COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1051-CR **Cir. Ct. No. 99-CF-1224**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD W. DELANEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Richard W. Delaney appeals from a judgment of conviction and sentence for operating while intoxicated (OWI), third offense,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(c). Richard[2] first argues that the trial court erroneously denied his motion to suppress a statement of confession given to the police prior to receiving a ***Miranda***[3] warning. Richard contends that his statement that he was the driver of a car involved in a hit-and-run accident was obtained during a custodial interrogation and should have been suppressed.

¶2 Richard additionally challenges the trial court's application of the penalty enhancement statute, WIS. STAT. § 939.62, as he was already subject to the penalty enhancers for multiple offenses pursuant to WIS. STAT. § 346.65(2)(c).

¶3 We reject both of Richard's arguments. We affirm the judgment of conviction.

FACTS

¶4 The facts relevant to the issues on appeal are undisputed. On November 19, 1999, Officer Kenneth Clelland of the City of Kenosha Police Department responded to a dispatch attempting to locate a brown station wagon with a certain license plate that had been involved in a hit-and-run accident. Dispatch identified the suspected driver as either Richard Delaney or Randy Delaney. Clelland located the vehicle in front of a residence later identified as that of Richard's brother, Martin Delaney. Clelland waited to approach the residence until his backup, Officer John Gray, had arrived. When the officers knocked on

[2] Because the facts of this case involve multiple members of the Delaney family, we will refer to them by their first names.

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

the door, a man who identified himself as Martin Delaney answered the door. He told the officers that he knew nothing about the car parked in front of his residence.

¶5 Clelland then asked Martin for identification. Martin asked if he could get it from the coffee table inside the residence and Clelland asked Martin if he could retrieve it himself. Martin agreed and Clelland entered the residence. Clelland noticed an individual sitting in a chair in the living room. Clelland asked his name and the individual replied with slurred speech that he was Randy Delaney. Clelland asked Randy to stand up, come outside and answer a few questions about the car parked out front. Clelland observed that Randy was "highly intoxicated and became somewhat verbally disorderly and was flailing his arms around asking … what is going on." Clelland placed Randy in handcuffs, explaining that he was doing so for "officer safety due to [Randy] being uncooperative."

¶6 Clelland then asked Randy where Richard was and Randy replied that he thought Richard was somewhere in the house. Martin indicated that Richard had left about twenty minutes ago. After Clelland informed Martin that he could "end up in some sort of trouble" if Richard was really in the residence, Martin indicated that Richard was "hiding in the bedroom." Clelland went into the bedroom and found Richard hiding on the floor next to the bed furthest away from the door. Clelland asked Martin to stay out of the bedroom and then asked Richard to stand up. Richard's speech was slurred and he smelled of alcohol. Clelland observed that Richard was "getting pretty worked up." Concerned that there were three brothers at the residence, Clelland placed Richard in handcuffs as well, explaining to Richard that he was doing so for "officer safety."

¶7 Clelland testified that as he was walking Richard out of the residence, Richard denied driving the vehicle. Richard continued to talk to Clelland and Gray on the porch; however, the officers denied questioning him at that point. The officers decided not to make an arrest but instead to call a road supervisor to the scene. While waiting for the road supervisor, Richard indicated that he was cold. Clelland did not want Richard to return to the residence so he offered to let him and Randy sit in the squad cars. They agreed.

¶8 The officers then went to look at some dents on the station wagon. Clelland returned to the squad car to retrieve a flashlight. When Clelland opened the door to the squad car, Richard told him that he did not want his brother to get in trouble, that he was driving the car and that the officers should let Randy go. Clelland denied asking Richard any questions prior to his confession. Richard was placed under arrest and transported to the police department.

¶9 On November 22, 1999, Richard was charged with eight counts related to his involvement in a hit-and-run accident. Eventually, Richard entered a no contest plea to OWI, third offense, as a repeater pursuant to WIS. STAT. §§ 346.63(1)(a), 346.65(2)(c) and 939.62. He also pled no contest to two counts of causing injury while operating while intoxicated in violation of § 346.63(2)(a)1.

