts with both the “mother” and the “daughter.” *Id.* ¶ 3. After additional telephone conversations, the officers agreed to meet Ohlinger at a truck stop.

After Ohlinger made contact with the officer posing as the mother, the police arrested him and charged him with attempted first-degree sexual assault of a child and child enticement, both as a persistent child sex offender. *Id.* ¶ 4. Following the issuance of charges, Ohlinger moved to suppress the content of the tape recording as being made in violation of the WESCL. The trial court denied the suppression motion. The recording of the telephone conversation was the centerpiece of the state’s prosecution, which resulted in a conviction. *Id.* ¶ 5. Ohlinger appealed.

The Wisconsin Court of Appeals determined whether Ohlinger’s telephone conversation with the two female officers was lawfully intercepted under the one-party-consent exception in section 968.31(2)(b), thereby permitting the contents of the intercept to be disclosed in a felony proceeding. *Id.* ¶ 7. The exception provides that it is not unlawful “[f]or a person acting under color of law” to intercept an electronic communication when the person is a party to the communication or one of the parties to the communication has given prior consent to the interception. *Id.* ¶ 8. The exception contains two requirements: the intercepting-person requirement and the consenting-person requirement. *Id.* The intercepting person must be “a person acting under color of law”; the issue on appeal in *Ohlinger* involved whether that person could be a law-enforcement officer. *Id.* ¶ 9. The consenting-person component requires that a party to the communication be either the person who intercepts the actual communication or one who gives prior consent to the interception. *Id.* ¶ 10. Ohlinger’s argument on appeal was that the one-party-consent exception was not applicable in this case, because the intercepting person and the consenting person were both law-enforcement officers. Ohlinger argued that at least one party—either the intercepting person or the consenting person—must be a private citizen. *Id.* ¶ 11. He also argued more technically that the intercepting person may never be a law-enforcement officer because such officer cannot be a person acting under color of law within the meaning of the WESCL. *Id.*

The court of appeals began its analysis by identifying that the phrase *person acting under color of law* in section 968.31(2)(b) is patterned after the federal wiretapping law. *Id.* ¶ 14 (citing *State v. Gilmore*, 201 Wis. 2d 820, 825, 549 N.W.2d 401 (1996)). The court referred to decisions that recognize that law-enforcement officers may be persons acting under color of law for the purpose of the federal wiretapping statute, *id.* (citing, among other cases, *United States v. Passarella*, 788 F.2d 377, 379 (6th Cir. 1986)), and the court of appeals gave the same interpretation to the Wisconsin statute, *id.* ¶ 24. Reviewing the legislative history of the one-party-consent exception in Wisconsin, the court of appeals rejected Ohlinger’s argument that the WESCL’s reference to a person acting under color of law refers only to a private citizen who is actively cooperating with a law-enforcement investigation and cannot refer to law-enforcement officers acting on their own. *Id.* ¶ 16. The court disagreed with Ohlinger and determined that his interpretation of the one-party-consent exception would lead to an unreasonable result: it “would mean that the intercept in this case was not lawful but, if the police had recruited a private citizen to conduct the intercept, it would be lawful.” *Id.* ¶ 23. The court declared that the exception may apply when one or more law-enforcement officers act as both the intercepting and consenting parties and does not require officers to work in concert with private citizens. *Id.* ¶¶ 23–24. The court of appeals affirmed the circuit court’s denial of the defendant’s suppression motion.

Other Acts Evidence

Other acts evidence was the subject of a noteworthy opinion in 2009 involving the admissibility of evidence concerning a defendant’s drug-related activity through a confidential informant pursuant to section 904.04(2). In *State v. Payano*, 2009 WI 86, 320 Wis. 2d 348, 768 N.W.2d 832, the defendant was convicted of second-degree reckless injury while using a dangerous weapon, contrary to sections 940.23(2)(a) and 939.63, and two counts of second-degree recklessly endangering safety while using a dangerous weapon, contrary to sections 941.30(2) and

939.63, in connection with a shooting incident at his apartment. *Id.* ¶ 1. In an initial trial on these charges, the jury was unable to reach a unanimous verdict. *Id.* ¶ 23.

The defendant was retried for the same offenses, and, during the second trial, the state introduced into evidence the testimony of a confidential informant (Kojis) who provided a police officer (Lutz) with information that led to the execution of a no-knock search warrant at Payano's apartment, where the shooting incident occurred. *Id.* ¶ 24. At trial, the prosecutor offered Kojis's testimony to rebut Payano's claim that he acted in self-defense when he fired a shot at the police officers, whom he thought were intruders, while they were breaking down the door to his family's apartment. The state contended that Payano fired the shot because he needed time to destroy evidence of drugs in the apartment. *Id.* ¶ 29. Kojis testified that, while at Payano's residence the day before the shooting, he observed Payano packaging cocaine and noticed a .380-caliber pistol on the kitchen table. Kojis provided this information to the police the next day, and the shooting by Payano occurred during the execution of the subsequent search warrant. *Id.* ¶¶ 27–28.

On appeal, Payano argued that the introduction of Kojis's testimony, which Payano claimed was inadmissible other acts evidence, was a reversible error. The court of appeals followed an analysis of the three-step framework articulated in *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998). Under that framework, for the court to admit other acts evidence,

1. A party must offer the evidence for an acceptable purpose under section 904.04(2).
2. The evidence must be relevant under section 904.01.
3. The probative value of the evidence must be substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id., cited in *Payano*, 2009 WI 86, ¶ 60, 320 Wis. 2d 348. The court of appeals in *Payano* held the other acts evidence offered by the prosecution was not relevant evidence under section 904.04(1) and further determined that the evidence presented a danger of unfair prejudice that outweighed its potential probative value. *State v. Payano*, 2008 WI App 74, ¶¶ 23–26, 312 Wis. 2d 224, 752 N.W.2d 378.

