STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP671

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEIMONTE ANTONIE WILSON, SR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, and an Order Denying Postconviction Relief, Entered in Milwaukee County Circuit Court, the Honorable William S. Pocan, Presiding.

REPLY BRIEF

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I. In a Criminal Case, a Witness is Properly Served When a Copy of the Subpoena is Left at the Witness's Residence Pursuant to Wis. Stat. § 885.03.

As the State acknowledges (at 12), Wisconsin Chapter 885 "shall" apply in "all" criminal proceedings. Wis. Stat. § 972.11(1) states:

> (1) Except as provided in subs. (2) to (4), the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction. No guardian ad litem need be appointed for a defendant in a criminal action. Chapters 885 to 895 and 995, except ss. 804.02 to 804.07[1] and 887.23 to 887.26,[2] shall apply in all criminal proceedings.

Wis. Stat. § 972.11(1).

Chapter 885 contains several statutes discussing subpoenas. In particular, Wis. Stat. § 885.03 provides three different ways to serve a subpoena:

> Service of subpoena. Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.

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[1] Wisconsin Chapter 804 is titled "Civil Procedure—Depositions and Discovery." Wis. Stat. §§ 804.02 to 804.07 address depositions.

[2] Wisconsin Chapter 887 is titled "Depositions, Oaths and Affidavits." Wis. Stat. §§ 887.23 to 887.26 address depositions and witnesses sent to other states.

Wis. Stat. § 885.03. Thus, a subpoena can be served by: (1) exhibiting and reading it to the witness; (2) giving the witness a copy; *or* (3) leaving a copy at the witness's abode.

Consequently, in this case, it was proper for trial counsel's investigator to leave a subpoena at Ms. Brown's residence with her daughter pursuant to Wis. Stat. § 885.03. Chapter 885 applies to "all criminal proceedings" and section 885.03 plainly states that a copy of a subpoena can be left at a witness's, such as Ms. Brown's, abode. (*See* Mr. Wilson's Initial Br. at 17-18).

The State's argument in this case engrafts an additional requirement onto Wis. Stat. § 885.03. The State argues that *before* leaving a copy of a subpoena at the witness's abode, as plainly permitted by Wis. Stat. § 885.03, "the server must first make reasonably diligent efforts to effect personal service on the witness…" pursuant to civil procedure statute, Wis. Stat. § 801.11(1)(b). (State's Br. at 13-14).

This argument is flawed as it ignores the plain language of both Wis. Stat. §§ 885.03 and 801.11(1)(b). *See* ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." (quotation omitted)).

First, Wis. Stat. § 885.03 makes no reference whatsoever to "reasonable diligence" or Wis. Stat. § 801.11(1)(b). As asserted in Mr. Wilson's initial brief (at 18), if the legislature wished to impose a "reasonable diligence" requirement in criminal cases, it could have easily included

such language in Wis. Stat. § 885.03, or alternatively referenced Wis. Stat. § 801.11(1)(b) in Wis. Stat. § 885.03.[3]

Second, civil procedure statute, Wis. Stat. § 801.11(1)(b), which the State argues applies to criminal cases, discusses service with regards to a defendant, not a witness, such as Ms. Brown. (*See* Mr. Wilson's Initial Br. at 18). Wis. Stat. § 801.11(1)(b) states:

> Personal jurisdiction, manner of serving summons for. A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:
>
> (1) Natural person. Except as provided in sub. (2) upon a natural person:
>
> (a) By personally serving the summons upon the defendant either within or without this state.
>
> (b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode...

Wis. Stat. § 801.11(1)(b).

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[3] Mr. Wilson's brief (at 18) incorrectly stated that Wis. Stat. § 885.03 was *enacted* after Wis. Stat. § 801.11(1)(b). It should have stated Wis. Stat. § 885.03 was *amended* after the reasonable diligence language in Wis. Stat. § 801.11(1)(b) came into existence. *See* 1993 Act 486, § 495, eff. June 11, 1994 (amending "him" and "his" to "the witness" in Wis. Stat. § 885.03); Wis. Stat. § 801.11(1)(b) (1991-1992) (includes the reasonable diligence language). Early versions of both statutes existed as far back as 1849. *See* Wisconsin Chapter 88 §§ 24 & 70 (1849).

In contrast, Wis. Stat. § 885.03 discusses service on a "witness":

> Service of subpoena. Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.

Wis. Stat. § 885.03.

The use of the word "defendant" supports Mr. Wilson's argument that Wis. Stat. § 801.11(1)(b) does not apply in a criminal case. Wis. Stat. § 801.03(1) specially states "'defendant' means the person named as defendant in a civil action…" (emphasis added). Moreover, the State does not provide any explanation as to why or when a criminal defendant would ever need to be "subpoenaed" or "served" for a hearing in his or her own case under Wis. Stat. § 801.11(1)(b). There is a specific criminal statute that compels or commands a criminal defendant to come to court. In Wisconsin Chapter 968, which is titled "Commencement of Criminal Proceedings," Wis. Stat. § 968.04, discusses arrest warrants and summons. *See* Wis. Stat. § 972.11(1) ("the rules of evidence and practice in civil actions *shall be applicable* in all criminal proceedings *unless* the context of a section or rule manifestly requires a different construction." (emphasis added)). Thus, Wis. Stat. § 801.11(1)(b) does not apply in a criminal case.

