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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

No. 2011AP1803-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GENERAL GRANT WILSON,

Defendant-Appellant.

Appeal from the Circuit Court of Milwaukee County,
The Honorable Victor Manian and
The Honorable Jeffrey A. Conen, Presiding,
Circuit Court Case No. 1993 CF 931541

REPLY BRIEF OF DEFENDANT-APPELLANT GENERAL GRANT WILSON

Anne Berleman Kearney
State Bar No. 1031085
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 332-0966

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ARGUMENT

General Grant Wilson was denied his right to present a full and fair defense at trial. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The State's concessions in its brief make evident that the circuit court did not engage in rational reasoning when it prohibited Mr. Wilson from presenting evidence that another had committed the charged crime. The court thus proceeded inconsistently with *State v. Denny*, 120 Wis. 2d 614, 623-625, 357 N.W.2d 12, 17 (Ct. App. 1984), even though Mr. Wilson could establish the criteria required to admit such evidence. Namely, he could show that there was a "legitimate tendency that [a] third person could have committed the crime." *Id.* at 623, 377 N.W.2d at 17. This was *harmful* error given the lack of physical evidence connecting Mr. Wilson to the charged crime and the doubts created by inconsistencies in the State's case.

Other prejudicial errors infected the trial. The circuit court compounded its error of prohibiting Mr. Wilson from offering a defense supported by the evidence and law when it allowed the State's admission of testimony highly prejudicial to Mr. Wilson. And defense counsel proved ineffective at important points at trial when he failed to make necessary offers of proof as to the *Denny* defense and did not properly object to the admission of the prejudicial character evidence.

These errors, alone and cumulatively, warrant a new trial.

I. THE CIRCUIT COURT ERRED IN PREVENTING MR. WILSON FROM PRESENTING A FULL DEFENSE DESPITE HIS MEETING THE REQUIREMENTS OF *STATE V. DENNY*.

The State concedes that the "court's reasoning" was "not" correct:

> While the State submits that the trial court's ruling was correct, the State agrees with Wilson that some of the court's reasoning was not. For example, the trial court's apparent dislike of the *Denny* decision and its desire to have the supreme court address the issue (see 57:12; D-App. 240) does not mean the court was free to disregard *Denny* or to wait for the supreme court to tackle the issue.

Brief and Supplemental Appendix of Plaintiff-Respondent ("State's Brief") at 13-14. This admission that the circuit court had improper reasons for its *Denny* rulings belies the State's argument that the circuit court's rulings were correct. A circuit court is required to employ a "demonstrated rational process" to reach the decision of a reasonable jurist. *State v. Hunt*, 2003 WI 81, ¶34, 263 Wis. 2d 1, 25, 666 N.W.2d 771, 782. The State's concession shows that the circuit court's ruling was not the product of a rational basis. The court did "disregard Denny," and because Mr. Wilson can bring forward the required "some evidence" of the *Denny* defense elements, 120 Wis. 2d at 624, 357 N.W.2d at 17, Mr. Wilson should be afforded a new trial.

The State concedes that two of the three *Denny* elements—proximity and motive—existed for Willie Friend. As the State explains:

> Willie was present at the shooting scene, so it would be disingenuous to argue that Wilson failed to show

> Willie's proximity to the murder. As for motive, the defense offered the testimony [to the circuit court in a partial offer of proof] of Mary Lee Larson, a friend of the victim, who said that two weeks before the shooting, Willie threatened that if Eva didn't keep 'in check' he would kill her (56:15-16). During the same time frame, Larson saw Willie slap Eva (id.: 16-17). This evidence arguably was sufficient to satisfy Denny's motive requirement.

State's Brief at 11.

And what the State will not concede—the third *Denny* element of opportunity—was supported by the trial evidence, through the testimony of Carol Kidd-Edwards. Ms. Edwards testified that Willie Friend was at Ms. Maric's car at the time of the shooting. Specifically, when Ms. Edwards looked out her bedroom window, after all five large caliber shots had been fired, she saw Mr. Friend running away from Ms. Maric's car. R.51: 97-98, 100. Ms. Maric was within that car, possibly killed by a bullet from a large-caliber gun. R. 53:117-118.

Contrary to the State's characterization, *see* State's Brief at 13, 15-16, Mr. Wilson did not attempt to show in his opening brief that Willie Friend was the shooter, nor must Mr. Wilson do so to satisfy *Denny*. Mr. Wilson maintains that he was entitled to argue to the jury that Willie Friend *was involved in the shooting*. *See* Brief of Defendant-Appellant General Grant Wilson ("Wilson's Brief) at 21-22.

