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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Winnebago County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-3460
	)	
FREDDIE J. WARE,	)	Honorable
	)	Ronald J. White,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Hutchinson and Spence concurred in the judgment.

**ORDER**

*Held:* The trial court's and State's comments regarding the codefendant's privilege against self-incrimination could have caused her not to testify, were improper, and prejudiced defendant. Reversed and remanded for a new trial.

¶ 1 Defendant, Freddie J. Ware, was convicted by a jury of unlawful possession with intent to deliver more than 30 but less than 500 grams of a substance containing cannabis (720 ILCS 550/5(d) (West 2008)). The trial court denied defendant's posttrial motions and sentenced him to 10 years' imprisonment. Defendant appeals, arguing that: (1) he was denied due process of law where the court and State convinced a defense witness (his codefendant, who had previously pleaded guilty)

to exercise her privilege against self-incrimination and not testify; and (2) the State committed reversible error where it stated in closing argument that “if it’s good enough for [codefendant] to be guilty—it’s the same evidence—we’ve proved [defendant] guilty beyond a reasonable doubt too.” For the following reasons, we reverse and remand.

¶ 2

## I. BACKGROUND

¶ 3 On November 3, 2009, defendant and his paramour, Gabrielle Phillips, were present in an apartment in Rockford. Police arrived and executed a search warrant, and both defendant and Phillips were subsequently charged with possession with intent to deliver. Immediately following her arrest, Phillips told police that she and defendant lived together in the apartment and that they were both involved in selling the marijuana found there.

¶ 4 In March 2010, Phillips pleaded guilty and was sentenced to 30 months’ probation. In June 2010, however, Phillips executed a handwritten, notarized affidavit in which she attested that defendant did not live with her, had nothing to do with possessing or selling the drugs, and that everything in the apartment belonged to her alone. She explained that her prior statement to the police, inculcating defendant, was made under duress due to an officer’s threat to take away her child. The following section describes the events surrounding Phillips’ appearance at trial and her subsequent decision to not testify.

¶ 5

### A. Codefendant’s Fifth Amendment Issue

¶ 6 On October 25, 2010, the parties appeared for defendant’s trial. Phillips was present in court.<sup>1</sup> Defense counsel informed the court that he expected Phillips to testify the following

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<sup>1</sup>When the case was first called, defense counsel informed the court that Phillips had stated, over the telephone, that she would be appearing, but she was not present yet. Counsel noted that,

Wednesday. When counsel asked for a subpoena to ensure Phillips' presence at trial, the trial judge asked Phillips to step forward and then asked defense counsel whether there were any fifth amendment issues to consider. Defense counsel responded that Phillips was a codefendant, but she had pleaded guilty and was currently on probation. The court noted that, even though Phillips had pleaded guilty, there may be some postconviction matters to consider. Accordingly, the court requested that Phillips' attorney from the public defender's office, Ms. Reeves-Rich, be contacted and asked to appear before the court "right away." Defense counsel reminded the court that more than 30 days had passed since Phillips had entered her plea; the court again noted "there's always an issue of postconviction matters that could come up in the future."

¶ 7 When Reeves-Rich appeared, the court explained the situation and stated:

"And even though, as I understand, she's pled guilty, she has fifth amendment rights because there could always be a postconviction matter. For example, let's say she's pled guilty, and through some investigation it's determined that the testing procedure involved in the controlled substance was faulty or skewed or whatever, and she would have a right to file a postconviction matter saying that I wish for a new trial based on some new evidence. So I just give that as an example. So she does have that postconviction right. And you represented her. I will again appoint you to represent her."

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in his experience, some witnesses who said they would cooperate nevertheless sometimes failed to appear and so, out of caution, he noted that he would be asking the court to issue a subpoena to ensure Phillips' presence at trial. The case was passed for about one hour. By the time it was recalled, Phillips had voluntarily appeared.

¶ 8 The court instructed Phillips to meet with Reeves-Rich. It further noted that Phillips had voluntarily appeared before the court. It advised her: “Your attorney is going to speak with you because you have a right not to testify in this case. And you need counsel to advise you on that issue.”

¶ 9 With Phillips still present, however, defense counsel objected, stating that the court’s comment that Phillips had a right not to testify was somewhat misleading. He questioned whether there was, given Phillips’ guilty plea, a legitimate postconviction concern. Further, he stated that Phillips’ “testimony is crucial and essential to our case at this point.”

¶ 10 Reeves-Rich asked the court whether the only fifth amendment issue would involve incriminating statements. The State then interjected:

“Well, one potential issue, and I don’t know if counsel wants Ms. Phillips to step outside or not, but one potential issue is depending on what she testifies to, there’s a couple of offense[s] that could be charged there because she gave a prior written statement.

So[,] if she testifies inconsistently with that statement, could be filing a false police report, obstructing justice. You know, I don’t know. Or if she lies under oath, that could be perjury. I mean, that’s why I believe the Court is right when you appoint her a counsel just so she is aware of her rights.”

¶ 11 In response, defense counsel requested that the State investigate how often in the recent past it had charged individuals for filing false police reports or obstruction based upon a witness making inconsistent statements. He noted that impeachment is the proper manner for dealing with such issues and that, because he had not seen such action taken by the State in the past, he did not believe

it to be a legitimate potential issue. The court disagreed, noting that it was assessing whether there was the potential for such charges and, if such potential exists, Phillips was entitled to counsel.

¶ 12 After additional discussion was held regarding whether there was a conflict in the fact that Reeves-Rich was in the public defender's office, as was Phillips' current counsel, the court determined that a new attorney, David Carter, should be appointed to represent Phillips. Accordingly, the court ordered Carter to appear immediately and explained to Phillips that she was to wait in the courtroom while Carter was located. When Carter ultimately appeared, the court explained to him that, "We have kind of an emergency situation." It explained that Phillips was a codefendant who had entered a guilty plea, yet defendant wished to call her in his case, "and I do believe that she has a right under the fifth amendment to remain silent. Even though she's pled guilty, there might be some postconviction matters that might come up in the future."

