STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2011AP394-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DEMONE ALEXANDER,
Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, CARL ASHLEY, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would not add to the arguments presented by the parties in their briefs.

The opinion should not be published because this appeal may be decided by applying established law to the facts of this case.

ARGUMENT

I. ALEXANDER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS WAIVED HIS PRESENCE AT HEARINGS WHERE TWO JURORS WERE QUESTIONED AFTER THE START OF THE TRIAL.

The attorneys who represented the defendant-appellant, Demone Alexander, during the proceedings leading to his conviction expressly waived Alexander's presence at hearings where two jurors who had been selected during the voir dire were reexamined after the start of the trial (84:58).

This waiver cannot be ignored. It was not the prosecutor who sought to have Alexander excluded from the hearings. It was not the court that ordered Alexander to be excluded. If it was error to exclude Alexander, it was an error committed by his attorneys.

Whether the decision by Alexander's attorneys to waive his presence was right or wrong, it was tactical. Counsel was adamant in insisting that Alexander not make any statements regarding the jurors on the record (84:64). Counsel wanted to talk to Alexander about the jurors outside the earshot of the court and relay any information they considered helpful (84:63-65).

A tactical waiver by counsel is binding on the defendant. *State v. Wilkens*, 159 Wis. 2d 618, 624, 465 N.W.2d 206 (Ct. App. 1990); *State v. McDonald*, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971). As long as a defendant is represented by counsel whose performance is not constitutionally ineffective, there is no inequity in requiring him to bear the risk of attorney error that results in a procedural default. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

A claim of ineffective assistance of counsel is a means of circumventing a waiver. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 680 n.5, 556 N.W.2d 136 (Ct. App. 1996). A waived error, even a constitutional error, is not reviewed directly, but is analyzed under the standards for determining whether counsel was ineffective. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31.

In *State v. Anderson*, 2006 WI 77, ¶ 64, 291 Wis. 2d 673, 717 N.W.2d 74, the supreme court indicated that a complaint about the defendant's absence from a proceeding would be treated as a direct challenge instead of a claim of ineffective assistance where defense counsel failed to object to the defendant's absence. The court stated that "something more than the failure to object is needed to convert the challenge from a direct challenge to the alleged error to a claim of ineffective assistance of counsel." *Anderson*, 291 Wis. 2d 673, ¶ 63.

In this case there is "something more." Here there was not merely a thoughtless passive forfeiture of a right but a conscious tactical waiver of that right. That conscious tactical waiver by counsel converts the issue in this case into ineffective assistance of counsel.

Although the state believes that the supreme court's analysis in *Anderson* was wrong, that case need not be overruled, limited or modified, but simply distinguished because the situation here is significantly different from the one considered in that case and the other cases cited in that case.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d

379 (1997). A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 13, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893.

On review, the appellate court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Thiel*, 264 Wis. 2d 571, ¶ 17. Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law which are determined independently. *Id.*, ¶ 23.

A. Alexander Failed To Prove That His Attorneys Performed Deficiently By Waiving His Presence At The Hearings Where The Jurors Were Reexamined.

Alexander failed to prove that his attorneys performed deficiently by tactically waiving his presence at the hearings where the jurors were reexamined during the trial.

To prove that his attorneys' performance was deficient, the defendant must overcome a strong presumption that counsel acted reasonably, and establish that counsel's representation fell below an objective standard of reasonableness. *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115; *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986).

The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217.

While a defendant's right to be present at proceedings where the jury is selected cannot be waived, *State v. Harris*, 229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999); Wis. Stat. § 971.04(1)(c) (2009-10), a different rule applies once the jury has been selected and sworn, and the trial has begun. *State v. Miller*, 197 Wis. 2d 518, 521-22, 541 N.W.2d 153 (Ct. App. 1995); Wis. Stat. § 971.04(3). A defendant who is present at the beginning the of trial may voluntarily absent himself once the trial has started. *State v. Koopmans*, 210 Wis. 2d 670, 678, 563 N.W.2d 528 (1997); *Miller*, 197 Wis. 2d at 521-22; Wis. Stat. § 971.04(3).

The ability of a defendant to choose to be absent includes proceedings conducted during the trial to reexamine jurors who have previously been selected and sworn in the defendant's presence. When a defendant chooses to be absent after the start of the trial, the trial "'shall proceed in all respects as though the defendant were present in court at all times.'" *Miller*, 197 Wis. 2d at 521 (quoting Wis. Stat. § 971.04(3)).

