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COURT OF APPEALS
DISTRICT 4

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2014AP000718 CR
Circuit Court Case No. 2013CM000147

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TRAVANTI D. SCHMIDT,
Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR GRANT COUNTY,
THE HONORABLE ROBERT P. VANDEHEY, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF ISSUE

Whether the defendant's Motion for a New Trial on grounds of ineffective assistance of counsel was sufficient on its face to entitle the defendant to a *Machner* hearing?

Trial Court's answer: No

STATEMENT ON ORAL ARGUMENT

Because the parties can adequately address their positions in the briefs, oral argument is not requested.

STATEMENT ON PUBLICATION

Publication would not be appropriate since the issue in this case involves no more than the application of well-settled rules of law to a recurring fact situation.

STATEMENT OF THE CASE

This is a criminal case. The defendant was charged with disorderly conduct in violation of sec. 947.01(1)Wis. Stats. as a repeater pursuant to sec. 939.62(1)(a)Wis. Stats. (R.1). On September 27, 2013, the Trial Court conducted a jury trial on that charge. The jury returned a verdict of guilty and the Court entered a judgment of guilty. (R.11,12). The defendant was sentenced to one year in jail consecutive to any previously imposed sentence. (R.12). The defendant filed a Motion for a New Trial

alleging ineffective assistance of counsel. (R.16; App.1-9). The Trial Court denied the motion without a court hearing. (R.17; App.11-15). The defendant appeals.

STATEMENT OF THE FACTS

On April 7, 2013, Travis Parr was working as a Correctional Officer at the Wisconsin Secure Program Facility. (R.26, pp.28-29; App.44-45). Travanti Schmidt was an inmate at that prison. (R.26, p.28; App.44). Travis Parr provided Travanti Schmidt a meal. (R.26, p.29; App.45). Mr. Schmidt later informed Officer Parr that he was having some issues with his milk carton. (R.26, p.30; App.46). Mr. Schmidt showed Officer Parr that the milk carton was open. (R.26, p.31; App.47). Officer Parr's sergeant told Officer Parr to replace the milk carton with a new one. (R.26, pp.30-31; App.46-47). Officer Parr obtained a new carton of milk, opened the trap door, set the new milk on the trap, and then milk came flying out and hit Officer Parr in the stomach and legs. (R.26, p.31; App.47).

At this point in the testimony, the State asked the court to turn on the video. (R.26, p.31; App.47). Officer Parr then identified two photos. (R.26, pp.31-32; App.47-48). The State then offered the two photos and a video

into evidence. (R.26, p.32; App.48). The defense attorney did not object, and the exhibits were received. (R.26, p.32; App.48).

Officer Parr then testified that there are cameras at the prison. (R.26, p.32; App.48). Officer Parr looked up at the screen and indicated that he recognized what was being displayed. (R.26, p.33; App.49). Officer Parr then identified it as Range 1 at the prison. (R.26, p.33; App.49).

The State requested that the video be played and it was played at that time. (R.26, pp.33-34; App.49-50). The State suggested that a little narration wouldn't hurt. (R.26, p.34; App.50). Officer Parr stated that it appeared to be him. (R.26, p.34; App.50). Officer Parr went on to indicate that that would have been him the last time when he brought the new milk back and when he got splashed by the milk. (R.26, p.34; App.50). Officer Parr further identified himself as picking up the milk carton. (R.26, p.34; App.50).

Prior to the commencement of the evidence, the State made an opening statement to the jury. (R.26, pp.21-25; App.37-41). The State did not mention the video during the opening statement. Defense counsel also made an opening statement to the jury prior to the commencement of the

evidence. (R.26, pp.25-27; App.41-43). During the course of her opening statement, defense counsel informed the jury that the jurors would see a video less than a minute long that would show this entire exchange. (R.26, p.26; App.42).

ARGUMENT

Because the defendant did not present sufficient facts in his motion to entitle him to a new trial, the Trial Court properly exercised its discretion and denied the Motion without an evidentiary hearing.

Standard of Review

In *State v. Bentley*, 201 Wis. 2d 303, 310-311, 548 N.W.2d 50 (1996), the Supreme Court stated:

While we agree with the State that *Nelson* controls, we disagree with the State's interpretation of *Nelson* that our review is limited to the erroneous exercise of discretion standard. Rather, we conclude that *Nelson* sets forth a two-part test which necessitates a mixed standard of appellate review. If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. *Nelson*, 54 Wis. 2d at 497. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo. See *Nottelson v. DILHR*, 94 Wis. 2d 106, 116, 287 N.W.2d 763 (1980) (whether facts fulfill a particular legal standard is a question of law).

However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a post-conviction motion without a hearing based on any one of the three factors enumerated in *Nelson*. When reviewing a circuit court's discretionary act, this court

uses the deferential erroneous exercise of discretion standard. *Brookfield v. Milwaukee Metropolitan Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

Motion Alleges Insufficient Facts

The defendant's motion does not allege sufficient facts to entitle the defendant to a new trial.