¶ 13 Carter informed the court that, upon speaking with Phillips "briefly in the conference room," he advised her that the statements she might make at trial could be used adversely against her if she were to file a postconviction petition and obtain a trial thereon. The court inquired, "And also the issue would come up that if she would testify anything inconsistent with any additional statements, there might be some additional charges which could be lodged against her. Did you speak with her regarding that issue?" Counsel confirmed that he did, but that he was "not sure Phillips really understood all of the issues involved." Still, counsel believed Phillips would exercise her fifth amendment right to not testify. The court asked Phillips to step forward and stated to her:

"Gabrielle, you've spoken to the attorney I appointed to represent you. And you understand that you have a right under the Constitution of the State of Illinois and the United

States Constitution not to testify because what you say in a hearing could have an affect on your case which you pled guilty to.

Maybe in the future you might wish to file what we call a postconviction matter. And since you were involved in this incident, as I understand, that if you testify inconsistent you could be charged with another offense. Do you understand that?"

Phillips answered, "yes." The court asked Phillips if she had spoken with Carter, and she answered, "yes." The court continued, "[a]nd based on his recommendations, you wish not to testify?" Phillips replied, "yes."

¶ 14 After the State offered to provide Carter with discovery, the court remarked, "I think it's quite clear that she wishes not to testify." Defense counsel again objected regarding the validity of the postconviction and future charges concerns. The court asked the State to explain what it believed Phillips would testify to. It explained that Phillips had given a written statement implicating both herself and defendant in dealing cannabis. Then, she gave a conflicting statement which she had provided to the public defender. The assistant State's Attorney stated that she presumed Phillips would testify consistently with her statement to the public defender. However, the State posited, such testimony would reflect that she provided false information to the police:

"So if, in fact, [she] did that then, you know, was she lying then? Is she lying now? Is she lying on the stand? Is she not? I mean, I don't know. I mean, I can't foresee what crime could be committed until the crime is committed. And so that being the case, I think that she does run a risk, and she does have a fifth amendment right to remain silent and not incriminate herself in this proceeding or any others."

The court then inquired whether the State agreed that there might be an issue of perjury if Phillips were to testify in court to one set of facts and another set of facts can be proven. The State agreed. Carter mentioned that he did not know enough about the case, and that, while he had advised Phillips that perjury charges were a potential risk, he did not know enough to say for sure. The court responded, “but you agree it could be a potential?” Carter answered, “I suppose there could be a potential, yes.” Defense counsel noted, however, that Phillips’ most recent affidavit was sent to his office by Phillips: he did not seek it out. “It showed up at our office. We went out and said basically, you know, did you write [t]his affidavit and is this what you would testify to? And the answers to that were in the affirmative.” Counsel further explained that Phillips’ affidavit stated that she initially told the police that defendant was involved because she was under duress and was afraid the police would send her to jail and take her daughter away from her.<sup>2</sup> As such, Phillips agreed she

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<sup>2</sup>The affidavit, which appears as an exhibit in the record, attests that, on November 3, 2009, defendant came to Phillips’ apartment to give her a ride to her college for a test. She was giving her daughter a bath, so he came in while they finished getting ready. Defendant followed her upstairs. At that point, the police raided the apartment. Phillips stated that, during the raid, Rockford detective John Wassner took her aside and threatened to take her daughter and to drown Phillips in the bathtub, like her daughter could have drowned, if she did not tell him where the marijuana was. He told her he did not think it was her marijuana, and that, if she said it was defendant’s, she would not go to jail or lose her daughter. Phillips attested that, under duress and afraid of losing her daughter, she previously made a statement that it was defendant’s marijuana and she was selling it for him when, in actuality, everything found in the apartment was hers and defendant was not involved. She attested that defendant “does not even stay” with her. Phillips attested that she was

made the prior statement to police, but claims it was under duress, so he questioned whether that could be perjury.

¶ 15 The court found that Phillips, based on Carter's representations, had decided not to testify. "I think she has a right not to testify under the fifth amendment. So I won't allow her to testify. I won't hold her under subpoena." The State noted that Phillips had a choice and made the decision not to testify. The court replied, "[S]he testified she wishes not to testify."

¶ 16 Defense counsel sought to admit Phillips' affidavit as a potential statement against penal interest. Ultimately, after written briefing and a hearing, the court denied defendant's motion.

¶ 17 **B. Trial Evidence**

¶ 18 The evidence reflected that, at around 9:00 a.m. on November 3, 2009, Rockford police officers executed a narcotics search warrant at 1216 Revell Avenue West (the west apartment) in Rockford. When they arrived, Phillips was standing on the front porch.<sup>3</sup> She looked at the police and quickly went inside the residence and closed the door. The officers approached the door, knocked and announced their presence, and then, because the door was locked, used a battering ram to forcibly enter the apartment. Upon entering the apartment, Wassner heard running water coming from the back of the apartment, and he noticed an 18-month-old boy seated on the couch. Wassner

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making the statement from her own free will because she did not want an innocent man going to jail for her own wrongdoing.

<sup>3</sup>Wassner testified that he recognized Phillips because, before going to the residence, he had obtained an online Secretary of State identification photo of her. Further, he was able to cross-reference that photo with the address, where he learned through the police reporting system that Phillips had, about 10 days earlier, filed a report regarding a burglary at that address.

heard detective Rossow shout; the water stopped running, and Rossow carried an 18-month-old girl out of the bathroom. Rossow testified that she was sitting unattended in the bathtub in 5 to 7 inches of water and that the water was still running.<sup>4</sup> The officers proceeded upstairs and, on the stairs, Wassner noticed a small, Ziploc baggie containing what he believed to be cannabis. Defendant and Phillips were found in an upstairs bedroom. They were handcuffed; both were cooperative.

¶ 19 Because it was her residence, Wassner read Phillips the search warrant. After execution of the search warrant was complete, Wassner told Phillips and defendant that, because there were children present at the execution of a narcotics search warrant, he would report the children's circumstances to the Department of Children and Family Services (DCFS). Defendant and Phillips were charged with possession with intent to deliver cannabis, endangering the health or life of a child, and criminal fortification of a residence. They were escorted to a marked squad car and placed together in the back seat. Wassner peered through the back window and told defendant and Phillips that they were going downtown to discuss what was found in the residence; defendant replied "Man, everything in there is mine. She didn't do anything."

