STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1598

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DANIEL G. SCHEIDELL,

Defendant-Respondent.

ON APPEAL FROM A DECISION AND ORDER GRANTING A MOTION FOR A NEW TRIAL AND VACATING THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY, THE HONORABLE JOHN S. JUDE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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INTRODUCTION

In 1995, a jury convicted Daniel Scheidell of armed burglary and attempted sexual assault. The victim, J.D., who knew Scheidell as a social acquaintance, neighbor, and coworker, claimed that on May 20, 1995, Scheidell had entered her

apartment without her permission and attempted to rape her at knifepoint. At issue was the identity of J.D.'s attacker: although the attacker did not speak and wore a mask and head covering during the attack, J.D. immediately and unequivocally recognized the attacker as Scheidell. Scheidell, who is white, was 46 years old in May 1995.

Scheidell's defense was that J.D. was mistaken and that an unknown attacker could have entered J.D.'s apartment through an unlocked bathroom window. To support his defense, Scheidell sought to enter third-party other-act evidence of an armed burglary and rape of a different victim, K.C., that had occurred about four blocks away from J.D.'s apartment and about five weeks after the attempt on J.D., while Scheidell was in custody. At that point, K.C.'s assailant had not been identified, but K.C. claimed that he was wearing a mask and hood during the assault. K.C. believed her assailant was between 35 and 40 years old and white.

The circuit court, applying *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), excluded the evidence, and a jury found Scheidell guilty. The case ultimately made its way to the Wisconsin Supreme Court. That court upheld the circuit court's decision excluding the evidence, concluding that the two attacks were not sufficiently similar to be probative of the identity of J.D.'s attacker and therefore were irrelevant. *State v. Scheidell*, 227 Wis. 2d 285, 308-10, 595 N.W.2d 661 (1999) (28; A-Ap. 177).

In 2014, Scheidell filed a motion for a new trial based on newly discovered evidence and in the interest of justice. His motion was based on DNA tests conducted on the rape kit from the K.C. assault, which identified Joseph Stephen,[1] an African-

[1] Stephen is also referred to by an alias, Elliot Maddock, in the record (*see* 34:38; A-Ap. 156). Consistently with Scheidell's motion, the State uses the name "Stephen" throughout this brief.

American man who was 24 or 25 years old in 1995, as K.C.'s attacker. Scheidell argued that because K.C.'s attacker was now identified, the other-act evidence of K.C.'s assault was admissible under *Denny*. The circuit court agreed, granted a new trial, and vacated Scheidell's 20-year-old judgment of conviction. The State now appeals.

The circuit court's decision granting a new trial cannot stand for multiple reasons. The first is simple and dispositive: the circuit court improperly disregarded the Wisconsin Supreme Court's previous decision declaring the evidence of K.C.'s attack to be too dissimilar to be relevant. The circuit court did not explain how evidence establishing that K.C.'s attacker was Stephen, who looked nothing like Scheidell, somehow negated the law of the case and rendered the dissimilar nature of K.C.'s attack to be now similar to J.D.'s attack. This court may reverse on that ground alone.

To the extent that this court digs deeper, Scheidell's claim fails because he did not satisfy the opportunity and direct connection prongs of *Denny*. Moreover, the circuit court erred in determining that there was a likelihood of a different result.

And finally, the circuit court erroneously premised its decision granting a new trial in the interest of justice on the same faulty reasoning supporting its newly-discovered-evidence decision.

In short, the circuit court's decision cannot be salvaged under any reasonable reading of the law and facts. This court must reverse.

ISSUES PRESENTED

1. Did the circuit court err in granting Daniel Scheidell a new trial based on newly discovered evidence, where:

   a. Scheidell's "newly discovered" evidence was the attacker's identity from a third-party other act that the

Wisconsin Supreme Court had previously deemed in Scheidell's direct appeal to be too dissimilar from the charged crime to be relevant?;

b. Scheidell presented no evidence establishing a direct connection between Stephen and J.D.'s attack and attempted to establish the opportunity prong of *Denny* with hearsay statements that Stephen was in Racine during the summer of 1995 and that he had little recollection of that time?;

c. The circuit court held that there was a likelihood of a different result but:

   i. In assessing the old evidence, it ignored the strength of J.D.'s testimony; the strength of the circumstantial evidence implicating Scheidell; and Scheidell's vigorous defense; and

   ii. In assessing the new evidence, it assumed that the jury would also hear expert testimony on witness memory and perception and opining that Scheidell did not fit the profile of a sex offender, none of which was newly discovered nor admissible?

2. Did the circuit court improperly grant Scheidell a new trial in the interest of justice based on that same reasoning in its newly discovered evidence decision?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

STATEMENT OF THE CASE AND FACTS

1. Pretrial motion and trial.

The State charged Scheidell with armed burglary and attempted sexual assault (2). The Wisconsin Supreme Court described the relevant undisputed facts as follows:

> In August 1994, [J.D.] began working at the Chancery Restaurant where she met Scheidell. When [J.D.] and her two roommates were searching for a new apartment in May 1995, Scheidell remarked that two apartments in his building were unoccupied. Only one of the apartments was available, and [J.D.] moved into the one-bedroom, studio apartment on the ground floor of the building.
>
> ¶ 4 Scheidell was friendly with [J.D.], and stopped by to chat on occasion. Scheidell, who did work around the building, had obtained a key to [J.D.]'s apartment from the owner of the building. He had asked to keep the key to help paint her bathroom, and allowed a cable company employee into [J.D.]'s apartment while she was at work.
>
> ¶ 5 At 4:45 a.m., on May 20, 1995, [J.D.] awoke to the sound of the window blind falling onto her bathroom floor. She walked into the bathroom and noted that the casement window which she had left ajar for air was now open approximately one foot.
>
> ¶ 6 [J.D.] shut the window and attempted to go back to sleep. Approximately 30 minutes later, [J.D.] awoke with a man straddling her waist. The assailant was wearing a black, knit ski mask with holes for the eyes and mouth, and a nylon jacket draped around his head.
>
> ¶ 7 The assailant had pulled up her shirt, exposing her chest, he had his hand over her mouth, and she felt an object at her throat. When [J.D.] struggled to break free, he began hitting her in the face with an open hand and tried to pull off her underpants. She was able to get one hand free and began hitting her assailant.
>
> ¶8 [J.D.] testified that she could see his eyes and believed she recognized the assailant as Scheidell. She said his name and asked him what he was doing. The assailant hesitated for a few seconds, pulled back, and then started hitting her again. [J.D.] managed to push the assailant off her bed, but he shoved her back down to the

bed at which point she noticed that he had a knife with a serrated edge. During the struggle, [J.D.] called out "Danno," Scheidell's nickname, at least six times; each time the assailant hesitated and then resumed hitting her harder. She also managed to expose the left side of the man's face from the bottom of the eye to the top of the lip. Based on the assailant's distinctive body and walk, [J.D.] was certain her attacker was Scheidell.