Alexander cites *Anderson* for the proposition that many cases involving a defendant's right to be present during the voir dire involved situations occurring after the initial jury selection was completed. Brief for Defendant-Appellant at 34. But to the contrary, *Anderson* and the cases it cited involved a defendant's right to be present at the trial. *Anderson*, 291 Wis. 2d 673, ¶¶ 35-43.

Although Alexander's presence was waived by his attorneys, Alexander has not shown that his absence was not voluntary. He has not shown that he disagreed with the waiver by his attorneys, and would have insisted on being present if his attorneys had not waived his right to be present.

To the contrary, because it is presumed that counsel acted reasonably it must be presumed that Alexander's attorneys told him about his right to be present at the hearings regarding the jurors, but advised him that it

would not be a good idea for him to be there. This presumption is supported to some extent by the record.

The record shows that Alexander's attorneys talked to him about the situation with the jurors (84:64), so he was well aware of what was going on in his absence. Counsel also relayed to the court information provided by Alexander regarding the problems that came to light after the jurors were selected (84:64-65). Alexander's provision of information to his attorneys for conveyance to the court suggests that he was satisfied with this manner of proceeding, and did not want to be present at the hearings in person.

Alexander has failed to prove not only that his absence was not voluntary, but also that his attorneys' presumed advice not to attend the hearings regarding the reexamination of the jurors was not reasonable.

Alexander has not shown that his attorneys did not have a valid concern that if he was present at the hearings, he might say something on the record which could be used against him by the prosecutor or the court.

Nor has Alexander shown that his attorneys did not have a valid concern that the jurors could have been less candid about potential conflicts involving Alexander's acquaintances if he was sitting only a few feet away from them in chambers.

Finally, Alexander has not shown that it was unreasonable for his attorneys to believe that his right to be present at the reexamination of the jurors could be fully protected by contemporaneously telling him what was transpiring at the hearings and conveying to the court tactically selected parts of what he said in response.

B. Alexander Failed To Prove That He Was Prejudiced By His Absence When The Jurors Were Reexamined.

Deficient performance is prejudicial when there is a sufficiently strong probability that the result of the proceeding would have been different without the error to undermine confidence in the reliability of the existing outcome. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20.

It is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not erred. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). The defendant must show actual prejudice. *State v. Keeran*, 2004 WI App 4, ¶ 19, 268 Wis. 2d 761, 674 N.W.2d 570; *Erickson*, 227 Wis. 2d at 773; *Wirts*, 176 Wis. 2d at 187.

When the defendant alleges that his attorney was ineffective, he must show with specificity what a different action would have accomplished if it had been taken, and how its accomplishment would have altered the result of the proceeding. *See State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; *Flynn*, 190 Wis. 2d at 48.

In this case, the "proceeding" is not the trial. Alexander was not absent from any part of the trial except the hearings where the jurors were reexamined.

The "proceeding" here, rather, is the pair of hearings at which two previously selected and sworn jurors were reexamined. That was the proceeding from which Alexander was absent, supposedly in violation of his right to be present.

The result of that proceeding was that the two jurors who were reexamined were ultimately struck for cause (85:17, 20).

To show prejudice from his absence, therefore, Alexander must show it is reasonably probable that the jurors would not have been struck if he had been present in person at the reexamination hearings. But Alexander cannot make any such showing.

Although Alexander was not personally present at the hearings, he was able to convey to the court through counsel all the facts he and his attorneys considered to be important regarding the jurors' bias (84:64-65). Alexander was also able to convey the fact that he did not want either of the jurors to be struck, a position with which his attorneys agreed (84:61, 71, 79). Alexander has not suggested anything additional he might have said to the court if he had been present in person.

The court decided to strike the first juror because she knew a woman present in court who was the mother of Alexander's child, and was concerned that this woman, who was hostile to her, might retaliate against her (84:58-59, 62; 85:12, 17). The court decided to strike the second juror because he knew one of the defense witnesses (84:37, 66-67; 85:20).

Alexander has not shown how he might have been able to help his attorneys convince the court not to strike the jurors for these objective reasons if he had been personally present at the proceedings. Whether the court might have committed error by striking the jurors for cause is irrelevant to the issue presented on this appeal. The question is whether the court would still have committed that alleged error if Alexander had been present at the hearings, and Alexander has not proved that he could have prevented the alleged error if he had been present.

This case is nothing like *Harris*, 229 Wis. 2d 832, where the court examined some sixty potential jurors before the defendant was ever brought into the courtroom.

Rather, this case is similar to *State v. David J.K.*, 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994), where the defendant was absent from an in camera voir dire of three prospective jurors.

