

**State of Wisconsin
Court of Appeals
District 3
Appeal No. 2012AP000801**

State of Wisconsin,

Plaintiff-Respondent,

v.

Walter Rupar III,

Defendant-Appellant.

**On appeal from a judgment of the Brown County Circuit
Court, The Honorable Kendall Kelley, presiding**

Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

One aspect of the issue presented by this appeal is not controlled by well-settled law; that is, whether the defendant has a constitutional right to not appear before the jury in jail clothes via a video statement to police. Therefore, the appellant recommends oral argument and publication.

Statement of the Issues

I. Whether the appellant is entitled to a new trial on the grounds that, during trial, the state showed the jury a video recording of the appellant's statement to police in which the defendant is displayed in shackles and in jail clothing, and in which the appellant says that he is a "King for life" (i.e. involved in gang activity); and where the appellant's motion for a mistrial was denied.

Answered by the trial court: No.

II. In the alternative, whether the appellant received ineffective assistance of counsel where it is alleged by the State that defense counsel was shown the final version of the video, and he did not object to it until after it was shown to the jury.

Answered by the trial court: This question was not addressed by the trial court because the judge found that there was nothing inappropriate in the video; however, the State did

argue that defense counsel participated in any error by not objecting prior to the time the video was shown to the jury. Defense counsel told the judge that he had no good reason for failing to object and, therefore, no postconviction motion is necessary to establish an evidentiary record. It is expected that, on appeal, the State will reflexively argue that Rupar waived this entire issue by failing to object prior to the time that the video was played. If such an argument is offered by the State, then the court should consider whether defense counsel was ineffective in failing to timely object.

Summary of the Argument

I. The trial court erred in denying Rupar's motion for a mistrial. The State played for the jury a portion of a redacted video recording of Rupar's statement to police. Rupar objected, arguing that the video showed him in jail clothing and restraints, and that the portion of the video that was played for the jury contained a statement to the effect that Rupar was a "King for life" (i.e. evidence of Rupar's affiliation with the Latin King gang). Rupar then moved for a mistrial.

The trial court denied Rupar's motion for a mistrial, finding that the disputed evidence was admissible. Regarding the images of Rupar in jail clothing and restraints, the judge reasoned that, since the legislature required that interrogations be recorded, there was nothing that could be done about the fact that Rupar was shown in jail clothing. Regarding the

gang evidence, the judge used the “other acts” analysis, and concluded that the evidence was offered to establish motive.

As will be set forth in more detail below, the trial court erroneously exercised its discretion. It applied no legal analysis to the video evidence of Rugar’s jail status. The defendant has a constitutional right to a fair trial, which includes the right to appear before the jury free from jail clothing and restraints; *unless* the court finds that a security consideration outweighs the defendant’s rights. Here, because the images in issue were on a video tape, there are utterly no courtroom security issues that could possibly outweigh Rugar’s right to a fair trial. Regarding the gang evidence, the trial court’s analysis was wrong because the evidence is not, in fact, other acts evidence. Thus, it should have been analyzed under the rules of relevance. The issues in this case have no gang component and, therefore, evidence of gang affiliation is irrelevant.

The admission of this evidence was not harmless error. It suggested to the jury that the police have arrested the right man, and this is contrary to the presumption of innocence.

II. If the court finds that Rugar’s issue is subject to waiver, then the court must find that the failure to object was the result of ineffective assistance of counsel. The record fails to establish that Rugar ever knowingly waived his objection to appearing before the jury in jail clothing and,

therefore, the court should find no waiver of the issue on appeal. However, if any error occurred, it was the result of ineffective assistance of counsel. Defense counsel admitted that he did not review the redacted version of the statement prior to the start of trial. Thus, he could not have had any strategic reason for failing to object.