¶ 9 [J.D.] was again able to kick the assailant away from the bed, allowing her to retrieve a pistol from her dresser. She pointed the pistol at the intruder and he lunged at her. She cocked the trigger, and she told the assailant that if he did not leave, she would shoot him. The assailant left her apartment having never uttered a word.

¶ 10 [J.D.] called the Racine police department to report the incident. When the police arrived, Scheidell was coming down the stairs and appeared to have just woken up. [J.D.] was brought into the hallway where she accused Scheidell of assaulting her.[4] An officer took Scheidell up to his apartment where Scheidell voluntarily gave a statement. After a limited search of Scheidell's apartment and the outside alley, the police arrested him.

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[4]According to the testimony of Officer Stephen Hansen, [J.D.] accused Scheidell of assaulting her and she confronted him about having a key to her apartment. Scheidell responded, "How do you know they didn't come through the bathroom window. It's not locked." When asked by the police, Scheidell provided the key to [J.D.]'s apartment.

State v. Scheidell, 227 Wis. 2d 285, 288-90, 595 N.W.2d 661 (1999) (footnotes 2 and 3 omitted) (28:2-5; A-Ap. 170-71).

Before trial, Scheidell sought to admit other-acts evidence of a burglary and sexual assault committed by an unidentified man against another Racine woman, K.C., that occurred after the burglary and attempted assault on J.D. while Scheidell was

in custody.[2] Again, the Wisconsin Supreme Court accurately set forth the pertinent facts:

> According to the offer of proof, a police report, [K.C.] was attacked in her second floor apartment approximately five weeks after the attack on [J.D.] and approximately four blocks away. The offender, reportedly, a white male, age 35 to 40, with a thin build, entered through a previously damaged window, he was wearing some type of hood and possibly a white mask, and he used a butcher knife with a dull, rusty blade.
>
> ¶ 12 According to the proffer, at approximately 5:00 a.m., [K.C.] awoke with a hand on the bare skin of her back just above her buttocks. When she attempted to get up and turn around, the offender forced her back down by applying pressure to her back with his hand. The offender said, "Get down!" or "Stay down!" The voice sounded familiar, but [K.C.] could not identify her attacker. He then laid on top of [K.C.]'s back, and placed the knife on her neck. [K.C.] stated that she grabbed the knife and pushed it away without cutting herself, but the offender retained control of the knife and stayed on top of her.
>
> ¶ 13 [K.C.] begged the offender not to hurt her baby, he ordered her to "Stay down!" [K.C.] then told the offender to "Do whatever it is you've got to do. Please don't put it into my butt," to which he responded, "Okay." The offender completed the attack without vaginal or anal entry, and then got up and put his pants on. The offender asked [K.C.] her name, and then told her to "Put your head down. Keep your face down. Keep it down!" [K.C.] covered her head, and the offender covered her buttocks and legs with a blanket. He then fled through the broken window.

Id. at 290-92 (28:5-6; A-Ap. 171).

The circuit court excluded the evidence based on the test for admissibility under *Denny*, 120 Wis. 2d 614 (69:37-44). It concluded that Scheidell failed to establish a direct connection under *Denny*, and that therefore the third-party other-act

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[2] Scheidell did not appear to file a formal motion on the matter. Rather, the parties introduced the matter to the circuit court on the first day of trial, and the circuit court ruled on it before trial began (69:20-44).

evidence of K.C.'s assault was irrelevant and inadmissible (69:42-44).

The case proceeded to trial, after which the jury found Scheidell guilty of both charges (22). The circuit court sentenced Scheidell to a total of 25 years in prison (*id.*).

2. Direct appeal.

In a 1996 postconviction motion, Scheidell challenged the circuit court's pretrial *Denny* decision (23). The circuit court—the Honorable Emmanuel J. Vuvunas, who also presided over trial—denied the motion, stating that it was satisfied with its pretrial decision (73:19). It also stated that even if it had allowed Scheidell to present the other-acts evidence of K.C.'s assault, "the conviction still would have happened" given the strength of J.D.'s testimony and the State's case: "This witness was a compelling witness. She was a very believable witness. She was an excellent witness. The evidence in this case was not—the evidence was strong" (*id.*).

On appeal, this court reversed, holding that the circuit court should have allowed the evidence of the third-party assault based on its similarity and proximity to the attempted assault on J.D. (27).

The State pressed the issue to the Wisconsin Supreme Court, which reversed this court, holding that the circuit court was right for the wrong reason: instead of *Denny*, the circuit court should have applied *Whitty* and *Sullivan* to unknown-third-party perpetrator evidence. *Scheidell*, 227 Wis. 2d at 287-88 (28:11-13; A-Ap. 170). Applying that test, the supreme court concluded that the circuit court nevertheless rightly excluded the evidence of K.C.'s allegations, primarily because the evidence lacked sufficient similarity to J.D.'s claims and were thus irrelevant to the issue of identity. *Id.* at 308-10 (28:24-26; A-Ap. 177).

3. Collateral postconviction motion and hearing.

In 2013, Scheidell had DNA tests conducted on the kit from the K.C. assault, which was never prosecuted (33). The test produced a match to convicted sex offender Joseph Stephen, who was incarcerated for a 1999 sexual assault in Racine (34:Exh. J; A-Ap. 153-55).[3]

Based on that evidence, Scheidell filed a Wis. Stat. § 974.06 motion seeking a new trial based on the newly discovered evidence of Stephen's identity, and a new trial in the interest of justice (34; A-Ap. 119-67). Scheidell argued that because DNA testing identified Stephen as K.C.'s assailant, the evidence of K.C.'s allegations would satisfy *Denny* and would create reasonable doubt about Scheidell's guilt (34:2; A-Ap. 120). Scheidell also argued that the real controversy was not tried, i.e., the attacker's identity, because "the new DNA evidence . . . links [J.D.'s] attack to [K.C.'s] attacker"(34:21; A-Ap. 139).

At a hearing on the motion, Scheidell first presented testimony from a law student, Laura Davis, who testified that she interviewed Stephen in prison after the lab reported the DNA results (76:41; A-Ap. 184). At the first interview, Stephen told Davis that he had lived in Racine in the "summer of 1995," that he had used a lot of heavy drugs at that time, and that he could not remember much from that time (76:47; A-Ap. 190). He neither confirmed nor denied having attempted or committed the assaults on J.D. or K.C. but said, "DNA speaks for itself" (76:50; A-Ap. 193). He also told Davis to tell her client that he was sorry, although Davis did not explain what, if anything, Stephen said that he was sorry for (76:50; A-Ap. 193). In a second interview, Stephen ultimately refused to provide

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[3] At the postconviction hearing, one of Scheidell's witnesses, Laura Davis, acknowledged that the 1999 sexual assault for which Stephen was convicted was factually "very" dissimilar from the assault on K.C. and the attempted assault on J.D. (76:58; A-Ap. 201).

any additional information to Davis, telling her that if he recalled anything about the assaults, he would "plead the Fifth" (76:52-53; A-Ap. 195-96).