The state sought supreme court review of the decision of the court of appeals and argued that the informant's testimony satisfied the *Sullivan* test. In support of its argument, the state maintained that the circuit court had properly determined that evidence of Payano's involvement in drugs and the possession of a gun at the apartment where the shooting occurred was offered for a proper purpose under section 904.04(2), the evidence was relevant under section 904.01, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under section 904.03. *Payano*, 2009 WI 86, ¶¶ 43–45, 320 Wis. 2d 348.

The state argued that it proffered the other acts evidence for two proper purposes under the first step of the *Sullivan* analysis: "(1) to provide the jury greater context for the shooting 'in order to give the State's case a complete presentation'; and (2) to rebut Payano's claim of self-defense." *Id.* ¶ 64. The trial court had determined that both purposes were permissible under section 904.04(2), and the supreme court agreed. *Id.* The supreme court noted that the issue of why Payano shot at the door directly implicated his claim of self-defense, and it implicated his motive and knowledge, both of which are enumerated purposes for the admission of other acts evidence under section 904.04(2). *Id.* ¶ 65. The court concluded that the trial court had properly exercised its discretion in satisfying the first step of the *Sullivan* framework regarding purpose.

Next, the supreme court analyzed the second step of the *Sullivan* test—relevance under section 904.01. Under the two subparts of this step, the evidence will be relevant if it (1) "relates to a fact of consequence to the determination of the action," and (2) "has a tendency to make the consequential fact ... more probable or less probable than it would be without the evidence." *Id.* ¶ 60. In upholding the decision of the trial court, the supreme court determined the central issue at trial was whether Payano acted reasonably in self-defense and the defense of others when he shot Lutz, and an additional issue was whether he knew Lutz was in fact a police officer when he was breaking down the apartment door. *Id.* ¶ 72. By offering Kojis's testimony and the information he provided to Lutz to undermine the claim of self-defense, the state offered it to help prove a fact of consequence to the determination of Payano's guilt or innocence and thus satisfied the first subpart of the *Sullivan* relevance test. *Id.* ¶ 75. The court concluded that Kojis's testimony satisfied the second subpart of the relevance test, in that it acted as direct rebuttal to Payano's

claim of self-defense and made it more probable that Payano shot the officer so that he could have time to get rid of the drugs that the police believed were in the apartment. *Id.* ¶ 78.

Finally, the supreme court reviewed the third prong of the *Sullivan* framework, which requires a determination whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion, or delay under section 904.03. The court acknowledged that the admission of other acts evidence regarding a gun and a large amount of cocaine having been present at Payano's apartment the day before the shooting may have permitted the jury to draw a forbidden character inference. *Id.* ¶ 93. Despite this danger, the court determined that the other acts evidence provided an alternative explanation of Payano's involvement in the shooting and was highly probative to his theory of defense. *Id.* ¶ 96. Without Kojis's testimony, "the [s]tate's case would have lacked credibility because it would have been supported only by the [s]tate's bald assertion that Payano must have shot at the officer to buy time to hide or destroy drugs." *Id.* ¶ 95. The court concluded that Kojis's testimony had a high degree of probative value because the case would essentially turn on the jury's assessment of credibility between the state's theory and Payano's theory of the incident, *id.*, and this probative value was not substantially outweighed by the danger of unfair prejudice. *Id.* ¶ 97. In finding the trial court did not err in admitting the other acts testimony of the confidential informant, the supreme court reversed the decision of the court of appeals.

Expert Testimony

The Wisconsin Court of Appeals issued two interesting opinions in 2009 dealing with the propriety of expert testimony. The first case addressed whether computer consultants were professionals, as that term is used in the context of professional negligence, thereby requiring the introduction of expert testimony relative to a breach of the standard of care. The second case addressed whether the state's expert at trial in a chapter 980 commitment proceeding improperly relied on other acts evidence in determining that the subject of the commitment petition had an antisocial personality disorder that predisposed him to engage in sexual offenses.

Professional-services Contract. In *Racine County v. Oracular Milwaukee, Inc.*, 2009 WI App 58, 317 Wis. 2d 790, 767 N.W.2d 280 (review granted), the Wisconsin Court of Appeals decided a question of first impression in Wisconsin: whether, in a breach-of-contract action involving the provision of allegedly professional services, the label of "professional" should subject the service provider to professional standards of care in the same fashion as a professional person is subject to a heightened standard of care in a professional-negligence case. *See id.* ¶ 25. In *Racine County*, the court reviewed a circuit court determination that the county's contract with Oracular was a contract for professional services and that, therefore, the county needed to provide expert testimony as a matter of law to prove professional negligence. *Id.* ¶ 1. The parties entered into a consulting-service agreement whereby Oracular would provide the county assistance in upgrading a software system. *Id.* ¶ 2. The county required the naming of a project manager and the performance of duties related to a complete upgrade and implementation of the software, training, and technical resources required to complete the project. *Id.* ¶ 3. The service agreement provided a "Go-Live" date of September 7, 2004, by when the updated software would be ready to use. *Id.* ¶ 6. Oracular did not complete the project by this target date. The county terminated the contract in 2006, and filed suit in 2008, for breach of the consulting-service agreement and violation of section 100.18 (Wisconsin's Deceptive Trade Practices Act). *Id.* ¶ 7.