In *David J.K.*, the defendant was absent because of a deliberate choice made by the defendant and his attorney after counsel advised the defendant of his right to be present and the reasons why he should not be. *David J.K.*, 190 Wis. 2d at 737. After the prospective jurors were examined, counsel advised the defendant what had transpired. *David J.K.*, 190 Wis. 2d at 737. The defendant and his attorney agreed that two of the persons who were examined in chambers should serve on the jury. *David J.K.*, 190 Wis. 2d at 737.

A significant difference is that, because the defendant was absent from a part of the voir dire where his presence could not be waived rather than a part of the trial where his presence could be waived, the primary issue presented on appeal was whether the defendant's statutory and constitutional rights to be present were violated by his absence when the prospective jurors were examined. *David J.K.*, 190 Wis. 2d at 736.

This Court found that any error was harmless because the same persons would have served on the jury even if the defendant had been present in chambers for the voir dire. *David J.K.*, 190 Wis. 2d at 738. Therefore, there was no reasonable possibility that any error contributed to the conviction. *David J.K.*, 190 Wis. 2d at 738.

Alternatively, the defendant argued that his attorney was ineffective for waiving his right to be present at the in camera voir dire. *David J.K.*, 190 Wis. 2d at 738. But of course, a defendant cannot show prejudice because of his absence from a hearing when his absence was

harmless beyond a reasonable doubt. *David J.K.*, 190 Wis. 2d at 740.

Another comparable case is *State v. Tulley*, 2001 WI App 236, ¶¶ 10-11, 248 Wis. 2d 505, 635 N.W.2d 807, where this Court found that the absence of the defendant from an in camera examination of three prospective jurors was harmless because none of the persons who were examined in private was selected to be on the panel of twelve jurors who actually deliberated in the case, and the defendant was present at the voir dire of all those persons who made up the jury of twelve which convicted him.

Having failed to prove either that his attorneys performed deficiently by waiving his presence at the reexamination of two jurors, or that he was prejudiced in any way by that waiver, Alexander has failed to prove that the assistance he received from his attorneys was ineffective.

II. ALEXANDER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS GAVE THE PROSECUTOR A DEFENSE INVESTIGATOR'S NOTES WHICH ALLOWED THE PROSECUTOR TO IMPEACH A DEFENSE WITNESS.

The record shows that a witness for the defense, David Benson, testified falsely at the trial. Benson testified that he saw Alexander, but did not see the person who did the shooting, at the time the shots that killed the victim were fired (84:14-25). But Benson had previously told a defense investigator just the reverse, i.e. that he had seen the shooter, but not Alexander, when the shots were fired (84:110-12).

Now Alexander asserts that he should have a new trial because he was not able to present Benson's false testimony to the jury without the prosecutor demonstrating

that this testimony was false by means of his prior inconsistent statements.

It is not as clear as Alexander assumes that his attorneys performed deficiently by giving the prosecutor the notes of the defense investigator's interview with Benson which allowed the prosecutor to show that Benson's testimony was false.

Wisconsin SCR 20:3.3(a)(3) (2009-10) provides that a lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a witness called by the lawyer "has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Wis. SCR 20:3.3(a)(3).

An earlier version of this rule provided that the reasonable remedial measures could include "'disclosure of information otherwise protected by Rule 1.6 [regarding confidentiality of information received from a client].'" *State v. McDowell*, 2004 WI 70, ¶ 35, 272 Wis. 2d 488, 681 N.W.2d 500 (quoting Wis. SCR 20:3.3(b) (1999-2000)) (brackets in supreme court opinion).

Here, Alexander's attorneys had to know that Benson's testimony, which was so obviously contrary the statements he had previously given to the defense investigator, was false. And one reasonable way of remedying their presentation of false evidence would have been providing the prosecutor with the means to show that the evidence was false, even if that meant disclosing information about Benson's prior statements they would not otherwise been required to reveal.

To prove that his attorneys performed deficiently by giving the prosecutor the notes of Benson's interview with the defense investigator, Alexander would have had to show that it would have been unreasonable for his attorneys to turn over the notes to remedy the presentation of false testimony in compliance with Wis. SCR 20:3.3.

Having failed to make any such showing, Alexander has failed to prove that his attorneys performed deficiently by giving the prosecutor the notes.

Alexander complains that the circuit court failed to give him the *Machner* hearing he demanded "to determine whether defense counsel had a strategic reason" for their actions regarding Benson. Brief for Defendant-Appellant at 40. But the evidentiary hearing contemplated by *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), "is not a fishing expedition to discover ineffective assistance; it is a forum to prove ineffective assistance." *State v. Balliette*, 2011 WI 79, ¶ 68, __ Wis. 2d __, __ N.W.2d __ (decided July 19, 2011).