Scheidell next presented expert testimony from Jeffrey Neuschatz, a psychology professor, who testified on research and studies on eyewitness testimony and memory (76:69-101; A-Ap. 212-44). Scheidell also presented expert testimony from Nick Yackovich, who did risk assessments of sex offenders (76:106; A-Ap. 249). Yackovich completed an assessment of Scheidell in 2014 and then extrapolated back to 1995 to opine, over the prosecutor's objections, that it was "much more likely that someone else other than [Scheidell] committed th[e] crime" against J.D. (76:140; A-Ap. 283).[4]

ADA Randy Schneider objected to Davis's statements as inadmissible hearsay that was too vague to be against Stephen's penal interest (76:47-49; A-Ap. 190-92). He objected to Neuschatz's testimony as irrelevant and not newly discovered (76:76, 102-03; A-Ap. 219, 245-46). He also objected to Yackovich's testimony as lacking foundation, involving improper speculation, being not newly discovered, and being inadmissible (76:119, 137-38, 140; A-Ap. 262, 280-81, 283). The

[4] Scheidell's proffered newly discovered evidence in his postconviction motion was limited to the DNA results identifying Stephen as K.C.'s attacker (34:1-20; A-Ap. 119-38). Scheidell did not identify or discuss either Neuschatz's or Yackovich's analyses or their scientific bases as newly discovered evidence. At the hearing, Scheidell's counsel confirmed that the experts' testimony was not a separate newly discovered evidence claim but rather that it presented "new science" necessary to support its argument that the DNA evidence would more likely than not result in a different outcome (76:104, 119; A-Ap. 247, 262). But in its closing argument at the hearing, Scheidell's counsel told the court that she wanted "to refocus. . . . [W]e have presented three witnesses today and had evidence come in" but reiterated that Scheidell's claim was a narrow one, i.e., "that we have newly discovered evidence from the DNA testing" establishing the identity of K.C.'s attacker (76:166; A-Ap. 309).

court "noted" most of those objections and withheld ruling on them (*see, e.g.*, 76:76, 103, 122; A-Ap. 219, 246, 265), but never expressly did so.

For his part, ADA Schneider entered photos of both Stephen and Scheidell from 1997 (76:158-60; 52; 53; A-Ap. 301-03, 168, 169). The photos showed that Stephen was 27, African-American, had brown eyes, was 5 feet 9 inches tall, and weighed 145 pounds; Scheidell was 48, white, had grey eyes, was 5 feet 11 inches tall, and weighed 161 pounds (*id.*). J.D. also testified. When shown Stephen's photo, J.D. denied having ever seen him before and stated that he was not the person who attacked her in 1995 (76:165-66; A-Ap. 308-09).

The court allowed briefing on the issue (54; 55) and issued its decision six months later granting Scheidell's motion on both newly discovered evidence and interest-of-justice grounds (57; A-Ap. 101-18). The State now appeals.

The State will present additional facts and details in the argument section below.

ARGUMENT

I. Scheidell is not entitled to a new trial based on newly discovered evidence.

To succeed on his newly discovered evidence claim based on the third-party other-act evidence of K.C.'s assault with Stephen identified as the assailant, Scheidell needed to satisfy the newly discovered evidence test, which involves multiple elements, many with their own sub-tests. In all, it is a hefty task for a defendant, especially one in Scheidell's position who wishes to enter third-party other acts evidence to prove the issue of identity.

To summarize the State's position in this appeal, Scheidell failed to satisfy the materiality prong of the newly discovered evidence test primarily because the supreme court already

determined that the two assaults were dissimilar, and the evidence identifying Stephen did not change that conclusion. Alternatively, to the extent that this court explores the *Denny* test further, Scheidell failed to otherwise satisfy *Denny*'s direct connection and opportunity prongs. Finally, the circuit court erred in concluding that there was a reasonable probability of a different outcome.

A. To be entitled to a new trial based on newly discovered evidence, a defendant must demonstrate that the newly discovered evidence is material and that there is a reasonable probability of a different outcome.

"Motions for a new trial based on newly discovered evidence are entertained with great caution." *State v. Morse*, 2005 WI App 223, ¶ 14, 287 Wis. 2d 369, 706 N.W.2d 152 (citation and internal quotation marks omitted). This court generally reviews the postconviction court's decision on whether to grant a new trial based on newly discovered evidence for an erroneous exercise of discretion. *See id.* (citation omitted). But when, as here, the court that decided the postconviction motion did not preside at trial, this court "starts from scratch and examines the record de novo so that it can consider the facts directly on which the legal issue raised by motion depends." *State v. Herfel*, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971).

"A defendant seeking a new trial on the basis of newly discovered evidence must establish, by clear and convincing evidence, that (1) the evidence was discovered after conviction, (2) the defendant was not negligent in seeking to discover it, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative." *State v. Vollbrecht*, 2012 WI App 90, ¶18, 344 Wis. 2d 69, 820 N.W.2d 443 (citations omitted).

If the defendant satisfies all four criteria, this court "then examines whether it is reasonably probable that, had the jury

heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." *Id.* (citing *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42). This final question presents a question of law for this court. *Id.* (citing *Plude*, 310 Wis. 2d 28, ¶33). A reasonable probability of a different outcome exists if there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt. *Id.*

The only parts of the newly discovered evidence test at issue on appeal are the third element (materiality) and the court's determination that there was a reasonable likelihood of a different outcome. The State addresses materiality first.

B. To satisfy the materiality element, the newly discovered other-act evidence must satisfy *Denny*.

When the newly discovered evidence is third-party other-acts evidence, and the defendant offers it for the issue of identity, the materiality prong of the newly discovered evidence test requires the court to determine whether the evidence is admissible under *Denny* and *Sullivan*. *Vollbrecht*, 344 Wis. 2d 69, ¶24. Whether other-acts evidence is admissible is a discretionary question for the circuit court. *State v. Muckerheide*, 2007 WI 5, ¶17, 298 Wis. 2d 553, 725 N.W.2d 930. This court will reverse the circuit court's discretionary decision to admit or exclude evidence if the circuit court failed to examine the relevant facts, apply a proper legal standard, or reach a reasonable conclusion using a demonstrated rational process. *See id.*

"If evidence of third-party culpability would not be admissible at trial under *Denny*, then it could not be material to the issue of guilt or innocence." *Vollbrecht*, 344 Wis. 2d 69, ¶25. To present evidence and argue that a third party may have committed the charged crime, under *Denny* a defendant must show that the third party had (1) opportunity; (2) motive; and (3) a direct connection to the crime that is not remote in time,

place, or circumstances. *Id.* (citing *Denny*, 120 Wis. 2d at 622, 624–25). The defendant must satisfy all three criteria in *Denny*; it is not a balancing test, in which one prong can make up for a defendant's failure to establish another. *See State v. Wilson*, 2015 WI 48, ¶64, 362 Wis. 2d 193, 864 N.W.2d 52 ("[T]he *Denny* test is a three-prong test; it never becomes a one-or two-prong test.").