Oracular brought a motion for summary judgment and relied on the decisions in *Hoven v. Kelble*, 79 Wis. 2d 444, 256 N.W.2d 379 (1977), and *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 434 N.W.2d 97 (Ct. App. 1988), arguing that the consulting-services agreement at issue was a professional-services contract, and the county could not recover on its claim because it had failed to disclose any expert witnesses on the standard of care owed by computer consultants. *Racine County*, 2009 WI App 58, ¶ 8, 317 Wis. 2d 790. The county argued that expert testimony was not required in the case. The circuit court granted Oracular's summary-judgment motion, finding that the agreement was a contract for professional services and the county needed to prove negligence to recover. *Id.* ¶ 10. The county brought a motion for reconsideration, arguing that the service agreement was simply a contract to install computer software, and the average juror could determine whether Oracular breached the agreement by not providing competent trainers or by failing to meet the established completion date without the need for expert testimony. The circuit court denied the reconsideration motion. *Id.* ¶¶ 11–12.

In reviewing the circuit court's determination that the county's failure to retain an expert witness was the equivalent of a failure of proof, the court of appeals briefly reviewed the decisions in *Hoven* and *Micro-Managers*. *Id.* ¶ 16.

The *Hoven* decision was a medical-malpractice case wherein the Wisconsin Supreme Court addressed whether it could apply the theory of strict liability to medical services. *Id.* The *Hoven* court observed that “[w]here ‘professional’ services are in issue the cases uniformly require that negligence be shown.” *Id.* ¶ 17 (quoting *Hoven*, 79 Wis. 2d at 462–64). In *Micro-Managers*, the court of appeals concluded that a party that designed and developed software had entered into a contract for services. *Id.* ¶¶ 18–19. Unlike the situation in *Micro-Managers*, the contract between the county and Oracular required the installation of off-the-shelf software and the training of county personnel to use such software, not custom-designed software such as that at issue in *Micro-Managers*. *Id.* ¶ 22. The court of appeals also noted that the *Micro-Managers* case did not decide the threshold issue whether computer software developers are even professionals. In addressing this issue in *Racine County*, the court of appeals reviewed authority from other jurisdictions and concluded that “computer consultants are not professionals as that term is used in the tort of professional negligence.” *Id.* ¶ 25.

In refusing to extend the doctrine of professional malpractice to cover independent computer consultants, the court of appeals noted the following persuasive criteria from the decision in *Hospital Computer Systems, Inc. v. Staten Island Hospital*, 788 F. Supp. 1351, 1361 (D.N.J. 1992), to identify what constitutes a professional:

- (1) a requirement of extensive formal training and learning; (2) admission to practice by a licensing body; (3) a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace; (4) a system of discipline for violating the code of ethics; (5) a duty to subordinate financial gain through social responsibility; and (6) an obligation of all members to conduct themselves as members of a learned, disciplined and honorable occupation, even in nonprofessional matters.

Racine County, 2009 WI App 58, ¶ 28, 317 Wis. 2d 790.

The court of appeals identified two additional characteristics of what constitutes a profession—namely, the term “‘professional’ is commonly understood to refer to the learned professions, such as medicine and law,” and a “‘professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise clients.” *Id.* ¶ 31 (citing *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 749 N.E.2d 161, 166 (N.Y. 2001)). Upon reviewing the factual record, the court of appeals determined that the computer consultants at Oracular were not professionals, and the agreement between the parties was for services, not professional services. *Id.* ¶ 33.

Following this determination, the court next addressed whether the county needed to provide expert testimony to support the proof of its contract claims. Expert testimony is not generally required to prove a party’s negligence. *Id.* ¶ 34 (citing *Trinity Lutheran Church v. Dorschner Excavating, Inc.*, 2006 WI App 22, ¶ 26, 289 Wis. 2d 252, 710 N.W.2d 680). The same principle applies equally to a breach-of-contract action. *Id.* ¶ 35 (citing *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 6, 186 N.W.2d 258 (1971)). The consulting-services agreement between the parties required that Oracular provide training for the county employees who would be using the software and established a date for completion of the contract. Finding that the requirement for expert testimony is necessary only when the issue is “esoteric and complex,” the court of appeals determined that the failure to complete a project by a negotiated deadline and a failure to provide competent and sufficient training fall outside that category. *Id.* ¶ 44. The court of appeals further determined that even if the agreement at issue were a professional-services contract, expert testimony would not be required as a matter of law to prove negligence in the performance of that contract. *Id.* ¶ 39. The court noted that the holdings in *Hoven* and *Micro-Managers* require only that negligence be established for recovery in actions on professional-services contracts; expert testimony on professional-services contracts, however, is not mandated. *Id.* In reversing the circuit court, the court of appeals concluded that the county need not present expert testimony on whether Oracular breached the contract by not completing the project in a timely manner and by not providing adequate training. *Id.* ¶ 44.

Expert Reliance on Other Acts Evidence. The second noteworthy opinion in 2009 addressing the introduction of expert testimony was *State v. Kaminski*, 2009 WI App 175, ___ Wis. 2d ___, 777 N.W.2d 654. In that case, the Wisconsin Court of Appeals reviewed whether the preliminary relevance requirement (also referred to as a foundational-reliability requirement) established in *State v. Gray*, 225 Wis. 2d 39, 590 N.W.2d 918 (1999), should be applied to an expert’s consideration of other acts evidence in a chapter 980 commitment proceeding.