¶10 On January 14, 2000, Richard moved to suppress his statement, contending that he was in custody and under arrest from the moment Clelland put him in handcuffs. At the suppression hearing, Richard testified that when Clelland returned to the vehicle for his flashlight, "He looked at me, and he said, Mr. Delaney … you know we have you, we have a witness, we have a statement from the person you got the car from that he gave you the car. He said if you just admit that you were driving, we can let your brother go."

¶11 In denying Richard's motion, the trial court found:

> The Court is satisfied that the officers were investigating a hit and run accident incident. They were told that several of the Delaney brothers were involved; Richard and/or Randall Delaney were involved, and that when the officers arrived, the investigating officer was confronted by an extremely intoxicated individual, Randall Delaney, and for the officer's own safety, that Randall Delaney was handcuffed. And at that point ***Miranda*** would not apply to the officer's efforts to secure his own safety, and there was a situation in which the officer then attempted to determine whether or not the brother, Richard Delaney, the defendant, was on the premises, and discovered the defendant also in an intoxicated state in a bedroom, in a situation in which the arresting officer had every reason to try to stabilize the situation for purposes of his own safety. The Court believes that that situation viewed in the totality of the circumstances as it took place that evening insulates the officer from the requirement to … give the ***Miranda*** warnings to the defendant. And that the placing the defendant in handcuffs at that point was not placing the defendant in custody, but merely was an act done for the safety of the officer….
>
> As to the voluntariness of this, it's quite clear that the officers were still investigating this case, and that … they were communicating merely the information as to why they were there, and the voluntary statement by the defendant, it appears to the Court, was voluntary, indicating that he was responsible and his brother was not responsible. It was not based on any coercion ….

The trial court therefore denied Richard's motion to suppress.

¶12 Richard also moved to dismiss the penalty enhancer under WIS. STAT. § 939.62 as applied to the OWI count, arguing that it was improper to add this enhancer when the crime was already enhanced under WIS. STAT. § 346.65(2)(c) because it is a third offense. The trial court denied the motion on the basis that Richard's prior felony offense provided a separate factual basis for the application of the § 939.62 penalty enhancer.

¶13 Richard appeals.

DISCUSSION

A. Suppression of Statement

¶14 Richard first argues that his pre-***Miranda*** statement that he was the driver of the car involved in the accident was obtained during a custodial interrogation and should have been suppressed by the trial court. Richard contends that he was in custody from the moment the police discovered him in his brother's bedroom, directed him to stand up and placed him in handcuffs. We conclude that although Richard was in custody, his statement was voluntary and not the result of police interrogation. As such, the statement was admissible.

¶15 When reviewing an order denying a suppression motion, this court will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law which we decide without deference to the trial court's decision. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995). Nonetheless, we value a trial court's decision on such a question. ***Scheunemann v. City of West Bend***, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

¶16 For ***Miranda*** warnings to be required, a person must be in custody and under interrogation by the police. ***State v. Mitchell***, 167 Wis. 2d 672, 686, 482 N.W.2d 364 (1992). We turn first to whether Richard was "in custody" at the time of his statement.

¶17 In determining whether an individual was in custody for purposes of ***Miranda***, the court must consider the totality of the circumstances. ***State v.***

Mosher, 221 Wis. 2d 203, 210-11, 584 N.W.2d 553 (Ct. App. 1998), *cert. denied*, 530 U.S. 1232 (June 12, 2000) (No. 99-8955). "The test is 'whether a reasonable person in the [suspect's] position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.'" ***Id***. at 211 (citation omitted). This determination depends on the objective circumstances and not on the subjective views of the officers or the person being questioned. ***Id***.