Here, Scheidell failed to satisfy the opportunity and direct connection prongs of *Denny*. The State focuses its discussion on those two criteria of the test.[5]

1. *Denny*'s direct connection prong requires both evidence of a direct connection and the other act to be similar to the charged crime under *Sullivan*.

When a defendant seeks to admit third-party other-act evidence, *Denny*'s direct connection prong requires two things: (1) that the defendant establishes a direct connection between the other-act and the charged crime and (2) that the other act is similar to the charged crime under the *Sullivan* analysis. *See Vollbrecht*, 344 Wis. 2d 69, ¶¶28-31.

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[5] The State does not concede that Scheidell established the motive prong. But given the many other grounds upon which this court should reverse, for briefing purposes the State proceeds on the assumption that Scheidell established motive under *Denny* in a general sense, inasmuch as proof that Stephen's entering a solo Racine woman's apartment to sexually assault her could indicate a motive to do the same to other similarly situated women. *Cf. State v. Vollbrecht*, 2012 WI App 90, ¶27, 344 Wis. 2d 69, 820 N.W.2d 443 (finding general motive by defendant to perpetuate violence on a victim through rape and murder). That said, there is no evidence that Stephen had a specific or personal motive to target K.C. (or J.D., for that matter). For example, if Stephen was an acquaintance of K.C.'s, that fact would likely undercut any motive for him to attack J.D., a stranger. So even if the motive prong is satisfied, the proof supporting it is not particularly strong so as to impact the evaluation of the other prongs. *Cf. Wilson*, 362 Wis. 2d 193, ¶64.

The direct connection inquiry in *Denny* is self-explanatory: a defendant must establish not just a connection, but rather a *direct* connection between the third party and the commission of the crime. To assess a third-party's purported direct connection to a crime, the court must assess

> " . . . whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." No bright lines can be drawn as to what constitutes a third party's direct connection to a crime. Rather, circuit courts must assess the proffered evidence in conjunction with all other evidence to determine whether, under the totality of the circumstances, the evidence suggests that a third-party perpetrator actually committed the crime. . . . In sum, courts are not to look merely for a connection between the third party and the crime, they are to look for some direct connection between the third party and the *perpetration* of the crime.

Wilson, 362 Wis. 2d 193, ¶71 (citations omitted).

In addition, the circuit court must assess whether the other act and crime evidence are similar enough to satisfy relevancy requirements in *Sullivan*. *Vollbrecht*, 344 Wis. 2d 69, ¶29 (citing *Scheidell*, 227 Wis. 2d at 294-95 (A-Ap. 172)). The relevancy assessment under *Sullivan* asks whether (1) "the evidence relates to a fact or proposition that is of consequence to the determination of the action[,]" and (2) whether there is probative value to the evidence such that it "has a tendency to make a consequential fact more or less probable than it would be without the evidence." *Scheidell*, 227 Wis. 2d at 307 (A-Ap. 176-77).

The probative-value analysis depends on the other act's "nearness in time, place, and circumstances to the alleged crime or to the fact or proposition sought to be proved." *Id.* (A-Ap. 177) (citations omitted); *see State v. Sullivan*, 216 Wis. 2d 768, 786, 576 N.W.2d 30 (1998) ("[T]he probative value lies in the similarity between the other act and the charged offense."). The more similar in detail and complexity the events, as well as the

relative frequency of the proffered other acts, the stronger the case will be for admission of the other acts evidence. *Scheidell*, 227 Wis. 2d at 307-08 (citing *Sullivan*, 216 Wis. 2d at 786 (A-Ap. 177)).

Scheidell satisfied neither subset of *Denny*'s direct connection test. Because the "similarity" analysis provides the narrowest grounds for reversal, the State first addresses that analysis.

a. The newly discovered evidence simply presents an additional dissimilarity between two assaults that the Wisconsin Supreme Court had previously concluded were dissimilar.

In his direct appeal, Scheidell challenged the circuit court's exclusion of the evidence of K.C.'s assault by a then-unknown attacker. In upholding the circuit court's decision, the Wisconsin Supreme Court compared the evidence of K.C.'s assault with J.D.'s assault and determined that, under *Sullivan*, they were materially dissimilar. Therefore, K.C.'s assault was not relevant:

> ¶ 50 We agree that there are some similarities between the later offense and the charged crime—the location, the nearness in time between events, and the early-hour of the assaults. Even so, we do not agree that the two incidents are so distinctively similar as to support the inference that some unknown third party, and not Scheidell, committed the charged crime.
>
> ¶ 51 We note several significant deficiencies with Scheidell's comparison of the other acts evidence. Scheidell's evidence involves only one incident, not a series of incidents which increases the probability that the two incidents occurred by mere chance or coincidence. *Sullivan*, 216 Wis. 2d at 786-87, 576 N.W.2d 30. Also, the factual details of the two incidents were not particularly complex or unusual—residential sexual assault committed at knife point in predawn hours by white man who concealed his identity.

> ¶ 52 Equally significant is the difference between the two assaults. In the charged crime, it is unclear whether the assailant entered through an open window or through the front door; however, [J.D.] awoke with a man, who was fully clothed, straddling her. In the other crime, the unknown assailant entered and exited through a broken window; and the assailant, who had taken off his pants, placed his hand on [K.C.'s] buttocks, laid on top of her back and legs, and assaulted her from behind.
>
> ¶ 53 The most distinguishing factor between the other crime and the charged crime, completely overlooked by Scheidell, was the significantly different behavior displayed by the two assailants toward their victims. In the other crime, the assailant never struck [K.C.], but he spoke directly to her, ordering her to stay down, verbally agreeing not to assault her anally, and asking her name. In the charged crime, the assailant did not utter a word; however, he immediately and persistently struck [J.D.] in the head and the face.
>
> ¶ 54 Based on the distinguishing circumstances of the two incidents, we conclude that the other acts evidence was not probative of (i.e., relevant to) Scheidell being identified as the assailant in the charged crime, and was therefore properly excluded by the circuit court.

Scheidell, 227 Wis. 2d at 308-10 (A-Ap. 177).

Under the "law of the case" doctrine, "a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." *State v. Stuart*, 2003 WI 73, ¶ 23, 262 Wis. 2d 620, 664 N.W.2d 82 (citation omitted).[6]

[6] Alternatively, Scheidell's claim of similarity is barred under the doctrine of issue or claim preclusion, given that his claim is essentially a relitigation of the issue already decided by the supreme court in Scheidell's direct appeal. *See Lindas v. Cady*, 183 Wis. 2d 547, 558-59, 515 N.W.2d 458 (1994) (discussing doctrine). Or this court may simply deem the claim barred based on and the general prohibition against relitigation of previously raised claims. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Accordingly, where the supreme court has already ruled on the legal issue of whether K.C.'s assault was similar to J.D.'s assault, for Scheidell to overcome that decision on this piece of other act evidence, he must show that the newly discovered information would somehow change the analysis.