A jury found that Kaminski was a sexually violent person subject to involuntary commitment. Following his trial, he filed a postverdict motion for a new trial on the ground that the jury heard improper expert testimony that

prevented the real controversy from being fully tried. *Id.* ¶ 1. During the commitment trial, two psychologists testified on behalf of the state. Dr. Hill diagnosed Kaminski with an antisocial personality disorder that predisposed him to engage in sexual offenses, but Hill acknowledged that Kaminski was not sexually deviant. *Id.* ¶ 3. She concluded that Kaminski's mental disorder made it more likely than not that he would engage in acts of sexual violence in the future. Dr. Elwood agreed with Hill's determination. *Id.* In formulating their opinions, the state's experts used three actuarial instruments to assess the risk presented by Kaminski, and they determined a score for him based on the input information, compared with the recidivism rates of other individuals with the same score. *Id.* ¶ 4. The experts further relied on four prior incidents of sexual assault involving Kaminski, which allegedly occurred in 1984, 1996, 1998, and 2003.

Dr. Rosell testified at trial on behalf of Kaminski. While he agreed with the state's experts that Kaminski had an antisocial personality disorder, Rosell did not find that Kaminski was predisposed to engage in acts of sexual violence. He opined that the state's experts improperly scored the actuarial instruments. He further indicated that he did not rely on such testing parameters because, in his opinion, they inflated the rate of recidivism. *Id.* ¶ 6. Rather, he relied on a list of 30 dynamic factors to formulate his opinion that Kaminski was unlikely to reoffend. *Id.*

On appeal, Kaminski sought a new trial under section 752.35, arguing that evidence of the 1984 and 1998 sexual assault incidents relied on by the state's experts did not satisfy the preliminary relevance requirement established in *Gray* and should have been excluded. *Id.* ¶ 8. (Neither of those alleged incidents had resulted in a conviction or even a trial. *Id.* ¶ 5.) Kaminski argued that a chapter 980 commitment hearing was analogous to a criminal trial and contended that the trial court erroneously admitted evidence of prior misconduct during the hearing. Admissibility of other acts evidence is determined by the three-step analytical framework adopted in *State v. Sullivan*, 216 Wis. 2d 768, 771–73, 576 N.W.2d 30 (1998), which operates as an exception to section 904.04(2)(a)'s prohibition of the use of other acts evidence. In *Gray*, the Wisconsin Supreme Court noted the similarity between the preliminary relevance requirement under sections 904.04(2) and 901.04(2), which requires that the relevance necessary for admissibility of certain evidence will be conditioned on the demonstration of a foundational fact before admission. *Kaminski*, 2009 WI App 175, ¶ 10, ___ Wis. 2d ___ (citing *Gray*, 225 Wis. 2d at 59–61 & n.6). Kaminski argued on appeal that the preliminary relevance requirement in *Gray* should be extended to proceedings under chapter 980, despite that such proceedings do not establish a criminal process. *Id.* ¶ 11 (citing *State v. Luttrell*, 2008 WI App 93, ¶ 9, 312 Wis. 2d 695, 754 N.W.2d 249). Under Kaminski's theory, the state would need to show, by a preponderance of the evidence, that he committed the other acts.

The court of appeals declined to extend the foundational-reliability requirement from *Gray* to chapter 980 commitment proceedings, noting that the nature of such hearings requires the jury to consider evidence that would normally be barred from admission during a traditional criminal trial. *Id.* ¶ 12. Chapter 980 proceedings look forward to assess a substantial probability of future conduct. *Id.* The court determined that the admission of evidence that did not satisfy the foundational-reliability requirement in *Gray* "poses a minimal risk of erroneous deprivation in light of the elaborate procedural protections afforded" in a chapter 980 proceeding. *Id.* ¶ 14. The court further noted that, to the extent the *Gray* standard would prevent the admission of relevant evidence, such a result would "frustrate the jury's ability to accurately assess the probability that a particular respondent will commit sexually violent acts in the future." *Id.* ¶ 15.

In addition to the relevance challenge, Kaminski requested a new trial on the ground that the jury heard testimony from the state's expert that a person committed under chapter 980 receives annual re-evaluation. Kaminski maintained that the infrequent references to annual re-evaluation tainted the jury and prevented it from performing its fact-finding function. *Id.* ¶¶ 20–21. In reviewing this challenge, the court of appeals did not find the comments "sufficiently egregious to diminish the jury's sense of responsibility for its verdict." *Id.* ¶ 22. The court found that the jury could reasonably infer that, once committed, Kaminski would receive re-evaluation as part of his treatment regimen. *Id.* ¶ 23.

Finally, the court of appeals rejected Kaminski's assertion that prejudice resulted from the introduction of evidence that commitment was in his best interest and that of the community. The court determined that none of the allegedly prejudicial testimony prevented the real controversy from being tried—namely, whether Kaminski was a sexually violent person under section 980.01(7). The court of appeals affirmed the circuit court's judgment and commitment order. *Id.* ¶ 28.