Statement of the Case

I. Procedural History

The defendant-appellant, Walter Rupar (hereinafter “Rupar”) was charged in a criminal complaint filed in Brown County on March 10, 2009 with first degree intentional homicide, armed robbery, and false imprisonment. (R:8) Rupar made his initial appearance on March 17, 2009, and the matter was set for preliminary hearing. Following the preliminary hearing, the court found probable cause, and it bound Rupar over for trial. Rupar entered not guilty pleas to all three charges. (R:132-3)¹

The case was called for jury trial on February 28, 2011. At the outset of trial, the court conducted a hearing into the admissibility of Rupar’s statement to police. After taking testimony, the judge ruled that Rupar’s statement was admissible. (R:143-69)

¹ On October 19, 2010, Rupar’s attorney raised the issue of Rupar’s competency to proceed. (R:139-6). Thus, the court ordered a competency examination. (R:139-11). The doctor’s report indicated that Rupar was competent to proceed and, on November 19, 2012, the court found Rupar competent. (R:140-2)

The case then proceeded to trial. During the State's case, Ruper moved for a mistrial. (R:146-3) Ruper argued that his video recorded statement (R:87) was partially played to the jury and defense counsel was unaware that the portion of Ruper's statement that was played would contain statements to the effect that Ruper was involved in a gang, and further that, in the video, Ruper was shown in jail clothing and shackles. *Id.*²

In arguing for a mistrial, Ruper's attorney told the court that the redaction process was "sloppily done" (R:146-7), and that he did not review the final version of the statement before it was shown to the jury. (R:146-8) He told the judge when the objection was initially made that, "I did get a copy of the redacted version, and it's my error. I didn't review my copy before this was played today." (R:145-115, 116) Thus, there was no strategic reason for failing to object. Rather, the attorney told the court, "I should have done something ahead of time, I should have done something prophylactic, and I didn't, and that's on me . . . (R:146-8)

Regarding Ruper's point that, in the video, he is shown in jail clothing and shackles, the court made short shrift. The judge said:

As to the issue of the visual impact, I do intend to make a decision here this morning, but I think that that's going to be regrettable, but I have to agree with your observation, that these are required recordings, and they're going to be-- it's going to be common for someone to be in custody, *and when they're wearing bright*

² See, additionally, R:145-114, where the court conducted a side-bar shortly after the disputed portions of the video were shown to the jury.

orange, there's really no way around that, and the decision to mandate recordings and the apparent preference for requiring those recordings, which are apparently intended to allow the finder of fact the get the most complete picture, literally, of what had occurred in terms of a statement as opposed to relying on the testimony of officers about an interview, this allows the finder of fact to have the most amount of information about that. That will, of necessity, include jail garb, it will, of necessity, include the usual security measures.

It would be highly extraordinary for someone with these types of charges to be out walking on the street in civilian clothes and to be utterly unencumbered . . .

(R:146-13, 14)

The court also denied the aspect of the motion concerning the evidence of Rugar's gang activity. The court went through the so-called *Sullivan* analysis, and concluded that it was admissible other acts evidence. (R:146-27)

The jury returned verdicts finding Rugar guilty on all three counts (R:147-123)

On the first degree intentional homicide charge, the court sentenced Rugar to life in prison without the possibility of parole (R:148-43)

II. Factual Background

On December 4, 2008, two armed and masked men made their way into the home of a man known as "Birdie".³ Birdie was made to lie on the floor, and he was ordered not to

³ Whose real name is Eulices Camacho-Pineda

move. When Birdie attempted to stand, he was shot and killed. The two masked men escaped from the house.

Adriana Rosas, who was granted immunity by the State (R:144-22), testified that Walter Rugar, who is known as “BJ”, is her step-brother. (R:144-43) Jacinto Fraire is her boyfriend. *Id.* According to Rosas, Birdie sold Fraire some cocaine that was bad. (R:144-47, 48) Fraire demanded that Rosas⁴ help him make it right with Birdie. (R:144-48) Therefore, along with Rugar, a plan was hatched to burst into Birdie’s home, and to rob him of his drugs and money. (R:144-51, 52) Rosas called Birdie to ostensibly set up a drug deal, and then she drove Rugar and Fraire to the house. (R:144-60) Rosas said that she saw the men with a rifle.