Here, all that the DNA testing revealed was yet another point of dissimilarity between the attacks, i.e., that Stephen, K.C.'s attacker, was markedly dissimilar in age and appearance from Scheidell. In 1997, Scheidell, who is white, was 46, 5 feet 11 inches tall, and weighed 161 pounds. Stephen is African-American. As of 1997, he was 27 (therefore 24 or 25 at the time of the attacks), 5 feet 9 inches tall, and weighed 145 pounds (52; 53; A-Ap. 168, 169). The State showed J.D. photos of Stephen at the postconviction hearing. J.D. denied having ever seen Stephen before and denied that he was her attacker (76:165; A-Ap. 308-09). She never expressed any doubt that Scheidell was her attacker.

Given that, this additional dissimilarity between the attacks cannot void the supreme court's earlier assessment on the issue and render the attacks similar. Even though the supreme court's previous analysis involved *unknown* third-party other-acts evidence, the relevancy analysis under *Sullivan* would have been the same regardless of whether K.C.'s attacker was known or unknown. *See Vollbrecht*, 344 Wis. 2d 69, ¶29 (invoking *Scheidell* and applying *Sullivan* similarity test to known third-party other-act evidence).[7]

Nevertheless, the postconviction circuit court here reassessed the points of similarity and dissimilarity and

[7] What's more, Scheidell appeared to have a stronger argument for admitting the evidence when K.C.'s attacker remained unidentified, given that K.C.'s description of her attacker as white, between 35 and 40, and around 5 feet 10 inches was much closer to Scheidell's appearance and age than Stephen's actual physical characteristics are.

concluded that the evidence of K.C.'s attack was sufficiently similar to the crimes against J.D. (57:10-13; A-Ap. 110-13). Its decision is as untenable as they come. As an initial matter, the court discounted the supreme court's holding on the matter and instead summarized the supreme court's findings and re-weighed the similarities and dissimilarities between the crimes (57:12; A-Ap. 112).[8] In so doing, it exceeded its authority by ignoring the law of the case and the fact that that the supreme court already deemed the dissimilarities to render the evidence of K.C.'s attack irrelevant (*id.*). What's more, in reaching its conclusion, the circuit court did not even factor in the new information from the newly discovered evidence, i.e., that Stephen and Scheidell were different in race, age, height, and weight (*id.*).

Rather, in addition to re-weighing the facts despite the law of the case, the court relied on Yackovich's opinion that it was "less likely" that two separate individuals committed the attacks and that such stranger-rapes-at-knifepoint were a small percentage of reported rapes (57:12-13; A-Ap. 112-13). But Yackovich's opinion was not newly discovered evidence or admissible, as argued in more detail in part I.C.2., *infra*. Yackovich's testimony cannot factor into the analysis.

In sum, Scheidell's newly discovered evidence simply indicates that a man who looks nothing like Scheidell committed a dissimilar rape to the one attempted on J.D. That additional dissimilarity does nothing to question the correctness or disturb the finality of the supreme court's

[8] The circuit court seemed to signal its disagreement with the supreme court's decision by noting that it was a "4-3 Opinion" and describing the relevant portions as what "the Majority" decided (57:2, 12; A-Ap. 102, 112). But like any 4-3 (or 5-2, 6-1, or 7-0) decision, the majority's opinion in *Scheidell* is the decision of the court, is the law of the case, and is binding on lower courts.

previous decision that the attacks were too dissimilar to be relevant. This court may reverse on this ground alone.

b. Scheidell otherwise provided no evidence of a direct connection between Stephen and the commission of the crime against J.D.

> [T]here are myriad possibilities how a defendant might demonstrate a third party's direct connection to the commission of a crime. For example, a third party's self-incriminating statement may be used to establish direct connection. Exclusive control of the weapon used may also establish a direct connection. Mere presence at the crime scene or acquaintance with the victim, however, is not normally enough to establish direct connection.

Wilson, 362 Wis. 2d 193, ¶72 (citations omitted).

Scheidell offered nothing to establish a direct connection between Stephen and the attack on J.D.: no physical evidence that Stephen was at or near J.D.'s apartment on the night of the attack; no physical evidence such as the key, knife, or clothing used in J.D.'s attack in Stephen's possession; no self-incriminating statements by Stephen. Moreover, J.D. testified that she did not know Stephen and had never seen him before.

Accordingly, Scheidell cannot satisfy either the direct connection to the commission of the crime or the "similarity" probe within this third *Denny* prong. Thus, his newly discovered evidence claim must fail.

2. Moreover, Scheidell did not satisfy the opportunity prong of *Denny*.

Under the second *Denny* prong, opportunity, the proponent must show that "the alleged third-party perpetrator *could have* committed the crime in question. This often, but not always, amounts to a showing that the defendant was at the crime scene or known to be in the vicinity when the crime was committed." *Wilson*, 362 Wis. 2d 193, ¶65.

The defense theory of the third party's involvement in the crime will guide the court's relevance analysis of *Denny* opportunity evidence. *Id.*, ¶67. For example,

> [i]f the third party is to be implicated personally as the shooter, then opportunity might be shown by the party's presence at the crime scene. If the defense theory is that a third party framed the defendant, then the defense might show opportunity by demonstrating the third party's access to the items supposedly used in the frame-up. In all but the rarest of cases, however, a defendant will need to show more than an unaccounted-for period of time to implicate a third party.

Id., ¶68 (citations and parentheticals omitted).

Here, to prove opportunity, Scheidell offered an affidavit and testimony of a law student, Laura [Benson] Davis, who interviewed Stephen in December 2013 (51:Exh. 10; 76:47). She said that Stephen told her that he had lived and worked in downtown Racine during the "summer of 1995" and that he did not have much recollection from that time because he was a heavy drug user (*id.*). Davis said that Stephen did not deny either assault against J.D. or K.C. (although she did not provide him details of either crime) but that "DNA speaks for itself" (76:50; A-Ap. 193). She also said that Stephen told her to tell her client that he was sorry (*id.*).

At a second meeting on February 8, 2014, Stephen told Davis that if he remembered anything about the 1995 assaults, he would "plead the Fifth" (76:52-53; A-Ap. 195-96). At that meeting, Davis presented Stephen with an affidavit with the above information and a statement acknowledging that he committed a sexual assault in 1999 for which he was serving time (76:51-52; 44:Exh. 3; A-Ap. 194-93). According to Davis, Stephen did not disagree with any of the information in the affidavit, but declined to sign it (76:53-54; A-Ap. 196-97).