Introduction of Evidence Regarding Absconding

In *State v. Quiroz*, 2009 WI App 120, 320 Wis. 2d 706, 772 N.W.2d 710, the court of appeals reviewed a trial court order that permitted the introduction of evidence of the defendant's absconding and provided the jury a flight instruction. Quiroz was charged in 2002 with two counts of sexually assaulting and sexually exploiting a minor and was released on bond. He was arrested again for other charges and, in August 2002, was again released on bond. *Id.* ¶ 2. Following that arrest, Quiroz jumped bail and fled to Mexico and Canada. *Id.* Immigration officials arrested him in Montreal, Canada, in December 2005; following extradition, the authorities turned him over to the Sheboygan County Sheriff's Department in October 2006. *Id.*

The charges against Quiroz stemmed from two alleged instances of sexual contact with his 15-year-old stepdaughter (A.S.) in 2002. During both instances, Quiroz made a videotape of the encounter with A.S. Shortly after the second incident, A.S. moved out of the home and went to live with a relative. *Id.* ¶¶ 5–8. During a subsequent summer cookout, A.S. learned from her mother (Patricia) that she and Quiroz were getting a divorce and that Patricia had found pornographic videotapes at his apartment. *Id.* ¶ 9. A.S. assumed the tapes that had been found were the same tapes Quiroz had made during the sexual assaults of A.S., and she proceeded to explain the whole situation to Patricia. *Id.* After A.S. and Patricia reported the assaults to the police, a police detective conducted a one-party-consent recorded-telephone conversation from A.S. to Quiroz on July 18, 2002. *Id.* ¶ 12. Following the taped conversation with Quiroz, the police interviewed him regarding the allegations. A subsequent search of Quiroz's apartment uncovered the existence of pornographic tapes, but not the ones involving A.S. *Id.* ¶¶ 14–16.

The trial on the sexual-assault and child-exploitation charges occurred in March 2007, following Quiroz's extradition from Canada. The flight evidence was presented at trial in the following three ways: (1) five stipulations regarding the details of Quiroz's flight; (2) two extradition documents; and (3) Quiroz's testimony regarding the details of and reasons for his flight. *Id.* ¶ 4. The state moved the court for Wisconsin's flight instruction (Wis. JI—Criminal 172) to be given, while Quiroz sought an order that no evidence of flight could be admitted. *Id.* ¶ 3. The trial court held the state could introduce evidence of Quiroz's flight but not the details of other charges that Quiroz claimed were the reason for his flight. *Id.* The only reference to the additional charges made during the trial were by Quiroz himself, who stated that he fled because he was arrested for "more charges" after he posted bail for the sexual-assault and exploitation charges. *Id.* Quiroz was convicted at trial.

In determining whether the trial court properly admitted evidence of flight, the court of appeals first reviewed the general admissibility of flight evidence. Flight is an admission by conduct, and the fact of an accused's flight is generally admissible as circumstantial evidence of consciousness of guilt. *Id.* ¶ 18 (citing *State v. Miller*, 231 Wis. 2d 447, 460, 605 N.W.2d 567 (Ct. App. 1999)). Further, the defendant's flight need not occur immediately following the commission of the crime at issue. *Id.* (citing *Gauthier v. State*, 28 Wis. 2d 412, 419–20, 137 N.W.2d 101 (1965)). The admissibility of flight evidence is weighed against the restrictive parameters of section 904.03, which governs the exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time.

Quiroz contended on appeal that the *Miller* decision provides an automatic exception to the discretionary ability of the trial court to admit flight evidence when the defendant offers an independent reason for flight that, if admitted, would unduly prejudice the defendant. *Id.* ¶ 21. Quiroz claimed that he proffered an independent reason for flight. He testified that he did not like the way the police "proceed[ed] to arrest" him and further described the manner in which the police arrested him for the sexual-assault charges at issue. He further testified at trial that he ran "just because I was scared." *Id.* ¶ 22. In determining that the reasons proffered by Quiroz for flight were not entirely independent of the sexual-assault charges, the court of appeals refused to accept his argument that flight evidence was inadmissible because he had offered an independent reason for flight. *Id.* ¶ 23. The court observed that, in *Miller*, by upholding the trial court's decision to admit flight evidence, the court of appeals had rejected the same type of automatic exclusion that Quiroz sought. *Id.* ¶ 26 (citing *Miller*, 231 Wis. 2d at 460–61).

The court in *Quiroz* went on to find that flight evidence is not inadmissible simply because a defendant points to an unrelated crime in rebuttal. Rather, the trial court must determine whether to admit the flight evidence by weighing the risk of unfair prejudice against its probative value under section 904.03. *Id.* ¶ 27. Reviewing the record, the court of appeals determined that the trial court had properly held hearings on the flight motions and made appropriate efforts to minimize potential prejudice by limiting the manner in which the state could use flight evidence at trial. *Id.* Finally, the court stated that, even if the admission of the flight evidence had been erroneous,

such admission would have constituted harmless error, given that there was overwhelming evidence of Quiroz's guilt presented at trial. *Id.* ¶ 28. The court of appeals therefore affirmed the judgment of conviction.

Computer-animated Depictions of Crime

In *State v. Denton*, 2009 WI App 78, 319 Wis. 2d 718, 768 N.W.2d 250, the court of appeals addressed a unique issue regarding the admissibility of a computer-generated animation that purported to illustrate the combined testimony of various state witnesses regarding what occurred during an alleged crime. A police officer (Ambach), who was not an expert witness and who lacked firsthand knowledge of the facts depicted in the animation, created the animation and presented it as an exhibit at trial. *Id.* ¶ 1.

The defendants in *Denton* (Denton and Dahl) were charged with attempted armed robbery, attempted kidnapping, and attempted false imprisonment. *Id.* ¶ 2. The charges arose out of an incident involving a victim (Giovannoni) who was allegedly accosted by the defendants while she was jogging. *Id.* ¶ 3. According to the evidence presented at trial, the two defendants exited a vehicle that had been pulled off the road, and they chased Giovannoni. A passerby in a second vehicle (Hohisel) witnessed the incident and stopped on the highway to let Giovannoni get in to escape the defendants. Hohisel called 911 and later testified that he observed one of the defendants appearing to hold a firearm in his hand while chasing Giovannoni. *Id.* ¶ 4. A police detective (Clapper) testified at trial that a police search did not turn up a gun. *Id.* ¶ 5. The defendants were convicted on all counts, but the jury did not find that a weapon was used in the crimes. *Id.* ¶ 6. The trial court denied the defendants' postconviction motions.