Lastly, assuming for the sake of argument, but not conceding, that Wis. Stat. §§ 801.11(1)(b), 805.07, and 885.03, all apply to a criminal case as argued by the State, the subpoena was still proper in this case. As noted above, Wis. Stat. § 801.11(1)(b) references a "defendant." In contrast, Wis. Stat. § 885.03 references a "witness." Consequently, given that at issue in this case is service on a witness, Ms. Brown, Wis. Stat. § 885.03 applies. *See* ***State v. Anthony D.***

B., 2000 WI 94, ¶ 11, 237 Wis. 2d 1, 614 N.W.2d 435 (When two statutes relevant to the same subject matter conflict, the more specific statute controls). From a practical standpoint, it makes sense that service on a witness would require a less stringent burden than service on a defendant. Regardless of the type of proceeding, a defendant usually has a more significant interest and stake in the outcome of a case than a witness.

Therefore, this Court should remand for an evidentiary hearing to take testimony from Ms. Brown.

II. Mr. Wilson Was Deprived of Effective Assistance of Counsel Because: (1) Trial Counsel Failed to Argue that a Key Witness Was Properly Subpoenaed; or in the Alternative, (2) Trial Counsel Failed to Properly Subpoena the Witness.

A. Trial counsel failed to argue that Ms. Brown was properly subpoenaed.

The State agrees, contrary to the circuit court's determination, that Mr. Wilson's postconviction motion did *not* need to contain an affidavit from Ms. Brown. (State's Br. at 16).

The State simply argues that Mr. Wilson was not deprived of effective assistance of counsel because the subpoena was invalid and "[a] lawyer does not provide ineffective assistance by refraining from pursuing a futile course of action." (State's Br. at 17).

However, as discussed above in Part I., Mr. Wilson disagrees that the subpoena was invalid. Consequently, as discussed in Mr. Wilson's initial brief (at 20-22), he was

deprived of effective assistance of counsel and this Court should remand for an evidentiary ***Machner*** hearing.

B. Alternatively, trial counsel was ineffective for failing to properly subpoena Ms. Brown.

The State concedes that trial counsel performed deficiently by failing to properly subpoena Ms. Brown. (State's Br. at 18). The State solely argues that this deficiency did not prejudice Mr. Wilson. (*Id.*). However, contrary to the State's argument, Mr. Wilson was prejudiced.

As the State acknowledges, the court identified whether the officers had their guns drawn as a "key issue" and "the most significant to the court." (State's Br. at 18). Consequently, the exclusion of Ms. Brown's testimony that she observed officers with guns drawn approach the vehicle was prejudicial. Ms. Brown's testimony would have corroborated Mr. Wilson's and Mr. Roberts's testimony that the officers had their guns out and bolstered Mr. Wilson's assertion that the search was not consensual.

The State argues that "Wilson has not provided any reason to believe Brown's testimony *would have altered* the circuit court's assessment of the officers' credibility." (State's Br. at 21) (emphasis added). However, prejudice does *not* require a defendant to prove that the result of a proceeding *would have been different*. Rather, prejudice requires a showing that "there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of a proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997). Given that the gun issue was a "key issue" and that trial counsel clearly felt it was important to have Ms. Brown testify at the suppression hearing, trial counsel's

failure to properly subpoena Ms. Brown undermines confidence in the outcome of the proceeding. Instead of having only two witnesses testify that the officers had their guns out, there would have been three witnesses testifying that the officers had their guns out.

The State argues that Ms. Brown "lacked any presumptive indifference to the impact of her testimony, increasing the likelihood that her testimony would not undermine the court's assessment of the officers' credibility or would have improved the court's view of Roberts's and Wilson's believability." (State's Br. at 21-22). However, without having a hearing at which the circuit court could assess Ms. Brown's demeanor and the overall persuasiveness of her testimony, it is speculation to conclude that her testimony would not have altered the circuit court's assessment. While a witness's relationship to the defendant and other witnesses is certainly a permissible consideration when assessing credibility, such testimony should not automatically be discredited. Automatically discrediting a witness's testimony based on his or her relationship to a party without a hearing is premature and simply unfair.

Lastly, the State argues that Ms. Brown's testimony might only support the testimony of one person (Mr. Wilson or Mr. Roberts), but not the other, or create a third account. (State's Br. at 21). However, it makes sense that there would be differences in testimony given that each person observed the officers from different vantage points. It would make no sense if Mr. Wilson, who was in the driver's seat, Mr. Roberts, who was in the passenger's seat, and Ms. Brown, who was not in the car, had the exact same testimony.

Therefore, this Court should remand for an evidentiary ***Machner*** hearing.

CONCLUSION

For the reasons stated, Mr. Wilson respectfully requests that this Court remand for an evidentiary hearing to take testimony from Ms. Brown, and, if necessary, hold a ***Machner*** hearing.

Dated this 26th day of January, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 of body text. The length of the brief is 1,868 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 26th day of January, 2016.

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