The picture of Willie Friend's involvement in the shooting is enhanced by the State's brief. The State acknowledges Willie Friend's

testimony that he was at Ms. Maric's car when five shots were fired from a larger gun. State's Brief at 12. Yet, as the State points out, the bullet holes near where Willie Friend had been standing were in the passenger door. *See id.* The bullet holes were in the lower panel, not near the window. R.51:147. Somehow Willie Friend, even though in close proximity to Ms. Maric, who was shot and possibly killed by a large-caliber bullet, remained entirely unscathed.

The State's brief mistakenly relies on the presence of other bullet marks in the ground as supporting Willie Friend's account of the shooting that "he was still being shot *at* while running away." State's Brief at 12 (emphasis added). But this evidence also supports the contention that he was not being shot *at*. The State observes that the "bullet strikes [were] in the concrete and in the dirt on either side of the side of the sidewalk." State's Brief at 12. Willie Friend ran from the car and bullets rained down around him, R.51:40, 42; yet he remained unharmed. Since this physical evidence could equally support the proposition that the intent was for Willie Friend *not* to be harmed, Mr. Wilson did not undertake the unnecessary burden "to explain why one of [Willie Friend's] unnamed confederates tried to kill him," as the State would push upon him. State's Brief at 16.

In this last statement at least, the State recognizes Mr. Wilson's argument for what it is: Willie Friend and "unnamed confederates" were

involved in the shooting of Evania Maric. State's Brief at 16. Again, the testimony of Ms. Edwards provides support. Ms. Edwards saw Ms. Maric's car and a gold Lincoln near Jabo's after-hours club. R.51:101. Ms. Edwards could not identify the license plate of the Lincoln, R.51:124-125 (which, if it had been Mr. Wilson's car, would have had a distinctive license plate, R.55:108).[1] But Ms. Edwards did connect the Lincoln to a person who did not match a description of Mr. Wilson. R.51:107-108. Ms. Edwards testified that, after Willie Friend ran from the cars, she saw a "slight[ly] built" man, about 6 feet tall, wearing a leather jacket, R.51:122-123, come around from the passenger side of the Lincoln, walk around the car, and fire shots at Ms. Maric's car from a smaller-caliber gun. R.51:103. Afterward, this same individual walked back around the car and entered the passenger side, whereupon the car sped away. R.51:106. Willie Friend was there at the car, Mr. Wilson should have been permitted to maintain, and so were his confederates.

The State concedes that Mr. Wilson need only show that that there was evidence against one additional suspect. State's Brief at 1-2 (referring to "third-party perpetrator evidence. . . with respect to Willie Friend and/or his brother"). Mr. Wilson accomplished that with his showing against Willie Friend.

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[1] And, as the State relates, there was testimony presented at trial of a number of gold Lincolns located in garages in the general vicinity. R.53:175-181.

However, in addition, there was evidence that Willie Friend's brother, Larnell (Jabo) Friend, was complicit. Jabo's proximity to the scene when Ms. Maric died and his opportunity were established by the evidence. Willie Friend and Ms. Maric were sitting outside Jabo's illegal after-hours club. R.51:31-33. Testimony showed that Jabo was on the scene when the police officers arrived. R.53:39. The State does not dispute these facts. Instead, the State's brief becomes mired in questioning Jabo's motive. But Jabo had a motive: Ms. Maric's mother and sister told police that Jabo was Ms. Maric's pimp. *See* D-App. 131.

Rather than counter this evidence in the police report, the State resorts to unsupported assertions. *See, e.g.,* State's Brief at 10 ("Wilson's assertion that the police report 'stated that Ms. Maric had *recently* left the prostitution business' [is] false"); *id.* at 7 ("Wilson's reference to the report misleadingly suggests that the victim's attempt to disassociate herself from Jabo was an ongoing effort at the time of her murder."); *id.* at 10 ("Wilson in a footnote denigrates the State's postconviction argument that the evidence in the police report was inadmissible on hearsay grounds"). The State is mistaken.

The police report statements from the mother of Ms. Maric (Clara) include details suggesting that Eva's bid to extract herself from prostitution was of recent vintage. Consider her statements:

> Clara stated "Jabo" acted as Eva's pimp during the time in which she prostituted herself. She stated "Jabo" had some type of tavern, or other, possibly a corner grocery store business near the area of N. 9th St. and W. Capitol Dr. She heard the aforementioned information through her eavesdropping on telephone calls which Eva made to Willie and "Jabo," as well as General Grant, and other friends of hers who frequented that area.