As an initial matter, none of Stephen's alleged statements appear to be against his penal interest. Wisconsin Stat. § 908.045(4) provides in part:

> **Hearsay exceptions; declarant unavailable**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (4) STATEMENT AGAINST INTEREST. A statement which . . . at the time of its making . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

Although the statement need not amount to a confession, it must tend to subject the declarant to criminal liability. *Ryan v. State*, 95 Wis. 2d 83, 97, 289 N.W.2d 349 (Ct. App. 1980), *overruled on other grounds by State v. Anderson*, 141 Wis. 2d 653, 416 N.W.2d 276 (1987).

To start, a person's failure to dispute facts in an affidavit cannot be understood to be an affirmative admission, particularly when the person declines to sign the affidavit. In any event, none of the facts in the affidavit had any tendency to subject Stephen to criminal liability. His living and working in downtown Racine in the summer of 1995,[9] his admissions to his past drug usage and current sobriety, his admission to having committed the 1999 assault for which he was incarcerated, did not carry any risk of additional criminal liability. His remark

[9] It is not clear whether Stephen understood "summer of 1995" to include the date of the attempted assault on J.D. in spring (May 20) 1995.

that "DNA speaks for itself" is vague at best,[10] and his remarks that he does not remember anything from that time likewise cannot form a basis for any criminal liability.

The circuit court recognized that Scheidell's offer of proof on the opportunity prong was threadbare: "Stephen acknowledged his presence in Racine at the time of assault. He was not in custody. He had opportunity, but so did hundreds, if not thousands, or other men who were in the Racine area" (57:10; A-Ap. 110). But rather than recognize that Scheidell failed to satisfy the opportunity prong, the court stated that it was placing "significant weight on the third prong, namely the 'connections' between the two crimes that would move the evidence beyond speculation" (57:11; A-Ap. 111).

Again, *Denny* is not a balancing test. Although the analysis and strength of one prong may affect the court's focus in another prong, a defendant nevertheless has to satisfy all three prongs. *Wilson*, 362 Wis. 2d 193, ¶64. An acknowledgement that Stephen was simply in the same metropolitan area in summer 1995—but no evidence that he was ever in the vicinity of J.D.'s apartment or J.D. herself in May 1995—is essentially an attempt to satisfy opportunity with a evidence that the third party could not account for the period of time when J.D.'s assault occurred. *See id.*, ¶68 ("[A] defendant will need to show more than an unaccounted-for period of time to implicate a third party.").

Further, to the extent any weighing of factors in the *Denny* test is appropriate, the direct-connection prong cannot save the

[10] The DNA statement could have meant that he had no basis to contest DNA evidence he was only just then learning about, particularly given that he professed having little memory of what he did in 1995.

weakness of the opportunity prong.[11] As explained above, Scheidell resoundingly failed to satisfy the direct-connection prong, particularly in light of the Wisconsin Supreme Court's previous decision deeming the two attacks dissimilar.

In sum, Scheidell cannot satisfy *Denny* and *Sullivan*, and accordingly cannot satisfy the materiality requirement for newly discovered evidence. The circuit court erred in concluding otherwise.

C. Alternatively, the court erred in concluding that there was a likelihood of a different outcome.

Although this court may easily reverse based on any of the arguments above, the State addresses the likelihood-of-a-different outcome analysis as an alternate ground for reversal and to give this court a complete picture of the case.

"A reasonable probability of a different outcome exists if there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." *Plude*, 310 Wis. 2d 28, ¶33 (internal quotation marks and quoted source omitted; brackets in *Plude*). In assessing this question, the court evaluates whether the newly discovered evidence had a sufficient impact on other evidence presented at trial such that a jury would have reasonable doubt as to the defendant's guilt. *Id.* (citation omitted).

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[11] As noted in note 5, *supra*, Scheidell's assumed satisfaction of the motive prong in a general sense is weak at best and cannot affect the analysis of the other prongs. Further, Stephen's conviction of a later sexual assault in 1999 does not add significantly to the motive factor, given that the 1999 assault involved markedly different facts and circumstances—kidnapping a high school student in public with the threat of a gun and assaulting her by touching her breast (*see* 49:1-2)—than the attacks on K.C. and J.D.

1. If believed, the new evidence is solely that K.C. reported a sexual assault by a masked and hooded man near in time and location to the attempt on J.D., and that DNA testing identified Stephen, a person physically distinguishable from Scheidell, as the perpetrator.

Here, the new evidence at trial would be that K.C. reported that a man assaulted her in her downtown Racine apartment approximately five weeks after the attempted assault on J.D., and that DNA testing of the rape kit produced a match to Stephen. The State would have countered that evidence with J.D.'s testimony that she had never seen Stephen before and that he was not the person who attacked her in May 1995 (76:165; A-Ap. 308-09), and the photographs of Stephen and Scheidell from 1997 showing their differences in age, size, race, and appearance (52; 53; A-Ap. 168, 169).

2. Stephen's, Neuschatz's, and Yackovich's testimony are not "new" evidence that the jury would hear.

Contrary to the circuit court's decision, the following is *not* new evidence that the jury at a new trial would hear:

Stephen's testimony ("Indeed, Stephen can actually testify at the trial under subpoena" (57:14; A-Ap. 114)). As the parties stipulated at the hearing, Stephen was an unavailable witness based on indications that he would invoke the Fifth Amendment if asked anything about the attack on K.C. (76:48; A-Ap. 191).[12] *See generally* Wis. Stat. § 905.13.

[12] Both parties acknowledged that the statute of limitations had passed on the K.C. assault, but that Stephen still was potentially subject to chapter 980 civil commitment if he admitted to another sexual assault (76:174-76; A-Ap. 317-19).

Dr. Neuschatz's testimony and report ("[T]he jury would also hear from an expert that [J.D.] identified Scheidell under conditions likely to lead to mistaken identity" (57:17; A-Ap. 117)). Scheidell offered Dr. Neuschatz's testimony to counter the State's arguments that J.D.'s eyewitness testimony identifying Scheidell as her attacker was strong enough to overcome any inferences suggested by the evidence of K.C.'s assualt (76:104; A-Ap. 247).

Dr. Neuschatz did not assess any documents or facts from Scheidell's case that did not exist at the time of trial (76:100-01; A-Ap. 243-44). He simply opined that under the circumstances of the attack—low-light early morning hours; masked and silent intruder; J.D.'s not wearing her corrective lenses; J.D.'s having just awakened and being stressed—J.D.'s identification of Scheidell was not necessarily accurate (76:98; A-Ap. 241).