Dulce Olvera-Gomez (“Candy”) was in Birdie’s house when the intruders entered. She described two men who stormed into the house wearing ski masks and bandanas over their faces, and one of them was carrying a “rifle”. They threw Birdie to the living room floor, and the man with the gun was kicking him. (R:144-128-130) There were a number of other people in the house at the time, and they were in the hallway becoming hysterical. (R:144-131) When Birdie tried to get up, he was shot one time. (R:144-131) After the shot, the two men ran out the door. (R:144-133)

According to Adriana Rosas, while she was parked near Birdie’s house on the day of the incident, Rugar got back into the car, and he admitted to her that he was the shooter. (R:144-

⁴ Who was friends with Birdie

66)

The medical examiner said that Birdie died from a large gunshot wound to his left lateral chest. (R:144-252)

Christl Stevens has a child with Rugar. She told the jury that some time after the shooting she was watching the television news with Rugar when a story about the shooting came on. According to Stevens, Rugar told her that he was the shooter. (R:144-258) Rugar explained to her that he did not believe he would be caught because he was slouching to disguise his height, and he had burned the clothing and the gun in a barrel. *Id.*

Tammy Gutierrez told a similar story. She is the sister of Rugar's girlfriend (Roberta Doucette). She said that there was an occasion where she encountered Rugar while he was using a computer. He was reading a story about the shooting. Gutierrez claimed that Rugar told her that he was the shooter, but that he would not be caught because he had destroyed all of the evidence. (R:145-20)

When Rugar was apprehended by the police they questioned him. In his initial statement, he denied any involvement but, according to the police, he made reference to facts that could only have been known by a person who had been at the scene. (R:146-52) He also told the police that he had an alibi, and listed Christl Stevens and Tammy Gutierrez as his witnesses. However, when the police talked to the two women, they denied that they were with Rugar at the time of

the homicide. (R:146-55) The police interrogated Rugar two more times. The third time he admitted that he was involved in the incident.

Rugar's brother, Aaron, testified in the defense case that, on the night of the shooting, he was with Walter Rugar until at least two or three o'clock in the morning. (R:146-126)

Argument

I. The trial court erroneously exercised its discretion in denying Rugar's motion for a mistrial.

The State played for the jury portions of the video recording of Rugar's statement to police. Rugar objected, arguing that the video showed him in jail clothing and restraints, and that the portion of the video that was played for the jury contained a statement to the effect that Rugar was a "King for life" (i.e. evidence of Rugar's affiliation with the Latin King gang). Rugar then moved for a mistrial.

The trial court denied Rugar's motion for a mistrial, finding that the disputed evidence was admissible. Regarding the images of Rugar in jail clothing and restraints, the judge reasoned that, since the legislature required that interrogations be recorded, there was nothing that could be done about the fact that Rugar was shown in jail clothing. Regarding the gang evidence, the judge used the "other acts" analysis, and

concluded that the evidence was offered to establish motive.

As will be set forth in more detail below, the trial court erroneously exercised its discretion. It applied no legal analysis to the video evidence of Rupar's jail status. The defendant has a constitutional right to a fair trial, which includes the right to appear before the jury free from jail clothing and restraints; *unless* the court finds that a security consideration outweighs the defendant's rights. Here, because the images in issue were on a video tape, there are utterly no courtroom security issues that could possibly outweigh Rupar's right to a fair trial. Regarding the gang evidence, the trial court's analysis was wrong because the evidence is not, in fact, other acts evidence. Thus, it should have been analyzed under the rules of relevance. The issues in this case have no gang component and, therefore, evidence of gang affiliation is irrelevant.

The admission of this evidence was not harmless error. It suggested to the jury that the police have arrested the right man, and this is contrary to the presumption of innocence.