D-App. 131. The "tavern" or other "business" located at 9th and Capitol Drive, which was mentioned by Ms. Maric's mother, is closely correlated to the location of the shooting. Further, Ms. Maric's mother points to contemporary sources as the basis for her knowledge, including calls that Eva made to Willie and Jabo and General Grant. All of these individuals were still in the picture near the time of Eva's death. For example, trial counsel for Mr. Wilson introduced a series of messages left by Ms. Maric on Mr. Wilson's answering machine in the spring. R.53:142, 147.[2]

Finally, the State simply cannot convincingly argue, based on its ability to locate only a 1987 charge for prostitution, that this proves that Ms. Maric had ceased the activity. *See* State's Brief at 8-9. It is no less plausible that Ms. Maric continued her prostitution activities but was lucky enough not to be caught. After all, Mary Lee Larson stated that Eva Maric and Willie Friend were at the Edge of Town Motel when

[2] These calls further show that Ms. Maric did not fear Mr. Wilson. R.55:67-70. This evidence is thus at odds with the testimony of Willie Friend—devoid of any corroboration—that Mr. Wilson had sought to drive Ms. Maric off the road. *See* State's Brief at 14-15.

Ms. Larson observed Willie Friend's violent acts towards Eva Maric. R.56:17, 30, 32.

As for admissibility of the police report statements, which is contested by the State, the statements were excited utterances by the mother and sister of Ms. Maric, relating to the startling event of an unknown person's having killed Ms. Maric, and made under the stressful circumstances of the police informing them of the death as well as their being questioned about the death and possible culprits. *See* D-App. 131, 133; *see also State v. Martinez*, 150 Wis. 2d 62, 72-73, 440 N.W.2d 783, 787 (1989) ("relating" in Wis. Stat. § 908.03(2) permits utterance to be broader than merely describing startling event). Thus, it would be reasonable to conclude, as Mr. Wilson argues, that the statements from Ms. Maric's family constituted excited utterances and fall within a hearsay exception.

The circuit court's prohibition of the *Denny* defense harmed Mr. Wilson. Every bit of evidence and testimony was significant because the case against Mr. Wilson was one of circumstantial evidence. No gun or other physical evidence connected Mr. Wilson to the crime. The State mistakenly contends that physical evidence would have contradicted the *Denny* evidence. State's Brief at 16. Not only does the physical evidence fail to connect Mr. Wilson to the shooting, it supports a third-person defense: the bullets landing everywhere but on Willie Friend; the

testimony of Ms. Edwards; and the inconsistencies in the State's story, ranging from the descriptions of the persons allegedly involved (which descriptions did not match Mr. Wilson), R. 51:123, to Willie Friend's statement that the gunman shot left-handed, R.51:67, when Mr. Wilson shoots right-handed, R. 53:139; 54:39, 42-44.

The State suggests that any error was dissipated by defense counsel's being able in closing argument to "float the theory that Willie Friend was involved in Eva's murder." State's Brief at 4-5. But, of course, a closing is only counsel's argument, as the jury was instructed. R.58:21. Mr. Wilson lacked the opportunity to present *evidence* giving weight to any closing argument of a third-party defense. If the *Denny* defense had proceeded, for instance, with testimony from witnesses Mary Lee Larson and Barbara Lange, they would have described Willie Friend's violent relationship with Ms. Maric and her concerns that Friend would cause her harm. R.56:15-17, 31-32, 39. In this way, Mr. Wilson could have ensured that the jury had a full picture of the circumstances surrounding the shooting based on evidence presented at trial.

In an additional attempt to suggest harmless error, the State notes testimony from Mr. Wilson that he had owned a .44-caliber gun, *see* State's Brief at 16, but the State goes widely off the mark. As the State acknowledges, the evidence is that Mr. Wilson owned a Smith and

Wesson .44 Magnum. *Id.* But the State's ballistics expert testified the .44 caliber bullets involved in the shooting came from a Stern Rouger revolver. R.53:53-56. There was no Stern Rouger connected to Mr. Wilson.

The circuit court's error was harmful and should give rise to a new trial for Mr. Wilson.

II. THE CONVICTION SHOULD BE REVERSED BECAUSE THE STATE IMPROPERLY INTRODUCED PREJUDICIAL EVIDENCE OF GUN OWNERSHIP AND OTHER ACTS.

The circuit court erroneously prevented Mr. Wilson from pursing a *Denny* defense, yet it permitted the State to introduce prejudicial evidence. That, too, is harmful error.