The defendants' primary challenge on appeal related to the trial court's admission of Ambach's computer-generated animation. On the last day of trial, the state disclosed its intent to use the animation in an effort to assist the jury in determining "who was where [and] when." *Id.* ¶ 7. The defense objected to the introduction of the evidence as unduly prejudicial and as constituting surprise. *Id.* The trial court overruled the objection, and Ambach presented the animation. He opened his testimony with a diagram reflecting measurements on which he had relied in making the animation depicting the alleged crimes; Clapper had taken the measurements during a visit to the scene with Giovannoni. *Id.* Although Ambach had not observed the scene personally, he based the animation on his review of other officers' reports and discussions with Giovannoni, Hohisel, and another occupant in the Hohisel vehicle. *Id.* Ambach showed various versions of the animation to the jury, demonstrating "all the key players" and the crime scene from various angles. *Id.* ¶ 8. During cross-examination, Ambach agreed with defense counsel that if the animation differed from the testimony at trial, the animation would not be an accurate depiction of the crime scene. *Id.* The defendants were convicted at trial.

On appeal, and based on the objections preserved before the trial court, the defendants challenged the introduction of the computer-generated animation on the grounds of lack of notice, inaccuracy, undue prejudice, and lack of foundation. *Id.* ¶ 10. The state argued that the animation was intended as a demonstrative exhibit and that the trial court's decision to admit the evidence was proper because the court determined that it was relevant under sections 904.01 and 904.02 and that the probative value was not substantially outweighed by the danger of unfair prejudice under section 904.03. *Id.* ¶ 11.

The court of appeals disagreed with the state and noted that, although surprise is not a basis for exclusion under section 904.03, the trial court may exclude testimony resulting in surprise if a continuance causing undue delay is required or if surprise is coupled with the danger of prejudice and confusion of the issues. *Id.* ¶ 12 (citing *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶ 12, 305 Wis. 2d 658, 741 N.W.2d 256). In determining that the surprise at trial was coupled with the danger of prejudice and confusion, the court of appeals in *Denton* determined that, unlike *Roy*, a medical-malpractice case in which the defendant introduced animations during the defendant's liability-expert's testimony and sought to depict the expert's theory of the case, the animation at issue in *Denton* was introduced by Ambach, who was not introduced as an expert witness, and the animation was not intended to illustrate his expert opinion. *Id.* ¶ 15. The court of appeals determined that the trial court should have limited Ambach's testimony to matters in which he had direct personal knowledge, as required by section 906.02. The state offered the animation not simply as a demonstrative exhibit, but as a depiction of the key witnesses' recollection of the events that transpired at the crime scene and "what people did." *Id.* ¶ 16. The court concluded that the animation improperly combined elements from the testimony of multiple witnesses, measurements provided by Clapper, and a summary of the state's version of what occurred at the crime scene. *Id.*

The court next analyzed the probative value of the evidence by examining a corollary issue—whether the state had failed to lay a foundation for the admission of the animation. Preliminarily, the court held that as computer-generated animation “represent[s] simply a new type of illustrative evidence[; its] admissibility is controlled by the basic principles applied to all demonstrative aids.” *Id.* ¶ n.1. The court then once again rejected the state’s attempted reliance on *Roy*, finding that the *Roy* court had addressed an expert’s ability to use an animation to illustrate his or her opinion. Ambach, on the other hand, was not illustrating an expert opinion or providing alternative scenarios for the crime. Rather, the animation showed distances; where the defendants, victim, and witnesses were purportedly situated; and “what people did.” *Id.* ¶ 17. The court expressly rejected the state’s position that computer-generated animation, when used as a demonstrative exhibit, is exempt from long-standing requirements for the establishment of a proper foundation. *Id.*

The court determined there was no authentication by any of the witnesses that the animation fairly and accurately represented their testimony, and no witness had firsthand knowledge of what was actually depicted in the animation, which violated the authentication provisions of sections 909.01 and 909.015. *Id.* ¶ 18. Ambach was not an expert witness or an evidentiary witness and lacked personal knowledge of the facts underlying the animation. *Id.* ¶ 19. The court stated that computer-generated animations are more properly introduced in conjunction with the actual witness’s testimony that it seeks to clarify. *Id.* ¶ 20 (citing *Anderson v. State*, 66 Wis. 2d 233, 248, 223 N.W.2d 879 (1974)). Because the animation at issue was merely a collection of bits and pieces of information taken from various state witnesses by an individual with no firsthand knowledge of the crime, the court of appeals determined that the introduction of this nonevidentiary perspective of the evidence was unduly prejudicial, *id.* ¶ 22, and its probative value did not outweigh its prejudicial effect, *id.* ¶ 23. The court of appeals concluded that the trial court had erroneously exercised its discretion in admitting the evidence. *Id.* Therefore, the court of appeals reversed the judgments of conviction.