And Dr. Neuschatz stated that much had changed in what experts know about witness identification and memory since 1995. But he did not elaborate on exactly what *was* new or explain how that new understanding impacted this case (76:97-98; A-Ap. 240-41). Nor is any relevant "new" science apparent. The circuit court invoked cases listing citations to articles on how lineups and photo arrays can produce inaccurate identifications (57:16; A-Ap. 116) but nothing, as far as the State could tell, that offered new insights that poor viewing conditions may affect the accuracy of a witness's identification during a crime.[13]

Indeed, the jury at Scheidell's trial received instructions in this case instructing it to consider the points that Dr. Neuschatz

[13] Indeed, in his brief supporting his § 974.06 motion, Scheidell invoked pre-1995 sources—1991 case law and a 1987 law review article—to support his point that experts have recognized how factors such as facial disguises and low light can undermine the accuracy of witness identifications (34:18; A-Ap. 317).

raised and how they could impact a witness's identification of the defendant:

> The identification of the defendant is an issue in this case. In evaluating the evidence relating to the identification of the defendant as the person who committed the alleged crime, you are to consider those factors which might affect human perception and memory. You are to consider all the circumstances relating to the identification.
>
> Consider the witnesses[‘] opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to see and hear the events, and any other circumstances of the observation.
>
> With regard to witness memory, you should consider . . . the period of time which elapsed between the witnesses[‘] identification and the identification of the defendant and any intervening events which may have affected the witnesses[‘] memory.

(71:76). In sum, Dr. Neuschatz considered no new facts and offered nothing as to the witness identification and perception at issue here that was unknown in 1995. His testimony and report were not newly discovered evidence.[14]

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[14] In addition to not making any findings or conclusions as to whether the expert testimony was "new," the circuit court never exercised its discretion in declaring Dr. Neuschatz's testimony (or Dr. Yackovich's testimony, for that matter) to be admissible. Both Neuschatz's and Yackovich's testimony would have had to satisfy pre-*Daubert* standards for admissibility. *See In re the Commitment of Alger*, 2015 WI 3, ¶26, 360 Wis. 2d 193, 858 N.W.2d 346 (holding that pre-*Daubert* standards applied to actions commenced before Wisconsin's *Daubert* rule came into effect). Those standards allow a court in its discretion to admit expert testimony if: "'(1) it is relevant ...; (2) the witness is qualified as an expert ...; and (3) the evidence will assist the trier of fact in determining an issue of fact....'" *State v. LaCount*, 2007 WI App 116, ¶15, 301 Wis. 2d 472, 732 N.W.2d 29 (quoted source omitted). Given that Dr. Neuschatz's testimony as to how conditions may affect real-time witness identifications echoes the instructions that Scheidell's jury heard,

(continued on next page)

Dr. Yackovich's testimony and report ("The jury would also hear from an expert that Scheidell does not fit the profile of a person who would commit the type of sexual assault like the one against [J.D.]" (57:17; A-Ap. 117)). Dr. Yackovich made two main points in his testimony. First, he opined that the nature of the assaults on J.D. and K.C.—i.e., by a masked assailant sexually assaulting a woman in her home with the threat of a weapon—was relatively rare and that in his view, the two attacks were less likely to have been committed by two different people (76:137; A-Ap. 280). Second, he did a sex-offender risk assessment of Scheidell in 2014 and extrapolated back to 1995 to conclude that he was a low risk to be a sex offender then and now (76:148-51; A-Ap. 291-94).

Neither part of that opinion is newly discovered nor relevant. As for Yackovich's first point, he provided no statistical foundation to support it (76:137; A-Ap. 280). Moreover, Scheidell's only apparent purpose in introducing it was to relitigate the supreme court's decision that the attack on K.C. was too dissimilar from the attempt on J.D. to be relevant. In *Scheidell*, the court noted that the details of the incidents were not particularly complex or unusual where both involved a residential sexual assault committed at knifepoint in predawn hours by a white man who concealed his identity. 227 Wis. 2d 285, 308-09 (A-Ap. 177). Moreover, they were not part of a larger pattern of assaults beyond those two. *Id.* Again, as stated above, the law of the case controls the issue of the similarity of the attacks.

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the record does not support a reasonable exercise of discretion in admitting Dr. Neuschatz's testimony as relevant or helpful to the trier. Similarly, as discussed *infra* in this section, Dr. Yackovich's testimony using tools to assess future risk to opine on Scheidell's past risk cannot be admissible under any reasonable exercise of discretion.

In any event, the supreme court's point was not that a home invasion and sexual assault by a disguised man holding a knife was common, period, but that J.D.'s and K.C.'s attacks did not involve anything distinctive beyond those base similarities to suggest that the two attacks were related. Further, sexual assault statistics existed in 1995. Yackovich made no claim that there was a general misunderstanding in 1995 as to the relative rarity of the type of attack on K.C. and J.D. Hence, there is nothing "new" to his opinion that this type of attack was less common than other sexual assaults.

Moreover, Yackovich's point that "home intruder" rapes with the attacker using a disguise is "a very small percent of the overall rapes" does not support Scheidell's defense, given that Yackovich also stated that the "vast majority"—70 to 80 percent—of sexual assaults were perpetrated by an acquaintance (76:137; A-Ap. 280). That would seemingly support an inference that Scheidell, whom J.D. knew, was much more likely than Stephen—a stranger—perpetuated the crimes against her.

As for Yackovich's second point, his opinion based on his 2014 risk assessment of Scheidell in which he extrapolated back to 1995 to conclude that he was then a low risk to commit a sex offense has no apparent foundation in any accepted science—new or not—that the State is aware of. Sex offender risk assessments are designed to allow experts "to draw conclusions about *future* risk." *In re the Commitment of Lalor*, 2003 WI App 68, ¶14, 261 Wis. 2d 614, 661 N.W.2d 898 (citation omitted) (emphasis added). Yackovich did not identify his methodology—i.e., retroactively using actuarial tools designed to assess future risk to opine on an offender's risk to offend in the past—as an accepted one, nor is the State aware of a court recognizing or or admitting an expert opinion applying that

methodology.[15] Accordingly, under no reasonable exercise of discretion could a court admit that testimony as relevant or assisting the trier of fact. *See State v. LaCount*, 2007 WI App 116, ¶15, 301 Wis. 2d 472, 732 N.W.2d 29 (stating the pre-*Daubert* standards for admissibility); *see also* note 14, *supra*.

3. The old evidence resoundingly supported the jury's verdict.

At trial, the State's case convincingly showed that the burglary and attempted assault of J.D. was not a "stranger" offense. J.D. positively identified Scheidell as her attacker from the outset of the assault, based on his eyes, his body structure, and his movements, noting that Scheidell "has a very distinct[ive] body structure and walk" (69:230-31). She also managed to see the left side of his face upon dislodging his mask (69:151, 172). She had good reason to be "a hundred percent" certain of her identification of Scheidell (69:152), because she not only had worked as his boss for the nine months preceding the assault, but she also had been living in the same apartment building as Scheidell for several weeks, only a flight of stairs away, and had socialized with him. And J.D. estimated that she fought with the attacker for 15 to 20 minutes before he left her apartment (69:190-91), during which she remained certain that the attacker was Scheidell.