¶ 20 At the time of his arrest, defendant had \$74 in small denominations in his wallet (specifically, bill denominations of \$1, \$5, and \$10). Wassner testified that the apartment's mailbox had on it two United States Postal Service stickers: one said "G. Phillips," and the other said "F. Ware." Further, inside the house, metal brackets were fixed to the exterior door so that a 2 x 4 wooden plank (one of which was leaning near the door) could be slid through them.

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<sup>4</sup>However, the child could stand, the water was not excessively hot or cold, and a rubber, non-slip mat was in the tub.

¶ 21 Detective Brian Skaggs testified that he collected evidence from the scene, including a small bag of marijuana from the stairs and, in a dresser drawer in the bedroom where defendant and Phillips were found, a Ziploc bag that contained 66 smaller bags containing marijuana. The gross weight, including the bags, was 60.29 grams. Skaggs also identified a letter from Comcast, dated October 19, 2009, that was addressed to Freddie Ware at 1216 Revell, west apartment, which he found in the same dresser drawer. Stuffed behind the dresser, between the dresser and the wall, Skaggs found what he described as a “men’s brown canvas shaving kit;” shaving items were not in the bag, however, it contained \$690 in cash (in bill denominations of \$1, \$5, \$10, and \$20). In a clothes hamper in the same bedroom, Skaggs found five small Ziploc bags containing marijuana; their gross weight, including the bags, totaled 4.57 grams.

¶ 22 Skaggs found in the closet a “lot of garbage, junk on the floor,” including a small, blue soft-sided cooler; inside the cooler was cannabis residue, a Ziploc bag with smaller Ziploc bags inside, and a gram scale. Skaggs also photographed “a bunch of mail and documents,” as well as shoes, some of which “appear to be men’s shoes,” inside the bedroom closet. The shoes were not presented at trial. Two pieces of mail on the closet floor were addressed to defendant, while other pieces of mail were addressed to Phillips. One manilla envelope was addressed to defendant at 1120 South Independence Avenue in Rockford (*i.e.*, not Phillips’ address).

¶ 23 Skaggs identified a photograph of a black leather jacket, that he thought was sized for a man, hanging on the back of a chair in the kitchen. He clarified that he knows what a men’s leather jacket looks like and that the jacket would not have fit Phillips, who was “very small, petite” and around five feet, two inches tall and 100 pounds. Inside the coat pocket was a bag containing 19 smaller bags containing marijuana; their gross weight, including the bags, totaled 18.59 grams. The smaller bags

had designs on them. There was no identification in the jacket, and it was not presented at trial. On the table were two scales, as well as some documents inside a small plastic container. Skaggs did not try to obtain fingerprints or hair samples from any of the recovered items.

¶ 24 Brian Klus testified that, as part of the booking process at the jail, he asked defendant whether he was employed. Defendant replied, “no.”

¶ 25 Narcotics expert Robert Reffett testified that, in his opinion, the evidence collected from the apartment indicated that the marijuana was possessed for distribution, rather than personal use. In support of his opinion, Reffett referenced the: (1) number of individual bags containing marijuana (according to Reffett, around 92); (2) digital scales with cannabis residue; (3) numerous, small and unused Ziploc bags; (4) hidden currency; (5) designs on the smaller bags; (6) absence of anything that would be used to smoke the marijuana; and (7) brackets on the house doors, which are commonly seen in residences where drugs are being sold. Reffett further testified that he had never encountered a situation where a simple user possessed 92 individually wrapped bags of cannabis. Finally, Reffett testified that, with the exception of the \$1 bills found in defendant’s wallet and the shaving kit, the smaller denomination bills found were commonly found on persons selling cannabis. However, he testified that, because the marijuana bags are often sold for \$5 each, and the singles in the shaving kit totaled \$20, it would be consistent with someone using singles to buy four bags.

¶ 26 Sara Anderson testified that she is a forensic scientist employed with the Illinois State Police at the Rockford lab. Anderson weighed and tested the plant material collected in the apartment. In total, the bags contained 43.3 grams of cannabis. The State rested. The court granted defendant’s motion for a directed verdict on the charge that he endangered the life of the child.

¶ 27 Defendant's first witness was his mother, Melinda Stone. Stone has been employed by Rockford Memorial Hospital for 21 years. Stone testified that defendant lives with her at 1120 South Independence Avenue in Rockford and has done so "practically all his life." Stone testified that defendant lived with her on November 3, 2009, but that Phillips was his girlfriend and, so, he stayed with her "once in a while." Defendant received, and continued to receive at the time of trial, his mail at Stone's house. Stone testified that, in November 2009, defendant had been working as a security guard, paid in cash, for El Burrito Loco, but that he had recently been laid off. Defendant also did odd jobs (like cleaning gutters and fixing a door) for Stone and her other son, and they paid him in cash.

¶ 28 Next, defendant called officer Timothy Stec, who testified to his investigation of a burglary at the west apartment on Revell Avenue, about 10 days prior to the raid at issue. The apartment was ransacked. He saw no males in the apartment and met only with Phillips.

¶ 29 Finally, defendant testified that, on November 3, 2009, he lived with Stone at 1120 South Independence Avenue. Phillips was his girlfriend of four or five months, and he would visit her at 1216 West Revell a few times each week and would sometimes stay overnight. When he stayed overnight, defendant would usually bring a bag of overnight items and then bring it "back" with him. He did not use any drawers in the apartment.

¶ 30 Defendant testified that, on November 3, 2009, he drove to Phillips' apartment to pick her up; he was giving her a ride to Rock Valley College. He had not stayed the night, and he did not wear a jacket because the weather was fairly warm. When Phillips answered the door, she said she was not ready. Defendant asked if he could go upstairs and check his e-mail on her computer. He went upstairs, got on the computer, and, 10 to 15 minutes later, Phillips ran upstairs with the police

behind her. After being handcuffed and escorted downstairs, defendant sat at the kitchen table. One of the officers asked whose residence it was so he could serve the search warrant, and Phillips answered that it was hers. After serving Phillips with the warrant, the police mentioned to Phillips that they would be calling DCFS (the children in the home were not defendant's). Phillips became upset and began crying. One of the detectives took Phillips into the bathroom and shut the door; a few minutes later, she came out, still crying. After the search was completed, the detectives escorted defendant and Phillips outside. Phillips was still crying and upset. After being placed in the squad car, defendant said he felt sorry for Phillips because she was afraid of losing her daughter, and he said "[e]verything's mine. She ain't do nothing. Just let her go." When defendant said everything was his, he did not know what the police had found.