Withdrawing Fifth Amendment Rights in a Civil Action

The Wisconsin Court of Appeals faced a unique challenge to a defendant’s attempted withdrawal of a prior invocation of the Fifth Amendment privilege against self-incrimination in a civil action when he sought to waive the privilege in the middle of trial, after he had precluded any opportunity for the plaintiff to explore various topics in discovery before trial in that action. The case of *S.C. Johnson & Son, Inc. v. Morris*, 2010 WI App 6, ___ Wis. 2d ___, 779 N.W.2d 19 (petition for review filed), arose from claims by S.C. Johnson against two of its employees for breach of fiduciary duty and against several transportation companies and their owners (defendants Russell and Buske) for fraudulent misrepresentation, conspiracy to violate section 134.05, fraud, and violations of the Wisconsin Organized Crime Control Act. The claims alleged that various S.C. Johnson employees invited bribes and kickbacks for a decade from the defendant transportation companies, which submitted inflated invoices to S.C. Johnson to make the payments. *Id.* ¶ 6.

During the discovery phase of the case, Russell testified as a corporate representative of his various transportation companies but refused to answer questions on certain topics related to his potential *individual* exposure, as opposed to the company’s corporate exposure, by invoking the privilege against self-incrimination afforded by the Fifth Amendment. *Id.* ¶ 8. Russell maintained the assertion of this privilege throughout the three-year discovery process, except when answering questions in his corporate capacity. *Id.* Then, shortly before trial, Russell’s counsel identified him as a “may call” witness, to which S.C. Johnson filed an objection. *Id.* ¶ 9. The trial court scheduled a hearing a few days before the trial to hear Russell’s proffered testimony, but the court held the issue in abeyance when counsel declared he was not sure whether Russell would actually testify. *Id.* On the Friday of the third week of trial, Russell’s counsel notified the court that Russell would testify at trial. The following Monday, during the final week of trial, Russell withdrew his Fifth Amendment invocation and proffered his testimony for review by the trial court. *Id.* ¶ 10. Following argument from the parties, the trial court denied Russell’s motion to withdraw the invocation of the Fifth Amendment privilege. *Id.* The trial resulted in a \$203.8-million-dollar verdict in favor of S.C. Johnson. *Id.* ¶ 5.

The court of appeals began its analysis by acknowledging Wisconsin’s long-standing recognition that a person may invoke the Fifth Amendment privilege against self-incrimination in a civil action as a protection from the adverse use of such evidence in a subsequent criminal case. *Id.* ¶ 11 (citing *Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 239, 172 N.W.2d 812 (1969)). The court noted the lack of any Wisconsin case law addressing the issue of when an opposing party may object if the person originally claiming the privilege in a civil action seeks to withdraw

the privilege and testify at trial. *Id.* Following review of applicable federal case law, the court of appeals determined that the general rule is that if a claimant makes a timely request to the court, the court will need to explore all possible measures to make a ruling that strikes a fair balance and accommodates both parties. *Id.* ¶ 13 (citing *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 191, 194 (3d Cir. 1994)).

The court's opinion placed heavy emphasis on the issue of the timing of the withdrawal as one of the most important factors for the trial court to consider in the balancing process. *Id.* ¶ 14. The court of appeals noted specifically that "[t]iming can mean everything when determining whether the petitioner invoked that privilege primarily to abuse, manipulate or gain an unfair strategic advantage over opposing parties." *Id.* (citing *United States v. 4003–4005 5th Ave.*, 55 F.3d 78, 84–85 (2d Cir. 1995)). The court continued by acknowledging that a late withdrawal may permit a party invoking the privilege to conceal information and tailor his or her version of the events in a favorable manner that defeats the opposition's theory of the case. *Id.* The court was also persuaded by various commentators on the topic who express the viewpoint that a "party who invokes the privilege up until trial and then withdraws the privilege to testify at trial 'mocks' the discovery process by gaining tremendous strategic advantages from concealing its version of events until trial." *Id.* ¶ 15 (citing Robert Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1131 (1982)).

Though identifying the negative impact that a late withdrawal of the privilege could produce, the court of appeals noted that a late withdrawal does not automatically lead to a finding of abuse that would require the "complete bar of submitting evidence." *Id.* ¶ 18. "If the late withdrawal does not in fact unduly prejudice the adversary, and if there is nothing to suggest the attempted withdrawal was used abusively or to gain an unfair tactical advantage, then the court should be especially inclined to permit the withdrawal." *Id.* (citing *4003–4005 5th Ave.*, 55 F.3d at 84).

Having established that the decision to permit withdrawal rests within the sound discretion of the trial court, the court of appeals reviewed the appellate record to determine whether the trial court's decision to bar Russell's testimony was appropriate. The subject matter of the proffered testimony involved Russell's bank account, which S.C. Johnson alleged he used to distribute money related to the conspiracy. *Id.* ¶ 21. The trial court had determined that the subject matter was "central to and critical to" S.C. Johnson's claims against Russell and his two companies. *Id.* The trial court reasoned that the lack of opportunity for S.C. Johnson to conduct discovery on this matter placed it at a distinct disadvantage and the court was not able to fashion a remedy sufficient to blunt the prejudicial effect because Russell did not withdraw the privilege invocation until the end of the third week of trial. *Id.* The court of appeals concluded that, although the barring of testimony is a severe remedy that should be sparingly used, the subject matter of the defendant's testimony that he had had previously hidden from discovery was directly related to "information that would answer why the money was there, how it got there, and who was involved" in the transactions that formed the basis for the claims at issue. *Id.* ¶ 22. As such, the court of appeals affirmed the trial court's decision to refuse to permit Russell to testify.