A. Standard of Appellate Review

Whether to grant a mistrial is a matter for the trial court's discretion and, on appeal, the appellate court will grant great deference to a trial court's decision on a motion for mistrial. *See, State v. Foy*, 206 Wis. 2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996). Thus, on appeal, the court will examine discretionary decisions to determine whether the trial court examined the relevant factors, applied the appropriate standard

of law and engaged in a rational decision-making process. See *id.*

B. Factors guiding the trial court's discretion

As mentioned above, whether to grant a motion for mistrial is a decision that is committed to the sound discretion of the trial court. See, e.g., *State v. Hampton*, 217 Wis. 2d 614, 621, 579 N.W.2d 260, 263 (Ct. App. 1998). The trial court must review the entire proceeding to determine "whether the claimed error is sufficiently prejudicial as to warrant a mistrial." *Id.*

C. In determining that the evidence of Rupar's in-custody status was not grounds for a mistrial, the trial court applied no standard at all.

The trial court ruled that the video evidence of Rupar in jail clothing and shackles was not inappropriate because, in effect, the legislature required that interrogations be recorded and, therefore, it must be expected that the suspect will be in jail clothing and restraints.

This is an erroneous exercise of discretion by the trial judge because: (1) the statute requiring that interrogations be recorded cannot-- and does not-- change the existing constitutional law prohibiting the jury from viewing evidence that the defendant is in custody; and, (2) the law does not require that adult interrogations be *video* recorded, and there are numerous methods of presenting the evidence of Rupar's statement without displaying him in jail clothing and restraints.

Thus, the court did not apply the correct law, and the trial court did not engage in a rational decision-making process.

As the Court of Appeals recently observed in, *State v. Champlain*, 2008 WI App 5, P22 (Wis. Ct. App. 2007):

A criminal defendant generally should not be restrained during the trial because such freedom is "an important component of a fair and impartial trial." (citations omitted). The defendant may be subjected to physical restraint while in court, however, if the trial judge has found such restraint reasonably necessary to maintain order.

Thus, the right of the defendant to be free of restraints while in the presence of the jury is a matter of the defendant's due process right to a fair trial.

It is also important to emphasize that, regardless of whether either party objects to the defendant's appearance in restraints before the jury, the trial court has an independent duty to ensure that the defendant receives a fair trial. This imposes on the trial judge the obligation to *sua sponte* take steps to make sure that the jury does not see the defendant in restraints. It is an erroneous exercise of discretion for the judge to simply abdicate his responsibility to the purported security needs of law enforcement. As the court explained in *Champlain*, 2008 WI App 5, P33:

A trial court maintains the discretion to decide whether a defendant should be shackled during a trial as long as the reasons justifying the restraints have been set forth in the record. *State v. Grinder*, 190 Wis. 2d 541, 550, 527 N.W.2d 326 (1995). It is an erroneous exercise of discretion to rely primarily upon law

enforcement department procedures instead of considering the risk a particular defendant poses for violence or escape. See *id.* at 521; see also *Sparkman*, 27 Wis. 2d at 96 ("It is for the trial court rather than the police to determine whether such caution is necessary to prevent violence or escape."). In addition, whenever a defendant wears a restraint in the presence of jurors trying the case, the court should instruct that the restraint is not to be considered in assessing the proof and determining guilt. See *Cassel*, 48 Wis. 2d at 624.

Here, it is obvious beyond the need to state it that there was utterly no security need present. Rupar was being shown on a video recording. There was literally no reason that the jury needed to see him in restraints.

The state statute requiring that in-custody interrogations be recorded certainly does not trump the defendant's constitutional right to a fair trial.

Moreover, the central tenant of the trial court's reasoning-- that the statute mandates that interrogations be *video* recorded-- evidences an inaccurate understanding of the law. Rather, Sec. 968.073, Stats., provides:

(2) It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony unless a condition under s. 972.115 (2) (a) 1. to 6. applies or good cause is shown for not making an audio or audio and visual recording of the interrogation.