¶ 31 Defendant further testified that, in 2003, he was convicted of possession of a controlled substance. He subsequently obtained his GED and an associate's degree, as well as a computer certificate and meat cutter and food sanitation licenses. While defendant was aware that Phillips smoked marijuana, he testified that he did not approve of her drug use, and that he tried to convince her to stop smoking it. He did not, however, know Phillips was dealing drugs. Defendant observed a few scales around the apartment, but he testified that, since Phillips smoked by tearing open a cigar, dumping out the tobacco, and rolling marijuana up inside it, he thought that, so she would not give herself too much, Phillips used the scales to weigh the marijuana before putting it in the blunt.

¶ 32 Defendant testified that none of the items found in the apartment belonged to him. He explained that the cable bill was in his name because Phillips (age 19) had been unable to get cable in her own name and had asked him try to get it for her. The bill was for Phillips' address because that was where the cable was hooked up. Defendant did not pay for any of the other utility bills, and

no other mail came in his name to that address. Defendant's name was on the mailbox so that the cable bill would be properly delivered. He explained that Phillips lived in a west apartment and her mail had been repeatedly mixed up with mail for the 1216 *east* apartment. She spoke with the mailman, and he gave her (and her neighbor) some postal stickers to put on the mailboxes so that the mail would be properly delivered. Addressing the manilla envelope in the photograph, which had defendant's name and Stone's address on it and was not produced in court, he stated that he had probably used to give Phillips a gift. Defendant did not come with (or leave with) a jacket; a detective asked him if he needed a coat and defendant replied that he had not worn a coat. The jacket was not his. The shoes in the closet were not his. Phillips also had friends, sisters, and brothers who came in and out of her house, and they sometimes smoked marijuana with her. Defendant denied that the shaving kit found behind the dresser was his. He confirmed that he had worked at El Burrito Loco and for his family and was paid in cash; the \$74 found in his wallet was not from drug sales, and some of it was from his brother to help defendant pay his cell phone bill. Phillips paid the rent. Defendant rested. The court granted defendant's motion for a directed verdict on the criminal-fortification-of-a-residence charge.

¶ 33 In closing argument, defense counsel argued that there was "no doubt" that Phillips is a drug dealer. He argued that, when Phillips became upset, was distressed, crying, and fearful of losing her child, defendant did something "not very smart, but understandable" and said everything was his, even though he did not even know what was found in the house. Defendant knew that Phillips used marijuana, but did not know, when he said everything was his, that there would be more than 30 grams of marijuana in the house.

¶ 34 In its rebuttal argument, the assistant State's Attorney stated:

“Gabrielle Phillips is guilty of possession with intent to deliver; I won’t dispute that. She was arrested and charged with it, too, but there’s the same evidence against [defendant] that there was against her. Same drugs, same packaging, same scales, same money, same location, same pictures of the locations of the evidence. If it’s good enough for Gabrielle Phillips to be guilty—it’s the same evidence—we’ve proved [defendant] guilty beyond a reasonable doubt too.” (Emphasis added.)

Defense counsel did not object to this portion of the State’s argument.

¶ 35 Defendant was convicted of possession with intent to deliver. The trial court denied defendant’s posttrial motions and sentenced defendant to 10 years’ imprisonment. Defendant appeals.

¶ 36

## II. ANALYSIS

¶ 37 Defendant argues that the repeated admonitions regarding self-incrimination and potential prosecution provided to Phillips by the trial court and the State essentially forced Phillips to exercise her fifth amendment privilege. Defendant notes that: (1) Phillips volunteered both her affidavit and her appearance in court, and she was ready and willing to testify at trial; (2) the court repeatedly (and impermissibly) warned Phillips that her testimony would jeopardize her ability to seek postconviction relief, and the State and court asserted that Phillips’ testimony could expose her to future prosecution; (3) there was no real danger that Phillips’ testimony would have resulted in any postconviction consequences or future prosecution; (4) the court’s belief that Phillips was entitled to invoke the fifth amendment privilege was mistaken; and (5) the error deprived him of due process in that his constitutionally protected right to present testimony critical to his defense was hampered. For the following reasons, we agree.

¶ 38 The fifth amendment provides that no person shall be compelled to testify against himself or herself in a criminal case. U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10. Accordingly, a witness may invoke the fifth amendment to refuse answering questions of an incriminating nature. *People v. Redd*, 135 Ill. 2d 252, 304 (1990). The trial court does *not* have an affirmative duty to warn a witness of potential incrimination; however, it may, in its discretion choose to do so. *People v. Radovick*, 275 Ill. App. 3d 809, 815 (1995); *People v. Blalock*, 239 Ill. App. 3d 830, 836 (1993).

¶ 39 Notwithstanding the witness's rights, a fundamental element of due process is a defendant's right to present witnesses in his or her defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967). "That fundamental right is violated if the State or the court exerts improper influence on defense witnesses causing them not to testify." *People v. Mancilla*, 250 Ill. App. 3d 353, 358 (1993). Thus, a trial court's actions in admonishing a defense witness may improperly interfere with a defendant's right to a fair trial. *Radovick*, 275 Ill. App. 3d at 815. While a court may appoint counsel to advise the witness or may advise the witness itself, "[i]f the court chooses the latter, it must walk the fine line between, on the one hand, fully advising the witness of the danger of self-incrimination and the right not to testify, and, on the other hand, threatening the witness to an extent which materially impairs the defendant's due process to present witnesses in his defense." *People v. Morley*, 255 Ill. App. 3d 589, 597 (1994) (quoting *People v. Schroeder*, 227 Cal. App. 3d 784, 788-89 (1991)).

¶ 40 Here, we conclude that the court and the State exceeded the scope of proper admonition and impaired defendant's due process right to present a witness in his defense. To provide context for our analysis, we first summarize the following instructive cases.