The State does not seek to defend its mentioning "a domestic disturbance" in the same sentence as seeking to put a gun in Mr. Wilson's hand. State's Brief at 29. Nor can the State defend its putting on certain testimony of Terry Bethly, which was the equivalent of collateral impeachment evidence, under Wis. Stat. § 906.08(4), where she talked about acts by Mr. Wilson, who was a witness at trial and was cross-examined by the State. R.53:17, D-App. 169; *see McClelland v. State*, 84 Wis. 2d 145, 158-159, 267 N.W.2d 843, 849 (1978). It matters not whether a door was opened (which it was not) for Ms. Bethly to discuss how Mr. Wilson supposedly handled open relationships with his women

friends; it was not appropriate for the State to elicit testimony about a specific instance—unrelated to the trial—where Mr. Wilson went to "Batterers' Anonymous." Contrary to the State's contention, State's Brief at 27, there is no "cur[e]" for introducing this highly prejudicial evidence.

As for the testimony of Pedro Smith, it is telling that the State's brief urges the Court to adopt its reading on appeal over that of all others who have read the testimony. *See* State's Brief at 20 & n.7. The prosecutor's questions to Mr. Wilson about a "Dirty Harry gun" followed on the heels of questions about Pedro Smith. R.56:106, D-App. 181. In response to the call by Mr. Wilson's counsel for a mistrial, the prosecutor stated that she "fully expect[ed] to be able to call Mr. Smith," R.56:116, D-App. 184, but she did not call him on these topics. These statements—made to portray Mr. Wilson as an undisciplined gun-owner—were highly prejudicial and are grounds for a new trial.

III. ALTERNATIVELY, MR. WILSON'S RIGHT TO A DEFENSE WAS INFRINGED UPON BY TRIAL COUNSEL'S INEFFECTIVENESS AND THE COURT'S UNWILLINGNESS TO HOLD A POST-CONVICTION HEARING.

Mr. Wilson's ability to show the motive, opportunity, and proximity of a third person with respect to the charged crime was an indispensable part of his defense. In failing to make offers of proof for witnesses with knowledge of these matters—Ms. Maric's mother and sister, as established in the police report, D-App. 131-134—trial counsel

did not provide representation "equal to that which the ordinary prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services." *State v. Machner,* 92 Wis. 2d 797, 802, 285 N.W.2d 905, 907 (1979).

The State makes the unfounded assertion that Mr. Wilson did not properly put before this court "whether counsel was ineffective in 'fail[ing] to object properly to the introduction of character evidence' against Wilson. Wilson's brief at 1." State's Brief at 2, n. 1. While the greater part of Mr. Wilson's argument challenging the effectiveness of counsel is devoted to trial counsel's failure to provide complete offers of proof, there is also a portion of that argument explaining that "[t]he absence of proof is all the more glaring when the State could introduce prejudicial character evidence, to which Mr. Kovac, at times, did not effectively object." Wilson's Brief at 43. And examples followed that argument (*"See, e.g*. R. 55:83; 56: 115-116") to substantiate the point.[3] Perhaps the State does not want to confront this argument (as is its right), but it cannot do so on the basis that it was waived. At a minimum, Mr. Wilson should have been afforded a post-conviction hearing so that he could question trial counsel on his failures.

[3] In fact, it is based on a failure to object to the introduction of prejudicial evidence that the State asks this Court to refuse to consider the merits of that part of argument II involving the "Dirty Harry" question. *See* State's Brief at 22-23.

CONCLUSION

For the foregoing reasons and those in the opening brief, the judgment of conviction against General Grant Wilson should be reversed and the matter remanded for a new trial. Alternatively, the circuit court's decision and order denying Mr. Wilson's post-conviction motion should be reversed and a post-conviction motion hearing held.

Respectfully submitted,

s/ Anne Berleman Kearney

Anne Berleman Kearney (WBN 1031085)
Appellate Consulting Group
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966

FORM AND LENGTH CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,997 words.

s/ Anne Berleman Kearney

____

Anne Berleman Kearney (WBN 1031085)
Appellate Consulting Group
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966

Attorney for Defendant-Appellant General G. Wilson

CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic brief 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 filed with the court and served on all opposing parties.

s/Anne Berleman Kearney
____

Anne Berleman Kearney (WBN 1031085)
Appellate Consulting Group
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966
Attorney for Defendant-Appellant General G. Wilson

MAILING CERTIFICATION

I, Anne Berleman Kearney, do hereby certify that the Reply Brief of Defendant-Appellant General G. Wilson was hand-delivered to a third-party carrier (Federal Express) on Wednesday, November 28, 2012 for delivery to

Ms. Diane Fremgen
Clerk of Court
Wisconsin Court of Appeals
110 E. Main Street, Suite 215
Madison, Wisconsin 53705

s/ Anne Berleman Kearney
____

Anne Berleman Kearney (WBN 1031085)
Appellate Consulting Group
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966

Attorney for Defendant-Appellant General G. Wilson