Plainly, the statute permits the interrogation of an adult to be *either* audio recorded, *or* audio and video recorded. Thus, the trial judge's belief that the law mandated a video recording of

Rupar's interrogation is simply inaccurate.

Finally, even though a video recording was made in this case, there were numerous methods available to present evidence of Rupar's statement without showing him in jail clothing and shackles. The court could have played the audio portion of the statement without the video. The court could have simply had the detective recount Rupar's statement for the jury with the understanding that if Rupar, on cross-examination, created the impression that the detective was recounting the statement inaccurately, the disputed portion of the audio recording could be played for the jury.⁵ None of these reasonable alternatives were even considered by the court.⁶

Thus, the trial judge's exercise of discretion in permitting the jury to see Rupar in jail clothing and restraints in the video recording of his statement was a woefully erroneous exercise of discretion.

D. The trial court applied the wrong standard in determining the admissibility of the gang evidence.

In *State v. Bauer*, 2000 WI App 206 (Wis. Ct. App. 2000), the Court of Appeals noted that "simply because an act can be

⁵ Incidentally, having a detective recount the defendant's statement is the procedure that had been employed in this state up until five years ago, when the new statute was created. Thus, the state cannot argue that it would be prejudiced by introducing the evidence through a police detective.

⁶ And, to be fair, it must be pointed out that neither were they *suggested* by defense counsel. This point will be further developed in the ineffective assistance of counsel section of the brief.

factually classified as ‘different’—in time, place, and, perhaps, manner than the act complained of—that different act is not necessarily ‘other acts’ evidence in the eyes of the law.” *Bauer*, 238 Wis. 2d 687, ¶7 n.2. The court went on to explain that “the first question the lawyers and the trial court should ask is, ‘what is the purpose of the State’s intention to admit the evidence?’ If it is not to show a similarity between the other act and the alleged act, then perhaps the parties should [ask] whether it is ‘other acts’ evidence at all.” *Id.*

Here, there is no similarity between the alleged act (i.e. a home invasion attempted robbery and homicide) and the other act (Rupar’s affiliation with the Latin Kings). Thus, the gang evidence was not other acts evidence at all.

In denying Rupar’s motion for a mistrial, then, in analyzing the gang evidence the trial judge applied the wrong standard of law. This is, again, an erroneous exercise of discretion.

E. If the court had applied the proper standard of law, the court would have been obligated to exclude the video portion of Rupar’s statement and the King statement.

There remains, of course, the question of whether the trial court reached the right decision for the wrong reasons. In other words, even though the judge did not apply the correct legal analysis to Rupar’s motion for a mistrial, would the decision have been different if the correct analysis were applied?

The video evidence is easy. As a general rule, it violates the defendant's constitutional right to a fair trial for the jury to see him in jail clothing and restraints *unless* the trial court finds that there is some compelling security need that outweighs the defendant's right to be free of restraints. Here, there was no security need involved. The images of Rugar in restraints were on a video recording. There is utterly no security issue present. Thus, under the correct analysis, it must still be concluded that it was improper for the jury to see evidence of Rugar in a bright orange jail outfit and restraints.

The evidence of Rugar's gang affiliation, too, would not have been admitted if the correct legal standard were applied. The evidence is not other acts evidence. Rather, its admissibility is determined under ordinary principles of relevance.

In the courtroom the terms relevancy and materiality are often used interchangeably, but materiality in its more precise meaning looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue nor probative of a matter in issue, the evidence is properly said to be immaterial. . . . Relevancy in logic is the tendency of evidence to establish a proposition which it is offered to prove. Relevancy, as employed by judges and lawyers, is the tendency of the evidence to establish a material proposition.

State v. Becker, 51 Wis. 2d 659, 667 (Wis. 1971).

The question here, then, is what is the material proposition for which evidence of Rugar's gang affiliation is

offered? Virtually every single appellate case approving of the admission of gang evidence had a gang component to the case. See, e.g., *State v. Long*, 2002 WI App 114 (Wis. Ct. App. 2002), where gang affiliation was relevant impeachment of witnesses.