¶ 41

#### A. Relevant Caselaw

¶ 42 The following four cases reflect instances wherein the courts' admonitions were deemed reversible error. First, in *Webb v. Texas*, 409 U.S. 95 (1972), the Supreme Court held that a defendant's due process rights were violated where the trial court's manner of admonishing the defendant's sole witness about the consequences of perjury "effectively drove [the] witness off the stand[.]" *Webb*, 409 U.S. at 98. There, the court stated to the defense witness:

"It is the court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the court will personally see that your case goes to a grand jury and you will be indicted for perjury and the likelihood [*sic*] is that you would get convicted of perjury and it would be stacked onto what you have already got \*\*\*. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. \*\*\* You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazard you are taking." *Id.* at 96.

The Court noted that the trial judge had implied that he expected the witness to lie, assured the witness of severe consequences for doing so, and his "unnecessarily strong terms" could have exerted such duress on the witness so as to preclude him from making a free and voluntary choice whether or not to testify. *Id.* at 97-98.

¶ 43 The second case we summarize is *People v. King*, 154 Ill. 2d 217 (1993), where the defendant's codefendant had pleaded guilty to the armed robbery at issue, but had not yet been sentenced to the recommended eight years' imprisonment. As part of his plea, the codefendant stipulated that, if called to testify, the *victim* would identify him and the defendant as the offenders. At the defendant's trial, the codefendant was prepared to testify that the defendant was not involved. The trial judge told the codefendant he recalled the codefendant previously stipulating to committing the crime with the defendant. The codefendant disagreed with the court's recollection. Nevertheless, the court informed him that "if you do testify and you testify in a manner that I believe is perjurious, which would not be the truth, I would, on my own motion, vacate the plea of guilty. \*\*\* However, if you testified in this matter in what I believe is a truthful manner, I would not vacate that plea and I would allow you then to be sentenced to the [eight] years that we previously agreed upon." *King*, 154 Ill. 2d at 221. The codefendant ultimately stated that he would not testify.

¶ 44 The appellate court reversed, and our supreme court affirmed. Citing *Webb*, the supreme court noted that the focus is on the effect that the trial judge's admonitions had on the potential witness. *Id.* at 224. The court stated:

"We believe that the trial judge's admonitions could have caused [the codefendant] to assert his fifth amendment right against self-incrimination. Causation alone, however, is not enough to violate the rule announced in *Webb*. A judge may admonish a potential witness although the judge's comments cause the potential witness not to testify.

For a trial judge's admonitions to a potential witness to violate the due process rights of the accused, the admonitions must be somehow improper. For example, the Court in *Webb* characterized the trial judge's admonition as 'unnecessarily strong' and 'threatening.'

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When determining whether a trial judge's admonitions to a potential witness are proper, the facts and circumstances of the case must be considered." *Id.* at 224-25.

The court found that the admonitions that could have caused the codefendant to not testify were improper, for the trial court misstated the facts and forced the witness to choose between not testifying and taking a chance that the judge would withdraw his offer of eight years' imprisonment. *Id.* at 225.

¶ 45 Finally, the court noted that, if the witness's testimony would have had no effect on the verdict, then the refusal to testify would not prejudice the defendant. *Id.* The court noted that the availability of additional witnesses is relevant to the question of prejudice: "where a defendant's sole witness is improperly prevented from testifying, defendant suffers a much greater harm than where a relatively unimportant witness among many is improperly prevented from testifying." *Id.* However, the court found that, in the case before it, the defendant was prejudiced by the witness's silence because his testimony could have directly contradicted the victim's testimony and the addition of that exculpatory testimony could have influenced the jury's verdict. *Id.* at 226. Further, the codefendant had no apparent motive to testify in the defendant's favor, as he had already pleaded guilty to involvement in the crime. *Id.*

¶ 46 A third case wherein admonitions were found improper is *Morley*, where, a few days before trial, a codefendant had contacted the defendant's attorney and expressed his wish to testify at trial on the defendant's behalf. The codefendant had an attorney, who appeared in court and explained that he had informed his client of the privilege against self-incrimination and had recommended that he not testify. The trial court then asked the codefendant whether: (1) his decision to testify was

voluntary; (2) any threats or promises had been made; (3) he understood that he had a constitutional right not to testify; (4) he understood the nature of the charges against him and the penalties involved; and (5) he understood that he would be subject to cross-examination. *Morley*, 255 Ill. App. 3d at 594. The court then asked the codefendant, “why are you doing it,” and whether he had considered the potential lack of any effect that his testimony might have at the defendant’s trial. The witness said, “oh, I don’t—go through that one more time.” He explained that his attorney had mentioned that his testimony might have no effect on the outcome of the case, but that he could “never rest easy” if he did not testify. The court then ordered him to talk to his lawyers again, and noted that it thought the witness possessed an “overinflated idea of what your testimony might be on this case and underinflated what the testimony might be in your case” and sent him to the jury room. While the attorneys met with their client in the jury room, the judge came in and told the witness that he “had a shot” in his own case if he did not testify, but that, if he did testify, “there would be two convictions instead of one.” *Id.* at 595. The witness ultimately declined to testify.

¶ 47 On appeal, a panel of this court found the trial court’s admonitions constituted reversible error. First, the court found the admonitions could have caused the witness not to testify. *Id.* at 599. Second, the court found the admonitions were improper because:

“the trial judge went beyond merely ensuring that the witness understood the privilege of self-incrimination and the general implications of waiving the privilege. Instead, the trial court offered a prediction of the precise consequences of a decision to testify, namely, that there would be ‘two convictions instead of one.’ \*\*\* In the case at bar, in attempting to evaluate the precise consequences of a decision to testify, the trial court, in

essence departed from its neutral judicial role and acted as counsel to the witness[.]” *Id.* at 600.