¶18 Clelland testified that he found Richard hiding at the far end of his brother's bedroom. Clelland directed Richard to stand up. Richard complied and asked Clelland "what was going on." Clelland told Richard they needed to talk about the car out front and placed Richard in handcuffs, explaining he was doing so for "officer safety." Clelland led Richard to the front porch of the residence. Richard indicated that he was cold and Clelland, who would not let Richard back into the house until things were "clarified," offered to let him sit in one of the squad cars.

¶19 Richard argues that the restriction of his movement to the porch of the residence or the police vehicle and the use of handcuffs deprived him of his freedom. Richard contends that a reasonable person in his position would clearly have considered himself or herself to be in custody given this degree of restraint. An individual whose movement is curtailed and who is not free to leave the scene is in custody for purposes of ***Miranda***. *See* ***Scales v. State***, 64 Wis. 2d 485, 491, 219 N.W.2d 286 (1974). We conclude that Richard, who had been handcuffed, removed from the residence and confined to the porch, was in custody.

¶20 The trial court appears to have determined that custody within the meaning of ***Miranda*** did not exist because the officers placed Richard into custody for purposes of their safety and not for purposes of interrogation. But we are

unaware of any law that draws this custodial distinction. Instead, custody is measured by the standard of the "reasonable person in the suspect's position … given the degree of restraint under the circumstances." ***Mosher***, 221 Wis. 2d at 211. Regardless of the police motivation for the custody, a reasonable person in Richard's position would have considered himself or herself to be in custody.

¶21 That brings us to the second inquiry—whether Richard, once in custody, was interrogated so as to invoke the procedural safeguards of ***Miranda***. In ***Miranda***, the Supreme Court held that "custodial interrogation" meant "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). "Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." ***Id***. at 478. Therefore, custody alone does not invoke the ***Miranda*** rule. ***Martin v. State***, 87 Wis. 2d 155, 166, 274 N.W.2d 609 (1979). "***Miranda*** holds that a statement that is volunteered and not elicited as a result of prior interrogation is free from the strictures of ***Miranda*** even if made while in custody." ***Martin***, 87 Wis. 2d at 166.

¶22 With respect to Richard's statement, Clelland testified that after examining the Delaney vehicle involved in the accident, he returned to his squad car to retrieve a flashlight. Richard was seated in his squad car and when Clelland opened the door to go into the squad, "Richard told [him] he did not want his brother to get in trouble, he was driving the car, let his brother go." Clelland denied having asked any questions eliciting this statement and simply responded, "[O]kay."

¶23 We acknowledge Richard's contrary testimony that, upon returning to the police vehicle, Clelland told him to admit to driving the vehicle so the officers could let Randy go. The trial court did not expressly resolve this conflict between Clelland's and Richard's testimony. However, when the trial court does not make a formal finding of fact, we may assume it was determined in the way that supports the court's ultimate ruling. ***Mosher***, 221 Wis. 2d at 212. Here, the court determined that Richard's statement was voluntary and not the result of coercion or interrogation. We therefore assume that the trial court favored Clelland's testimony that he did not question or pressure Richard while Richard was seated in the police vehicle.

¶24 We also acknowledge that in further defining "interrogation" for purposes of ***Miranda***, the Supreme Court in ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980), stated:

> [T]he term "interrogation" under ***Miranda*** refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. (Footnote omitted.)

However, we find nothing in the trial court's findings or otherwise which indicates that the police used any words or actions likely to elicit an incriminating response from Richard.

¶25 We conclude that Richard's statement was voluntary and was not the result of police questioning or custodial interrogation. As such, Richard's statement was admissible.