First off, it is clear that the defense wanted the jury to see the video. Both the prosecutor and the defense attorney gave opening statements prior to any evidence being introduced. The prosecutor never mentioned the video during the opening statement. The defendant's attorney, however, brought up the video during her opening statement and told the jury,

You will see a video less than a minute long that shows this entire exchange. You will see that they never come in direct physical contact. You will see that Travanti never reached for Travis Parr. That there isn't milk being sprayed everywhere flying up in the air. It's the classic accident of spilled milk, and you will see it pour down. (R.26, p.26; App.42)

The defense wanted the jury to see the video and planned on the jury seeing the video. It is unreasonable for the defendant to want the jury to see some evidence and then complain because the jury saw it.

Second, the defendant focuses much of his argument on the application of sec. 909.015(9). The defense argues

that for the video to be authenticated, the State needed someone from the prison who was familiar with the surveillance system testify. Another way to authenticate a video is through the testimony of a witness with knowledge that the matter is what it is claimed to be pursuant to sec. 909.015(1) Wis. Stats. The witness who testified about the video was Travis Parr, the correctional officer or prison guard who was depicted in the video. A witness should be able to testify about a video if he is the person being depicted in that video. Victims routinely testify about photographs of their injuries even though they are not looking at the injury through the camera lens when the photo is being taken. It is clear from the record that Travis Parr, the correctional officer or prison guard, identified the video. Officer Parr testified that the video depicted him the last time when he brought the new milk and when he got splashed by the milk. (R.26, p.34; App.50)

Third, the defense argues that the video was not sufficiently authenticated under sec. 909.015(1) Wis. Stats. because Officer Parr never testified that the video depicted a fair and accurate representation of what he had witnessed on April 7. In *State v. Peterson*, 222 Wis. 2d

449, 455-456, 588 N.W.2d 84 (Ct. App. 1998), the court stated,

In *State v. Sarinske*, 91 Wis. 2d 14, 44, 280 N.W.2d 725, 739 (1979), the court held that for still photographs, the photographer's testimony that the pictures accurately portray what they purport to portray is a sufficient foundation under secs. 909.01 and 909.015(1), Stats. Other jurisdictions have routinely held motions pictures admissible with the same foundation as that held adequate for still photographs in *Sarinske*.

It is clear that Officer Parr did not use the magic words that the video depicted a fair and accurate representation of what he had witnessed. But it is also clear that he believed it to be a fair and accurate representation of what he had witnessed. He testified about what had happened without the video, he identified the video, and then pointed out what was going on in the video between the defendant and himself during the course of the incident which was the subject matter at trial in this case. The State concedes that the prosecutor could have and should have asked Officer Parr if the video was a fair and accurate representation of the incident. If the prosecutor had asked that question, we would not be writing this brief for the Court of Appeals today. But it is also clear from Officer Parr's testimony, that the video was a video recording of the incident for which the defendant was

on trial. Wisconsin courts have long made it clear that magic words are not necessary and that substance is more important than form. See *Pucci v. Rausch*, 51 Wis. 2d 513, 519-520, 187 N.W.2d 138 (1971) (relating to expert witness), See *State v. Echols*, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993) (related to Trial Court's findings).

Insufficient Facts Means Deferential Standard

For these three reasons, the defendant has not alleged sufficient facts which would entitle the defendant to a new trial. Because the defendant failed to allege sufficient facts which would entitle him to a new trial, the circuit court was entitled to exercise discretion in denying the post-conviction motion without a hearing. Therefore, the standard of review for the Appellate Court is for the Appellate Court to utilize the deferential erroneous exercise of discretion standard.

The Trial Court denied an evidentiary hearing. (R.17; App.11-15). The Trial Court considered the relevant facts. The Trial Court applied the correct standard of law. The Trial Court considered the arguments of defense and exercised its discretion to deny an evidentiary hearing.

In *State v. Bentley*, 201 Wis. 2d at 318, the court stated, "A circuit court properly exercises its discretion

when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." The Trial Court in this case did all of those. For those reasons too, the State respectfully requests the court to affirm the Trial Court's decision to deny an evidentiary hearing on the defendant's motion for a new trial.

Conclusion

The defense planned on having the jury see the video. Officer Parr sufficiently authenticated the video. Therefore, the defendant has not alleged sufficient facts to entitle the defendant to a new trial. The Trial Court considered the facts, the relevant law, and rationally decided to deny the Motion for a New Trial without an evidentiary hearing. The State respectfully requests the court to affirm the Trial Court's order.

Dated this 3rd day of June, 2014.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § (Rule) 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of the brief is 9 pages.

Dated this 3rd day of June, 2014.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with the content requirements of Wis. Stat. S (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's appendix fall into one of the categories specified in sub. (2)(a).

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

Dated this 3rd day of June, 2014.

Signed:

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**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 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.

Dated this 3rd day of June, 2014.

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