Finally, the court found prejudice because, although the codefendant’s testimony would have been somewhat duplicative of the defendant’s, it could have provided clear and credible bases to support the defendant’s assertions. *Id.* Moreover, the court noted that, while the defendant’s own testimony was subject to impeachment on the basis of a prior conviction, there was no indication that the codefendant’s testimony could have been similarly impeached. *Id.*

¶ 48 The fourth case we summarize in which admonitions were improper is *Radovick*, where a witness told the court that he had consulted with a lawyer and wished to testify for the defendant. The State asked the court to admonish the witness regarding his fifth amendment rights and that counsel be appointed for him. The following exchange occurred:

“THE COURT: I don’t know what your lawyer told you, I want somebody in front of you. You have the right to have counsel. I have a duty to tell you that before you testify that you have right to have the advice of counsel and make sure what the legal ramifications of you testifying here and after you learn what the real ramifications are then you could decide to testify which is fine with me. If you decide not to testify that is fine with me, too, but I want to make sure you understand what is being said and done before you do it. Do you want to talk to the public defender.

\*\*\* You have a private lawyer. Fine. If you want for purposes before your testimony today in this court if you want to just converse with the P.D. I will appoint him. You’re not giving up any rights that you have. I just want to make sure that you’re fully advised because after the P.D. talks to you I will just ask not what you said, but did he advise you of your

rights. \*\*\* I just want to make sure that you understand.

\* \* \*

Do you want to talk to the P.D. one time; it's between you and him?

[WITNESS]: I don't really think it's necessary. I spoke with my attorney. He said nothing really could be done and answer whatever they want.

THE COURT: May I ask the name of your lawyer?

[WITNESS]: James Porn. Suite 2505 on 180 North La Salle."

*Radovick*, 275 Ill. App. 3d at 812-13.

¶ 49 Unsuccessful efforts were then made to locate the witness's private counsel. The court suggested that a special attorney be appointed. The defense counsel objected. The court spoke again to the witness at length, stating, in part, that it could not force the witness to speak with an attorney, that he had the right to decide to testify, and that the court was "not trying to scare" him, but that it could appoint an attorney for him immediately and for free. The witness stated that he wanted to testify. The court continued, remarking it was not suggesting that the witness had anything to hide, but that it could appoint counsel. The court then "formally" advised the witness of his rights, mentioning it would be willing to get the witness an attorney immediately. The witness stated that he wished to testify. The court replied, "you're telling me you discussed your potential testimony in full with your attorney and after hearing what you testified your own private attorney told you there's no problem with that; go to court and testify; is that what you're telling the court[?]" The witness replied that he told his attorney the basics of the case, and his attorney said he had nothing to worry about. The prosecutor requested that the court appoint an attorney for the witness. The

court agreed and ordered an attorney be found. Following consultation with that attorney, the witness invoked his fifth amendment rights.

¶ 50 The appellate court reversed. First, the court found the extent of the court’s warnings to the witness “was clearly excessive.” *Id.* at 816. It noted that, although the witness indicated he had already consulted with an attorney and wished to testify, the court repeatedly “again and again” discussed the possibility that the witness reconsider speaking with another lawyer. *Id.* Second, the court found the warnings were an “obvious factor” in the witness’s decision not to testify, and rejected the State’s argument that, because the witness consulted with the court-appointed counsel first, the court’s comments did not influence the decision not to testify.

“A more reasonable inference, however, is that the court’s repeated admonishments contributed to [the witness’s] decision not to testify, particularly after the court appointed a new lawyer for him after being informed of his private attorney’s advice. The only conclusion [the witness] could draw from this sequence of events is that the judge believed he had been given bad advice from his counsel and that the new counsel’s advice should be followed. It is not surprising, therefore, that after he had consulted with appointed counsel, [the witness] elected for the first time to assert his fifth amendment right not to testify.” *Id.* at 816.

Finally, the court held that the defendant was prejudiced because the witness was his sole occurrence witness and could have convinced the jury that the defendant did not participate in the murder. *Id.*

¶ 51 We turn now to two examples of permissible admonitions. First, in *Blalock* (a case decided one week prior to the supreme court’s decision in *King*), this court determined that a trial court’s admonishments to a witness were *not* improper. There, after a motion to quash a witness subpoena

was filed, the court met in chambers with the witness, the witness's attorney, and the attorneys in the case. The witness informed the judge that he wanted to testify. The judge explained the witness's fifth amendment rights and stated that it would be "foolish" for him to testify because of the potential danger of self-incrimination. *Blalock*, 239 Ill. App. 3d at 834. The trial judge gave the witness until the next day to weigh his decision. The next day, the witness returned and exercised his privilege against self-incrimination.

¶ 52 On appeal, a panel of this court found that the trial court's comment that to testify would be "foolish" was inappropriate: "it was appropriate for the trial judge to inform the witness of his right to remain silent. However, we believe it was inappropriate for the trial judge repeatedly to inform the witness of this right and editorialize that testifying would be foolish." *Id.* at 836. Nevertheless, the court found there was no reversible error, noting it found significant that the trial court admonished the witness in response to a motion to quash a subpoena and not *sua sponte*. *Id.* Further, the court noted that the witness's attorney stated that the witness was following counsel's advice in declining to testify, and the witness announced his decision the day after the trial court's admonitions. *Id.* We concluded that "the trial court's warning had little persuasive effect on [the witness], but allowed him the additional time to make an informed decision." *Id.* at 837. We further noted that, in the cases where admonitions were found improper (*e.g.*, appellate court decision in *King* and *Webb*), the witness had been presented with "if-then" propositions; specifically, the trial judges, "implying that [they] anticipated the witness would lie, informed the witness of the adverse consequences of testifying. The witnesses then exercised their privilege under the fifth amendment for fear of having probation revoked or their plea agreements vacated." *Id.* at 838.