Here, there was no evidence that the crime alleged was in any way gang-related, and Rupar did not testify. Thus, there is no material proposition of fact for which the “King” evidence could have possibly been offered.

Therefore, if the court had applied the correct legal standards, the judge would have concluded that the disputed evidence should not have been admitted.

F. The improper evidence was not harmless

In ruling on Rupar’s motion for a mistrial, the judge found that the disputed evidence was admissible. Thus, judge never reached the question of whether the admission of the evidence was prejudicial. As will be set forth in more detail below, the improperly admitted evidence affected Rupar’s fundamental right to a fair trial. Therefore, the error was not harmless.

An evidentiary error requires reversal or a new trial only when the improper admission of evidence has affected the substantial rights of the party seeking relief on appeal. *State v. Kourtidas*, 206 Wis. 2d 573, 586, 557 N.W.2d 858 (Ct. App. 1996). In making this determination, the court must weigh the

effect of the inadmissible evidence against the totality of the credible evidence supporting the verdict. *Id.*

The State will certainly argue that the evidence against Rugar was overwhelming. The driver of the car, Adriana Rosas, testified that she drove Rugar to the scene, and that he got into the car following the incident and admitted that he was the shooter. Two women who knew Rugar, Christl Stevens and Tammy Gutierrez, testified that he admitted to them that he was the shooter. And, finally, Rugar admitted to police in his third interrogation that he was involved. Thus, the State will argue, the mere sight of Rugar in jail clothing and restraints, and the brief comment that he was a “King for life”, certainly did not contribute in any meaningful way to the jury verdict.

Here, though, what is at stake is Rugar’s constitutional right to a fair trial, including the right to be presumed innocent. In denying Rugar’s motion for a mistrial, the judge recognized that the jury probably does not presume Rugar to be innocent. The court said:

I would think that a jury might even be more distracted if they saw somebody there in civilian clothes, if they believed that there were a suspect in a case with such serious allegations.

. . . . I’m not convinced that they would not be more alarmed to suppose that, during the pendency of this matter, that there would be no effort made to ensure the security of the community against any of our accused of such a serious offense. So with respect to that, I don’t find that the visual impact is either surprising, nor controlling in a decision that I would have to make today.

(R:146-14, 15). Thus, recognizing that the jury may not actually presume Rupar to be innocent, instead of allowing Rupar to appear before the jury as a “civilian”, the judge thought it more appropriate to require him to appear in jail clothing to assuage the jury’s concerns. In other words, the image of Rupar in custody conveys the reassuring message to the jury that *the government has arrested the right guy*. You need not worry.

Then, on top of that, the jury was permitted to learn that Rupar was a “King for life.”

When an error concerns a fundamental right, the harmless error rule applies sparingly. Perhaps the most eloquent articulation of this principle was by the Seventh Circuit in the notorious case of Theodore Oswald, a criminal defendant who also had overwhelming evidence of his guilt against him. The court wrote:

We explained the thinking behind these exceptions to the rule that harmless errors do not vitiate criminal convictions in *Walberg v. Israel*, 766 F.2d 1071, 1074 (7th Cir. 1985): “If the police, after arresting Walberg and obtaining an eyewitness identification of him plus his confession, had taken him directly to the penitentiary on the ground that a trial would be a waste of time for someone so patently guilty, he would be entitled to release on habeas corpus; he would have been deprived of his liberty without due process of law. The Constitution requires (unless the defendant waives his rights) a certain modicum of adversary procedure even if the outcome is a foregone conclusion because the evidence of guilt is overwhelming.” Oswald was entitled to be tried by a jury that undertook to decide his guilt on the basis of the evidence rather

than of what they had learned from the pretrial publicity about the case a jury that decides guilt before the trial begins is little better than a lynch mob.

Oswald v. Bertrand, 374 F.3d 475, 482-483 (7th Cir. Wis. 2004).

For these reasons, the the trial court erroneously exercised its discretion in denying Rugar's motion for mistrial.