B. Repeater Sentence

¶26 Richard next contends that his sentence was improperly enhanced by the trial court's application of both the repeater provisions of WIS. STAT. § 346.65(2)(c) and WIS. STAT. § 939.62(1)(a).[4]

¶27 The criminal complaint charged Richard with OWI pursuant to WIS. STAT. § 346.63(1)(a). The complaint also alleged that Richard had previously been convicted of OWI in July 1992 and that his driving privileges were previously revoked for failing to submit to a chemical test in July 1990, making him a third-time offender pursuant to WIS. STAT. § 346.65(2)(c). In addition, the complaint alleged that Richard had previously been convicted of felony attempted possession of THC with intent to deliver in July 1996, making him a repeat offender pursuant to WIS. STAT. § 939.62.[5]

¶28 Richard argues that the legislature did not intend that a defendant already subject to the enhanced penalty provisions of WIS. STAT. § 346.65 should be further subject to the enhanced penalty provisions of WIS. STAT. § 939.62.

[4] Anticipating that a published opinion in ***State v. Peltz***, No. 01-0923-CR, would answer this issue, we pended this case until ***Peltz*** was released and published. However, while this court was still considering the issue in ***Peltz***, the appellant in ***Peltz*** moved to voluntarily dismiss the appeal, and we granted that motion. In order to achieve a published decision on this issue, we could convert this one-judge appeal to a three-judge appeal. However, that would further delay this case while we awaited the attorney general's response whether it wished to file a brief and, if so, while we awaited the brief. In light of the delay attendant to ***Peltz*** and in light of the further delay if we were to convert this case to a three-judge appeal, we chose not to delay this case any further. Therefore, a published decision on this issue will have to await another case or a decision by our supreme court should it accept a petition for review in this case. We urge Delaney to seek such a review in this case.

[5] The criminal complaint alleges a prior conviction of the felony of "attempted possession of THC with intent to deliver." Although the trial court later states that Richard was "convicted of possession with intent to deliver," we will refer to the offense as alleged in the complaint.

This argument requires us to interpret the statutes at issue, which presents a question of law that we review de novo. ***State v. Ray***, 166 Wis. 2d 855, 872, 481 N.W.2d 288 (Ct. App. 1992). The purpose of statutory construction is to determine and give effect to the legislative intent, which is ascertained by considering the language of the statute in relation to its scope, history, context, subject matter and object intended to be remedied or accomplished. ***Id***. When construing multiple statutes, we seek to harmonize them. ***Id***. at 873. "It is a cardinal rule of statutory construction that conflicts between statutes are not favored and will be held not to exist if the statutes may otherwise be reasonably construed." ***Wyss v. Albee***, 193 Wis. 2d 101, 110, 532 N.W.2d 444 (1995).

¶29 Richard concedes that he was properly subjected to the repeater provision of WIS. STAT. § 346.65(2)(c) based upon his prior OWI conviction and his prior revocation for a refusal to submit to a chemical test. So the issue narrows to whether the additional repeater provisions of WIS. STAT. § 939.62 based upon Richard's prior felony conviction of attempted possession of THC with intent to deliver were properly applied against him. Therefore, we analyze the statutory scheme of § 939.62.

¶30 We begin with WIS. STAT. § 939.62(1), which focuses on the defendant's present conviction. Pursuant to this subsection, the defendant is a repeater if the present conviction is "for any crime for which imprisonment may be imposed, except for an escape under s. 946.42 or a failure to report under s. 946.425." In this case, it is undisputed that: (1) Richard's present OWI conviction constitutes a third offense under WIS. STAT. § 346.65(2)(c); (2) a third

offense under this statute constitutes a crime pursuant to WIS. STAT. § 939.12;[6] and (3) that OWI and a refusal to submit to a chemical test are obviously not an escape or a failure to report. Therefore, Richard's present conviction satisfies the first prong of this statutory test.

¶31 Next, we look to the balance of WIS. STAT. § 939.62 which focuses on the defendant's past conviction. Pursuant to § 939.62(2), the defendant is a repeater if he or she has been convicted of any felony during the five-year period immediately preceding the commission of the present offense or three misdemeanors on separate occasions during the same period. Here, Richard's prior drug conviction is a felony and it occurred within the statutory time period.