Alexander was required to allege facts in his postconviction motion showing why his attorneys' performance was objectively unreasonable. *Balliette*, __ Wis. 2d __, ¶¶ 64-67. He was required to allege facts showing why it would have been objectively unreasonable for his attorneys to turn over the notes to meet their ethical obligations. Having failed to allege any such facts, Alexander has failed to make the necessary showing that his attorneys performed deficiently.

In addition, Alexander has failed to show that he was prejudiced by giving the impeaching information to the prosecutor, even if giving him the notes would have been deficient performance. The result of Alexander's trial would have been the same even if the prosecutor had not been able to show that Benson's testimony was false because it is not likely that Benson's testimony, even if unimpeached, would have caused the jury to have any reasonable doubt about Alexander's guilt.

Benson's trial testimony was not totally exculpatory. Benson placed Alexander at the scene of the shooting at the time it occurred (84:14-16). And Benson admitted shouting "'[g]et the killer'" at Alexander around the time the shots were fired (84:16, 22).

Although Benson said he was referring to Alexander's dog, the jury was not required to believe that Benson would call a small poodle a "killer" just because the dog was barking at him (84:19, 22). Moreover, Benson's exhortation to "get" the killer poodle remained unexplained. The jury could have reasonably concluded that when Benson shouted get the killer at Alexander, he was exhorting bystanders to catch Alexander because he was the person who did the shooting.

In any event, Benson was the only witness who attempted to suggest that Alexander might not have been the person who did the shooting. In this respect, the parts of Benson's testimony which were exculpatory conflicted with the testimony of several witnesses for the state.

Stephen Jones testified that he saw Alexander shoot at the victim (78:57-59). Jones said that Alexander continued to shoot even as the victim ran away (78:61). Jones said he knew Alexander, and could see him clearly as he was shooting (78:60). Furthermore, Jones testified that when he saw Alexander later that day at Getharia Smith's house, Alexander admitted killing the victim (78:73-74).

Lester Rasberry testified that Alexander kept a Glock .40 semiautomatic pistol in his home at 4553 North 26th Street, just seven doors away from where the shooting occurred in the vicinity of 2600 Victory Lane (79:42-43, 48-51). Rasberry testified that Alexander asked him for the gun about eleven o'clock on the morning of June 10, 2007, saying he needed it to help a friend (79:45-46). Rasberry loaded the gun and gave it to Alexander (79:45-46).

About ten or fifteen minutes later, Alexander came back to the house and asked Rasberry to give him another clip (79:47-48). Alexander told Rasberry that he had just been shooting on Victory Lane (79:48-49). Alexander said he fired at and "dropped" a man who came out of an apartment building with a long gun (79:55-56).

The police found a dozen .40 shell casings in the area where the shooting occurred (76:45-47). Testing at the State Crime Laboratory revealed that all twelve casings had been fired from the same Glock semiautomatic pistol (77:61-64).

Keith Bradley testified that although he could not be 100% sure, Alexander looked like the person he saw from the door of his apartment on Victory Lane holding a gun after the shots were fired (82:11-13, 16-18, 50). Bradley testified that the person with the gun said he did not mean for this to happen (82:20).

Finally, Detective Jeffrey Norman testified that Getharia Smith told him that Alexander came to his house on the day of the shooting, and in the presence of Stephen Jones admitted shooting the man with the long gun (83:12).

In light of the facts that Jones' testimony was consistent with Rasberry's, that some of Jones' testimony was corroborated by Smith, and that Rasberry's testimony was corroborated by the physical evidence, no reasonable jury would have given Benson's testimony any weight, even if that testimony had not been shown to be false by his prior inconsistent statements. The jury would have convicted Alexander on the basis of the strong evidence of guilt presented by the state even if his attorneys had not provided the prosecutor with the notes used to impeach Benson.

Because Alexander has not proved that his attorneys performed deficiently by giving the prosecutor the notes of Benson's interview with a defense investigator, or that he was prejudiced by the prosecutor's possession of the notes reflecting Benson's inconsistent statements, Alexander has not proved that the assistance he received from his attorneys was ineffective.

III. ALEXANDER'S DISCOVERY OF NEW EVIDENCE DOES NOT JUSTIFY GIVING HIM A NEW TRIAL.

Alexander's new evidence qualifies as newly discovered. Alexander could not have found this evidence until he was in prison where he could find another inmate who would be willing to make statements which would be helpful to him.