II. If the court finds that Rugar waived any objection to the admissibility of the video evidence, then the court should find that Rugar received ineffective assistance of counsel.

The State opposed Rugar's motion for mistrial. Its central argument was that the redacted version of the video had been provided to Rugar's attorney prior to the start of the trial, and Rugar had offered no objection until after it had already been partially played for the jury.

If the State makes a similar argument on appeal, and if the court is inclined to find waiver, then the court must consider whether Rugar was afforded ineffective assistance of counsel.

There is good reason, though, for the court to reject any waiver argument. As explained above, what is at issue here is Rugar's fundamental right to a fair trial. *Champlain, supra*, has many factual similarities to the present case. There, in addressing the State's waiver argument, the Court o Appeals explained:

However, waiver is the intentional relinquishment of a known right. *State v. Matson*, 2003 WI App 253, P41, 268 Wis. 2d 725, 674 N.W.2d 51. We indulge in every reasonable presumption against waiver of a constitutional right. See *State v. Baker*, 169 Wis. 2d 49, 76, 485 N.W.2d 237 (1992). In this case, at virtually the last minute before entering the courtroom, Strand informed Champlain he had to wear the Band-It. This event occurred outside the courtroom setting and thus was not captured or preserved on the record. Nor was it memorialized by any other method. Generally, waiver will not be presumed from a silent record. See *id.* We are not prepared to hold that by opting to wear his own clothing instead of something from jail storage, Champlain should be held to have appreciated and weighed the legal implications of declining Strand's offer. In short, the record does not show that Champlain intentionally relinquished a known right.

Champlain, 2008 WI App 5, P16 (Wis. Ct. App. 2007).

Here, the redacted video was provided to Rugar's attorney shortly before the trial started. The record is silent as to whether Rugar ever saw the redacted version himself. Thus, this could not have been an intelligent relinquishment of a known right by Rugar. For this reason, the Court of Appeals should reject any suggestion by the State that Rugar waived his right to object to the video.

If waiver is found, then the Court of Appeals should likewise find that the waiver was the result of ineffective assistance of counsel. To be clear, the claim of ineffective assistance of counsel here is limited to counsel's failure to timely object to the admission of the video portion of the

statement, and his failure to object to Ruper's statement "King for life" such that the waiver on appeal rule is applied.

An attorney's decision at trial-- such as the decision not to object-- can rarely be the subject of a claim of ineffective assistance of counsel. The exception, of course, is where the attorney has not conducted a reasonable inquiry into the relevant law and facts. As the Supreme Court explained:

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a

duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 690-691 (U.S. 1984).

Here, the State's claim is that Rugar waived his right to object to the version of the video statement that was played to the jury because a copy of the video was provided to defense counsel prior to the start of the trial. Ordinarily, defense counsel's decision not to object until after the video was played would be subject to application of the waiver rule.

Here, though, counsel admitted that he did not watch the video prior to the start of trial. Thus, he could not possibly have had a strategic reason for not objecting.

The court should find that Rugar's issue is not subject to waiver because it affects a substantial right and the record contains no evidence that the waiver was knowing and voluntary. If there was any waiver, it was the result of ineffective assistance of counsel.

Conclusion

For these reasons, it is respectfully requested that the Court of Appeals reverse Rugar's conviction, and remand the matter for a new trial with instructions that the video portion of Rugar's statement to police is not admissible; and with further

instructions that the portion of the recording in which Rupar says that he is a “King for life” is likewise not admissible.

Dated at Milwaukee, Wisconsin, this _____ day of July, 2012.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 5725 words.

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Dated this _____ day of _____, 2012:

Jeffrey W. Jensen

**State of Wisconsin
Court of Appeals
District 3
Appeal No. 2012AP000801**

State of Wisconsin,

Plaintiff-Respondent,

v.

Walter Rupar III,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Excerpt of trial court's decision denying motion for mistrial (R:146-13 et seq.)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of July, 2012.

Jeffrey W. Jensen