¶32 However, just as with a defendant's present conviction, not all prior convictions permit the imposition of an enhanced sentence. WISCONSIN STAT. § 939.62(3) exempts certain categories of prior offenses from the definition of felony and misdemeanor. This subsection states:

> In this section, *"felony" and "misdemeanor"* have the following meanings:
>
> (a) In the case of crimes committed in this state, *the terms do not include motor vehicle offenses under chs. 341 to 349* and offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938, but otherwise have the meanings designated in s. 939.60. (Emphasis added.)

¶33 Richard argues that this exemption for motor vehicle offenses from the definitions of "felony" and "misdemeanor" in WIS. STAT. § 939.62(3) bars the

[6] Pursuant to WIS. STAT. § 939.12, "A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime." Pursuant to WIS. STAT. § 346.65(2)(c), the penalties for a third violation are a fine and imprisonment.

application of § 939.62. A close reading of the statute reveals otherwise. Section 939.62(1) does not use the terms "felony" or "misdemeanor" when describing the defendant's present conviction. Instead, the legislature used the phrase "any crime" in subsec. (1) and then exempted only two crimes—escape and a failure to report. If the legislature had intended to exempt motor vehicle offenses and juvenile adjudications from the defendant's present offense, it surely would have included those in this litany. Or, at a minimum, the legislature would have incorporated the definitions of "felony" and "misdemeanor" as set out in subsec. (3). But it did neither. Therefore, the exemption for motor vehicle offenses does not apply to a defendant's present conviction.

¶34 Instead, the terms "felony" and "misdemeanor" only appear in WIS. STAT. § 939.62(2) when the legislature alludes to the defendant's *prior* conviction. Therefore, the exemption of motor vehicle offenses from these definitions applies only to the defendant's prior convictions. Since Richard's prior felony offense of attempted possession of THC with intent to deliver is obviously not a motor vehicle offense, that prior conviction satisfies this second prong of the statutory inquiry.

¶35 WISCONSIN STAT. § 939.62 is not a stand-alone statute. By its very terms, it must be linked to another statute creating a crime before it can be implemented. WISCONSIN STAT. § 346.65 represents such a statute. Both statutes are clear and unambiguous in their own right and in their relationship to each other. Despite this clarity, we have nonetheless looked to the history of these statutes to see if the legislature has otherwise indicated that the repeater provisions of § 939.62 were not intended, under any circumstances, to apply to OWI offenses already enhanced by the provisions of § 346.65. This history reveals no such wholesale ban. Instead, as the foregoing analysis reveals, the legislature has

barred the application of § 939.62 in only two settings—where the present conviction is for escape or a failure to report and where the prior conviction is for a motor vehicle offense. That is not the situation here. Richard's present offense is not for escape or a failure to report and his prior conviction is a drug-related offense, not a motor vehicle offense.

¶36 When the legislature enacts a statute, it is presumed to act with full knowledge of the existing law, including statutes. ***State v. Trongeau***, 135 Wis. 2d 188, 192, 400 N.W.2d 12 (Ct. App. 1986). Over the years, the legislature has amended the repeater provisions of both the present WIS. STAT. § 939.62 and the present WIS. STAT. § 346.65. The legislature has had ample opportunity to implement the wholesale ban on the application of § 939.62 in a § 346.65 setting for which Richard argues. It has not done so. As such, the statutes are not in conflict and can be reasonably construed to operate harmoniously. *See* ***Wyss***, 193 Wis. 2d at 110.