Disclosure of McMorris Evidence Before Trial

In *State v. McClaren*, 2009 WI 69, 318 Wis. 2d 739, 767 N.W.2d 550, *cert. denied*, 130 S. Ct. 642 (2009), the Wisconsin Supreme Court reviewed a trial court's order permitting McClaren to introduce so-called *McMorris* evidence. See *McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973). Under *McMorris*, a defendant who asserts self-defense may introduce evidence of violent acts the victim had committed and about which the defendant knew at the time of the alleged crime that would bear on the reasonableness of the defendant's claim of self-defense. In *McClaren*, the trial court agreed to admit such evidence, but on the condition that McClaren provide a summary of the evidence before trial so the court could determine relevance and admissibility.

The charges against McClaren, including attempted first-degree intentional homicide, arose from an incident in which McClaren had spent an evening drinking with his wife's ex-boyfriend (Goehl); the two had an altercation, in which McClaren hit Goehl with a pickaxe. *McClaren*, 2009 WI 69, ¶ 8, 318 Wis. 2d 739. When the police arrived, McClaren claimed self-defense, and Goehl said he had been attacked by McClaren without provocation. *Id.*

In support of his claim of self-defense and before trial, McClaren filed a motion in limine relating to his intended introduction of evidence regarding Goehl's extensive prior criminal record and time in prison, including evidence of his "dangerous character and prior acts of violence." *Id.* The trial court ruled that it would allow McClaren to introduce *McMorris* evidence regarding Goehl's violent past, which included 11 prior convictions, but imposed a

pretrial deadline for McClaren to disclose to the state and the court the nature of the evidence that he was going to introduce. *Id.* ¶ 9. As part of the order, the trial court also imposed a reciprocal requirement that the state provide a pretrial summary of any evidence it intended to use to rebut the *McMorris* evidence. *Id.* ¶ 10.

Before trial, the court of appeals granted McClaren's request for an interlocutory appeal and reviewed the order of the trial court. *Id.* ¶ 11. The court of appeals reversed, holding that the trial court order exceeded its authority under section 971.23, which establishes limited pretrial disclosure requirements for defendants, and section 906.11, which permits the court to exercise control over the presentation of evidence, because these statutes did not properly extend to an order to provide *McMorris* evidence in advance of trial. *Id.* ¶¶ 2, 12. The state filed a petition for review in the supreme court. The supreme court granted the petition.

The Wisconsin Supreme Court began its analysis with a discussion of a defendant's right to attempt to prove prior specific instances of violence within the defendant's knowledge at the time of the incident in support of a claim of self-defense. *Id.* ¶ 21 (citing *State v. Wenger*, 225 Wis. 2d 495, 507, 593 N.W.2d 467 (Ct. App. 1999)). Such evidence is other acts evidence and is subject to application of a balancing test involving the weighing of probative value against the danger of unfair prejudice under section 904.03. The question before the court in *McClaren* was one of timing—namely, whether the circuit court has the authority to order a pretrial disclosure of the defendant's planned *McMorris* evidence, so that the court can make an admissibility determination both before admission and before trial. *Id.*

In reviewing section 906.11 and section 901.04(3)(d), which permits hearings to be held outside the presence of the jury for any preliminary matter if the interest of justice so requires, *id.* ¶ 23, the supreme court concluded that the trial court had the necessary authority to order the pretrial disclosure of the defendant's intended offering of *McMorris* evidence. *Id.* ¶ 28. The supreme court rejected McClaren's argument that the forced disclosure before trial runs afoul of the Constitution. The court found support for its position in the decision of the U.S. Supreme Court in *Taylor v. Illinois*, 484 U.S. 400, 411 n.15 (1988), which upheld a rule requiring pretrial notice of witnesses as a proper rule "of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." See *McClaren*, 2009 WI 69, ¶¶ 30–32, 318 Wis. 2d 739. In response to McClaren's additional argument that the order violated his right against self-incrimination under the Fifth Amendment, the court found no violation had occurred because the order merely required McClaren to accelerate the disclosure of information that he would present at trial. *Id.* ¶¶ 33–35.

The court similarly rejected McClaren's challenge that the order was constitutionally deficient under the Due Process Clause because of its alleged lack of reciprocal disclosure required from the state. *Id.* ¶ 36. The supreme court observed, however, that the written order of the trial court made clear that reciprocity was absolutely required, because the order directed the state to disclose any rebuttal evidence showing a lack of self-defense in a similar fashion to McClaren's *McMorris* offering, before trial. *Id.* ¶¶ 38, 39.

Finally, the Wisconsin Supreme Court addressed the challenge to the constitutionality of the potential sanction for violating the trial court's order. McClaren argued that exclusion of evidence was not a proper remedy for violation of the order. The supreme court disagreed and, relying on the decision in *Taylor*, found that sanctions up to and including exclusion of evidence were permissible, if warranted. *Id.* ¶¶ 43–45. The court noted that the trial court's stated intention to exclude from trial any evidence that McClaren attempted to offer in violation of the order should not have resulted in exclusion as the only potential sanction. *Id.* ¶¶ 6, 46. Rather, the trial court first should consider lesser sanctions; a court should permit the extreme sanction of exclusion only after the court has determined that the violation was willful and "motivated by a desire to obtain a tactical advantage." *Id.* ¶ 43 (citing *Taylor*, 484 U.S. at 415). The supreme court reversed the decision of the court of appeals.

STATUTORY DEVELOPMENTS

On December 11, 2009, the Wisconsin Supreme Court issued an order amending SCR 71.01(2), governing the reporting of court proceedings. That amendment, effective January 1, 2010, added the following exception to the rule's requirement that all proceedings in the trial court be reported: "(e) Audio recordings of any type that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is

played in court, the part played shall be precisely identified in the record.” Wis. Sup. Ct. Order 09-05, 2009 WI 104, ___ Wis. 2d ___ (eff. Jan. 1, 2010).