¶ 53 Second, in *People v. Johnson*, 262 Ill. App. 3d 781 (1994), a potential witness was one of four men who allegedly committed aggravated battery against the victim. Before the witness testified, the State asked that the court inform the witness of his *Miranda* rights. The court agreed, telling the witness he had been implicated and could be charged with a crime as a result of his participation in the beating. The witness stated that he thought he could clarify what had happened, but the court stated it did not know what the witness could clear up, in light of two police officers' testimony. The court then explained the witness's *Miranda* rights, made sure he understood them, and asked if the witness if he wished to meet with an attorney to explain more fully the consequences of testifying on the defendant's behalf. The witness stated that he did want to speak with an assistant Public Defender before making a decision, and he agreed to return the next day. The next day, however, no mention was made of the witness. On appeal, the court found no due process violation, noting that the court did not drive the witness from the stand, but properly informed him that he had been implicated in the beating and could face prosecution. *Johnson*, 262 Ill. App. 3d at 795. Further, from the facts, it could be assumed that, after meeting with an attorney, the witness decided for himself not to testify. *Id.*

¶ 54 Finally, before turning to the merits of this appeal, we note that the State, too, can violate a defendant's due process rights where it improperly intimidates a witness into not testifying. For example, in *Mancilla*, 250 Ill. App. 3d 353 (1993), the court noted that it is not, generally, improper for a prosecutor to: (1) advise prospective witnesses of the penalties for perjury; (2) voice disbelief about the veracity of the witness's proposed testimony; or (3) suggest that a witness be appointed counsel to be advised of the privilege against self-incrimination. *Mancilla*, 250 Ill. App. 3d at 359. However, the court noted that it is critical to determine whether the prosecutor's warnings

concerning perjury and possible criminal prosecution are used as instruments of intimidation. *Id.* at 360. In the case before it, the court noted that the witness, a resident alien from Mexico, appeared in court and was prepared to testify, when the State first asked that she be advised of the consequences of perjury, and, then, proceeded to advise her that: (1) her proposed testimony was inconsistent with her earlier statements to police; and (2) her testimony could effect her immigration status and could expose her to criminal prosecution for obstruction of justice.

¶ 55 On appeal, the court noted that, although it was *possible* that the State could have pursued those charges, it found it highly unlikely that the State would have actually done so and, if it had done so, it would not likely have obtained convictions because it would have to establish that the witness knowingly made a false statement. *Id.* It would be difficult to do so, the court noted, since the only indication that the witness's proposed testimony would constitute lying was her former statement to police, which was not a sworn statement. *Id.* Therefore, the proper method to challenge the contrary statements was impeachment, not intimidation. *Id.* After finding prejudice, the court reversed for a new trial. *Id.* at 361.

¶ 56 B. Admonitions Were Excessive

¶ 57 Here, mindful of the foregoing authority, we follow our supreme court's three-step analysis as enunciated in *King* to determine whether the trial court, in exercising its discretion to admonish Phillips, violated defendant's due process rights. *King*, 154 Ill. 2d at 224-25.

¶ 58 First, we consider whether the court's admonitions could have caused Phillips to not testify. We answer this question in the affirmative. In so doing, we consider the effect that the admonitions had on Phillips (*id.* at 224). Phillips appeared before the court voluntarily and prepared to testify on defendant's behalf. The court, *sua sponte*, inquired as to fifth amendment issues. Thereafter, the

court, with Phillips present, inquired about her prior counsel and ordered that the attorney appear immediately. Then, it explained to counsel its belief that Phillips had a fifth amendment right to remain silent and re-appointed her as counsel for Phillips. Without asking Phillips any questions or even whether she wanted counsel, the court informed her that she first needed counsel's advice before she proceeded with her testimony. Thereafter, in response to the State's interjection that it could file charges against Phillips if she testified, discussion ensued on the likelihood of that course of action. Discussion was next held on whether Phillips needed a different attorney to advise her before she testified, and Carter was ordered to appear. When he did so, the court informed him of the "emergency situation." The court again expressed its belief that Phillips had the right to remain silent and questioned whether Phillips understood that future charges could be filed against her. Even though Carter represented that he had spoken to Phillips only briefly, and that she did not seem to understand the issues, he believed she would exercise her fifth amendment privilege. Thereafter, Phillips answered "yes," that she wished to not testify, and the court found that she had "clearly" decided not to and that it would not allow her to do so.

¶ 59 Together, the scope of inquiry and discussion, the repeated attempts to obtain counsel, and the repeated admonitions that Phillips had a right not to testify and could be subjected to future charges, could have caused Phillips not to testify. Although she stated that she did not wish to testify after speaking with Carter, a more reasonable interpretation of the events (as in *Radovick*), is not that Carter's advice, after meeting with Phillips only briefly and wherein he did not believe she understood the issues, formed the basis of Phillips' decision, but, rather, that the court's repeated concern that Phillips have counsel and its repeated comments that she had a right not to testify and

that she might be charged with other crimes, caused her to believe that *the court believed* that she should not testify.

¶ 60 Second, we consider whether, given the facts and circumstances of this case, the court's *sua sponte* admonitions were improper. In so doing, we consider whether they were unnecessarily strong or threatening (*Webb*, 409 U.S. at 97; *King*, 154 Ill. 2d at 224) or “clearly excessive” (*Radovick*, 275 Ill. App. 3d at 816). Further, we consider whether they reflect that the court went beyond merely ensuring that Phillips understood, generally, the fifth amendment privilege and the implications of waiving that privilege and, instead, by attempting to evaluate the precise consequences of a decision to testify, “departed from its neutral judicial role and acted as counsel to [Phillips].” *Morley*, 255 Ill. App. 3d at 600. We conclude that, while the court's and State's actions here were not necessarily as egregious as in *Webb*, *King*, and *Morley*, they nevertheless were closer to *Radovick* and *Mancilla* than to *Blalock* or *Johnson* and, thus, that they exceeded the scope of proper admonition.

¶ 61 Here, the court came close to presenting the “if-then” scenario referenced by the court in *Blalock*; namely, the court specifically asked Carter if he had explained to Phillips that, were she to testify in a manner inconsistent with her prior statement, the State could pursue additional charges against her. As in *Radovick*, the court continued to discuss the need for counsel and the potential implications of testifying, rather than merely informing Phillips that she had the right not to testify and that there were potential implications if she chose to do so. Again, it *sua sponte* appointed counsel, twice, and, as in *Radovick*, it repeatedly tried to evaluate the specific consequences of a decision to testify. Essentially, the only question the court asked Phillips was whether she had decided not to testify, to which she answered “yes.” From this, the court found she had made a

“clear” decision, and it reiterated that it believed she had a right to do so and that it would not permit her to testify. As noted in *Webb*, there is a great disparity between the posture of a judge and a witness. *Webb*, 409 U.S. at 97. Where the court undertook an effort and went to great lengths through conversation with four attorneys to ensure that Phillips was protected, Phillips was likely left with the impression that the court thought she was in peril and that she should not testify. As such, by going to great lengths to protect Phillips, the court, as in *Morley*, essentially “departed from its neutral judicial role and acted as counsel to [Phillips].” *Morley*, 255 Ill. App. 3d at 600. In this court’s view, where, without an obligation to do so, the court chose *sua sponte* to admonish Phillips and then, through its subsequent comments and discussion, departed from its neutral role, the court abused its discretion.