¶37 We reject Richard's reliance on the rule of lenity because that rule applies only where the legislature's intent is ambiguous or when a strict construction would contravene the legislative purpose. ***State v. Rabe***, 96 Wis. 2d 48, 70, 291 N.W.2d 809 (1980). Here the two statutes are clear and unambiguous both in their own right and in their relationship to each other. The same is true of Richard's reliance on the maxim that WIS. STAT. § 346.65 as the more specific statute should apply over the WIS. STAT. § 939.62, the more general statute. "[T]he rule that the more specific governs the more general is only resorted to when the legislative intent is not otherwise clear from a reading of the two provisions and the two provisions are in irreconcilable conflict." ***I.V. v. State***, 109 Wis. 2d 407, 414, 326 N.W.2d 127 (Ct. App. 1982). We also reject Richard's reliance on certain language in ***State v. Wideman***, 206 Wis. 2d 91, 556 N.W.2d

737 (1996). The issue there was whether a prior conviction alleged pursuant to § 346.65 must be proven in the same manner required by WIS. STAT. § 973.12. ***Wideman***, 206 Wis. 2d at 94. That is a wholly different question than the issue in this case.

¶38 In summary, the legislative intent is clear. Both statutes permit an enhanced penalty and the facts squarely support the implementation of both statutes. Richard's present conviction qualifies him as a repeater pursuant to WIS. STAT. § 939.62(1) because the conviction is not for an escape or a failure to report. And Richard's prior felony conviction for attempted possession of THC with intent to deliver further qualifies him as a repeater because the conviction is not a motor vehicle or juvenile offense. Therefore Richard was properly sentenced as a repeater under both statutes.[7]

¶39 Richard also argues that the application of WIS. STAT. § 939.62 is barred by our opinion in ***Ray***. There, the State attempted to use a single prior drug-related conviction as an enhancement pursuant to WIS. STAT. § 161.48(2) (1991-92), and also as a repeater enhancement pursuant to § 939.62. ***Ray***, 166 Wis. 2d at 871-72. Relying on the "specific over the general" principle of statutory construction, we held that multiple enhancers were not permitted. ***Id***. at 873. However, we were very careful to explain the reach of our holding. "Therefore, we hold that *where both the previous and the current offenses are under ch. 161, Stats.,* the trial court may apply *either* the more specific sec.

[7] The parties both point to decisions from other jurisdictions in support of their competing arguments. However, we do not deem those decisions helpful because our analysis rests on the clear and unambiguous language of the two statutes.

161.48, Stats., or the more general sec. 939.62, Stats., to the defendant's conviction." ***Ray***, 166 Wis.2d at 873 (first emphasis added).

¶40 The situation in ***Ray*** is not present here. Richard's enhanced sentence pursuant to WIS. STAT. § 939.62 is not premised on the same motor vehicle conviction used to enhance his sentence under WIS. STAT. § 346.65. Nor is the prior conviction premised on any prior convictions under the motor vehicle code.[8] This is not a ***Ray*** case.

¶41 We hold that the trial court properly invoked the repeater provisions of both WIS. STAT. §§ 346.65 and 939.62 against Richard.

CONCLUSION

¶42 Although Richard was in custody at the time of his inculpatory statement, we conclude that his statement was voluntary and was not made as the result of a custodial interrogation. Therefore, the trial court correctly denied Richard's motion to suppress. We further conclude that the trial court properly invoked the repeater provisions of WIS. STAT. §§ 346.65 and 939.62. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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[8] Richard cites to various general statements that we made in ***State v. Ray***, 166 Wis. 2d 855, 481 N.W.2d 288 (Ct. App. 1992), in support of his argument. However, as we have noted, when we made our ultimate holding, the limits of our decision were clearly expressed. Moreover, our supreme court has cautioned that "the language of an opinion must be considered in connection with the particular facts involved. Applying language pertinent to one state of facts to a different state of facts is seldom warranted." ***Vinograd v. Travelers Protective Ass'n of Am.***, 217 Wis. 316, 321, 258 N.W. 767 (1935). "A quotation from an opinion in a prior case is of no value as a precedent without a review of all of the facts and circumstances there present." ***Bartell Broadcasters, Inc. v. Milwaukee Broad. Co.***, 13 Wis. 2d 165, 171, 108 N.W.2d 129 (1961). Our general statements in ***Ray*** were uttered in a factual setting different from those here.

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