However, a defendant is not entitled to a new trial because of newly discovered evidence unless there is a reasonable probability that a jury, looking at the evidence presented at the trial, the new evidence the defendant could introduce, and other new evidence the state could introduce to rebut it, would find that the new evidence changes the factual picture so significantly that it would now have a reasonable doubt about the defendant's guilt. *State v. Plude*, 2008 WI 58, ¶¶ 32-33, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Love*, 2005 WI 116, ¶ 43-44, 284 Wis. 2d 111, 700 N.W.2d 62. *See Wong v. Belmontes*, 130 S.Ct. 383, 386-89 (2009).

This test is not concerned with the impact of the new evidence on the reviewing court's view of the case, *see Plude*, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 11, ¶ 44, so it is not enough that the evidence may undermine the court's confidence in the existing verdict. *State v. Avery*, 213 Wis. 2d 228, 237-41 and n.1, 570 N.W.2d 573 (Ct. App. 1997), *modified in part on other grounds, State v. Armstrong*, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98.

The test focuses, rather, on a jury's assessment of the new evidence. *Plude*, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 11, ¶ 44. And this is an outcome determinative test. *Avery*, 213 Wis. 2d at 237-41 and n.1. *See State v. Edmunds*, 2008 WI App 33, ¶¶ 21-22, 308 Wis. 2d 374, 746 N.W.2d 590. To order a new trial the court must be able to affirmatively determine that a jury would probably

reach a different result because of the new evidence. *Avery*, 213 Wis. 2d at 237-41. *See Plude*, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 111, ¶ 44.[1]

Whether the new evidence would have a sufficient impact on the other evidence that a jury would have a reasonable doubt about the defendant's guilt is a question of law. *Plude*, 310 Wis. 2d 28, ¶ 33.

Although Alexander describes his new evidence in detail, he fails to suggest any reason why this evidence would change the result of his trial.

When a party's arguments fail to cite factual or legal authority, or to develop themes reflecting legal reasoning, but rely instead only on general assertions of error, the court may decline to consider them. *State v. West*, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 68, 517 N.W.2d 482, *cert. denied*, 513 U.S. 955 (1994); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

Even if this Court decided to consider Alexander's claim of newly discovered evidence, that evidence would not change the result of his trial.

The inmate who made the newly discovered statement was vague about the time and place he claimed to have witnessed a shooting. He said it was in early June 2007, somewhere near Glendale and Teutonia Avenues in Milwaukee (51:9).

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[1] In *Love*, the supreme court declined to resolve the debate between the parties in that case whether the test was outcome determinative. *Id.*, 284 Wis. 2d 111, ¶¶ 52-54. But this does not mean that the issue remains to be decided by controlling precedent. Unless and until overruled by the supreme court the decision of this Court in *Avery* remains good law. In addition, the subsequent decisions of the supreme court in *Plude* and this Court in *Edmunds* essentially confirm the holding in *Avery*

Yet more than three years later, he was able to give a fairly detailed description of the man he saw doing the shooting, telling a defense investigator that the man was a "brown skinned afro-American with a tattoo on his neck about 5'7'' and 160 lbs. short wavy hair wearing black shorts and black long sleeve T shirt" (51:9-10).

A jury would surely wonder how a man who could not clearly remember when and where he witnessed a shooting could give such a detailed description of the shooter so long after the shooting occurred.

In addition, it does not appear that the inmate ever told the police what he had seen to help them apprehend the shooter. Apparently, the first person the inmate told about the shooting was another unidentified prison inmate (51:9).

A jury would surely wonder why one inmate would tell another inmate about the shooting so long after it happened, especially when it appears he had never told anyone else including the police the important information he conveyed to Alexander's investigator and attorney.

Considering these inherent problems with the credibility of the newly discovered evidence, it is highly unlikely that the jury would give it enough weight to create a reasonable doubt about Alexander's guilt, convincingly established by the evidence discussed in the previous section of this brief.

Alexander's new evidence is not enough to justify giving him a new trial.

CONCLUSION

It is therefore respectfully submitted that the judgment convicting Alexander of murder, and the order denying his postconviction motion, should be affirmed.

Dated at Madison, Wisconsin: August 9, 2011.

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 4,869 words.

_____
THOMAS J. BALISTRERI

STATE OF WISCONSIN
CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief, excluding the appendix, is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief, excluding the appendix, filed with the court and served on all opposing parties.

Dated: August 9, 2011.

_____
THOMAS J. BALISTRERI
Assistant Attorney General