¶62 We further note that “[n]either an unreasonable fear of self-incrimination nor mere reluctance to testify is a ground for claiming the privilege, it is the circuit court which determines if, under the particular facts, there is a *real danger* of incrimination.” (Emphasis added.) *People v. Edgeston*, 157 Ill. 2d 201, 220 (1993). Here, we think the court’s concerns regarding the risk to Phillips were overstated. As defendant notes, the basis for the court’s belief that Phillips had the right to exercise the fifth amendment privilege against self-incrimination was that she might wish to pursue postconviction relief. Postconviction rights can form a basis for invoking the privilege. *Id.* In *Edgeston*, however, the witness stated that he intended to file a postconviction petition challenging his guilty plea, which was the basis of the State’s dismissal of murder charges against him, and the State expressed its intent, if that guilty plea were vacated, to prosecute the witness for murder. Accordingly, the court found no abuse of the trial court’s discretion in finding a real danger of incrimination existed, which allowed the witness to assert the privilege. *Id.* at 221-22.

¶ 63 Here, Phillips, who we note was serving a sentence of only probation, never filed a direct appeal and, unlike the witness in *Edgeston*, never indicated that she wished to pursue postconviction proceedings. Further, as Phillips had accepted responsibility for her role in the possession charges by pleading guilty, and would, at trial, be testifying that she was responsible and defendant was not, it is unclear to this court how her proposed testimony would be in conflict with her plea. Finally, the only statement that Phillips gave indicating that defendant *was* involved, *i.e.*, her police statement, was not a sworn statement. Thus, like in *Mancilla*, that the State here could theoretically have pursued various charges of perjury or obstruction, it would have been unlikely to do so and, if it did, it would not likely have been successful in that endeavor. Impeachment, not the repeated mention of the specific, but unlikely, charges that could be pursued against Phillips were she to testify, would have been the proper manner for handling any alleged inconsistencies in her story.

¶ 64 Third, we consider whether Phillips' failure to testify prejudiced defendant and conclude that it did. The State argues that there is no reasonable probability that, if Phillips had testified, the jury would have acquitted defendant because Phillips would have been impeached with her police statement, her bias as defendant's former girlfriend would have weakened her credibility, and defendant's statement in the squad car that everything in the house was his would have rendered Phillips' testimony irrelevant. We disagree.

¶ 65 It is certainly true that weighing the evidence would have been the jury's responsibility. However, the question here concerns whether defendant's due process right to present witnesses in his defense was improperly impaired, not whether that evidence was flawed. Phillips was not a "relatively unimportant witness among many." *King*, 154 Ill. 2d at 225. Phillips was the sole occurrence witness and the only person, other than defendant, who could have explained why

defendant was present, whether he lived with her, and to whom the marijuana belonged. Although her testimony that defendant did not live with her and that the marijuana was not his would have been somewhat duplicative of defendant's and Stone's, it could have bolstered the credibility of those assertions. If she testified consistently with her affidavit, Phillips would have explained that she was distraught and fearful that she would lose her child, which is why she originally tried to deflect responsibility and why she inculpated defendant. Further, her description of being fearful and distraught could have bolstered defendant's explanation regarding why he felt moved to claim that whatever police found in the apartment was his. Finally, Phillips might have been able to shed light on the evidence allegedly linking defendant to the apartment, *i.e.*, whether she knew if the "men's" shoes, jacket, and "shaving kit," were his, whether he brought her a gift in a manilla envelope with his name and mother's address on it, whether defendant obtained a Comcast account in his name on her behalf, and whether his name was on her mailbox to ensure she received all of her bills.

¶ 66 In sum, the admonitions to Phillips deprived defendant of his due process right to present witnesses in his defense, and defendant is entitled to a new trial. Although he does not raise a sufficiency argument, we note that the evidence was sufficient to sustain the verdict against defendant and, therefore, that retrying defendant will not violate double jeopardy principles. See *Morley*, 255 Ill. App. 3d at 600-01.

¶ 67 C. Closing Argument

¶ 68 As we are remanding for a new trial, we need not address at length defendant's challenge to the comments made by the State in its rebuttal closing argument. Again, those comments were:

“Gabrielle Phillips is guilty of possession with intent to deliver; I won’t dispute that. She was arrested and charged with it, too, but there’s the same evidence against him that there was against her. Same drugs, same packaging, same scales, same money, same location, same pictures of the locations of the evidence. If it’s good enough for Gabrielle Phillips to be guilty—it’s the same evidence—we’ve proved [defendant] guilty beyond a reasonable doubt too.” (Emphasis added.)

In the interest of judicial economy, however, we note for purposes of retrial that the facts that Phillips was charged with a crime and had pleaded guilty thereto were not mentioned at trial. It is improper to argue assumptions or facts not based upon the evidence in the record. *People v. Kliner*, 185 Ill. 2d 81, 151 (1998). Additionally, we note that, generally, it is improper to admit, for purposes of establishing a defendant’s guilt, that a codefendant has pleaded guilty or was convicted of the same offense. See, e.g., *People v. Sullivan*, 72 Ill. 2d 36, 42 (1978). Finally, we agree with defendant that the foregoing comments suggest that Phillips was found guilty beyond a reasonable doubt by a factfinder (when, in fact, she entered a plea) and insinuated that, since one factfinder found, on the same evidence, that the evidence was sufficient to convict, the jury must convict defendant too. “A defendant who is separately tried is entitled to have his guilt or innocence determined upon the evidence against him without being prejudged according to what has happened to another.” *Id.*

¶ 69

### III. CONCLUSION

¶ 70 For the aforementioned reasons, the judgment of the circuit court of Winnebago County is reversed, and the cause is remanded.

¶ 71 Reversed and remanded.