In addition, Judge Vuvunas, who presided over the trial, found in the initial postconviction proceedings that J.D. was a very credible witness when he concluded that a different result was unlikely even if the jury heard about the K.C. attack. Judge Vuvunas noted that Scheidell was attempting to introduce the

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[15] Moreover, as Yackovich acknowledged, he reached his opinion that it was "much more likely" that someone other than Scheidell planned the crimes and attacked J.D. without reviewing the police reports, victim's statement, crime scene photos, or other facts of the crimes (76:140, 142-47; A-Ap. 283, 285-90).

evidence because J.D. had observed Scheidell in suboptimal conditions, but explained that her testimony was convincing: "This witness was a compelling witness. . . . She was an excellent witness. The evidence in this case . . . was strong. I think whether this evidence [of the K.C. assault] was admitted or not, the conviction still would have happened" (73:19). *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (stating that appellate courts are deferential to the trial court's "the superior opportunity . . . to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony") (internal quotation marks and citation omitted).

And significant pieces of circumstantial evidence bolstered J.D.'s positive identification of [Scheidell] as her attacker. Scheidell knew J.D. would be in her apartment alone, he was familiar with the apartment layout and condition, including the unscreened bathroom window and the fact that the kitchen door led to a way out. Each time J.D. called out Scheidell's nickname, "Danno," the attacker would "hesitate" and "pull back" (69:152, 230). Despite J.D.'s fighting back and eventually pointing a loaded gun at him, he never spoke a word, which supported the reasonable inference that the attacker knew J.D. and did not want her to recognize his voice. And when the attacker left through the kitchen door, he seemed to know it was a way out (69:155).

Further, Scheidell had arranged to retain a key to J.D.'s apartment, and he had shown both an interest and an animus toward J.D. in the days leading up to the assault, seeking to meet her for a drink and insisting on giving her a wake-up call, but turning angry and upset when she did not pay him the attention he sought. Scheidell's first reaction to learning of J.D.'s claim that he attacked her was to direct police to her unlocked, unscreened bathroom window (70:33, 156). Scheidell also initially told police that J.D. was "pretty drunk" the night before and that he and J.D. arranged for him to give her a

wake-up call early the next morning (70:84-85). But by trial, Scheidell denied telling police that J.D. was drunk (70:176).

The State also established that it was very unlikely that the attacker entered J.D.'s apartment through her bathroom window, which was about nine feet above the floor (69:211-12; 70:74). Based on where and how she slept and the way the window opened into the bathroom (69:140), J.D. would have immediately heard and seen anyone climbing in. With no other signs of forced entry, the evidence supported the finding that J.D.'s attacker entered through one of her apartment doors.

Finally, Scheidell presented a vigorous defense to the charges. He stated that he was gay, downplayed the disagreement that he and J.D. had had the evening before the assault, and said that he and J.D. had a bantering relationship in which he would call her a "slut" and "bitch" in jest (70:136, 142-43, 182-83). He emphasized evidence that he did not have any visible bruises, scratches, or marks consistent with anyone having fought him (*e.g.*, 70:80). When cross-examining J.D., he brought out that her apartment was dark, she had just woken up, she was frightened, she could only see the attacker's eyes for most of the attack, and that she was not wearing her corrective lenses (69:169, 176, 190).

Given that, the new evidence would not have altered the outcome. The jury would have learned that Stephen, an African-American man nearly 20 years younger and physically distinct from Scheidell and whom J.D. claimed she has never seen, sexually assaulted another single woman in Racine close in time to the attempt on J.D. But as Judge Vuvunas noted, the jury's guilty verdict was built on a solid case and excellent witness in J.D., who never registered any doubt that Scheidell was her assailant during the 15- to 20-minute attack. The evidence of K.C.'s assault and Stephen's identity as her attacker would not have disturbed that foundation or the verdict in Scheidell's trial.

In sum, this court has its pick of any one of multiple grounds for reversal: (1) the supreme court previously decided that the attacks were dissimilar and the new information that Stephen was K.C.'s attacker does not change that or overcome the law of the case; (2) Scheidell failed to otherwise satisfy *Denny*'s direct connection requirement; (3) Scheidell failed to satisfy *Denny*'s opportunity requirement; or (4) the court erred in determining that a different result was likely with the new evidence. But the bottom line is that this court must reverse because Scheidell resoundingly failed to demonstrate that he is entitled to a new trial based on newly discovered evidence.

II. Scheidell is not entitled to a new trial in the interest of justice.

The circuit court also ruled that Scheidell was entitled to a new trial in the interest of justice, but in doing so primarily relied on its findings that the evidence of K.C.'s assault and the attempt on J.D. were similar, its conclusion that evidence of K.C.'s assault by Stephen satisfied *Denny*, and its assumptions that Neuschatz's and Yackovich's testimony on witness identification and sex offender profiling would be admitted and heard by the jury (57:17-18; A-Ap. 117-18). It found that "the issue of identity was not fully tried" (57:18; A-Ap. 118).

Under Wis. Stat. § 805.15(1), a trial court possesses "discretion" to order a new trial "in the interest of justice." *State v. Harp*, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. Ap. 1991). "[T]he extent to which [an appellate] court should defer to a trial court's ruling denying a new trial in the interest of justice under § 805.15(1), Stats., is not entirely clear." *State v. Hagen*, 181 Wis. 2d 934, 949, 512 N.W.2d 180 (Ct. App. 1994).

Nevertheless, under Wis. Stat. § 752.35, this court may exercise its own discretion in the first instance to determine whether reversal of a judgment or order is warranted in the interest of justice. *See, e.g., State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. Accordingly, the State

frames the analysis under the standards of § 752.35, because if it is not appropriate for this court to exercise its discretion in to grant a new trial in the interest of justice, it is likewise not appropriate for the circuit court to do so.

Under Wis. Stat. § 752.35, this may exercise discretion to determine whether reversal is warranted in either of two situations: when the real controversy has not been fully tried, or when it is probable that justice has for any reason miscarried. *See Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The principal difference between these two standards is that in the "real controversy" situation, unlike the "miscarriage of justice" situation, "it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial." *Id.*

"[T]he real controversy has not been [fully] tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial." *State v. Maloney*, 2006 WI 15, ¶14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436 (citation omitted).

But the power of discretionary reversal is intended to be an emergency exit for those who may be innocent, not an escape hatch for those who are guilty. *State v. Mathis*, 39 Wis. 2d 453, 458, 159 N.W.2d 729 (1968). Thus, the circumstances in which courts may exercise their authority to grant a new trial when a defendant is not entitled to a new trial under the law must truly be exceptional. *State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60; *State v. Armstrong*, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98.

A court must analyze the reasons why a case is so exceptional as to warrant a new trial in the interest of justice when a new trial is not warranted in the application of law. *Avery*, 345 Wis. 2d 407, ¶55 & n.19. The court must consider the totality of the circumstances to determine why a new trial is required to accomplish the ends of justice. *Maloney*, 288 Wis. 2d

551; *State v. Wyss*, 124 Wis. 2d 681, 735-36, 370 N.W.2d 745 (1985).

For the same reasons that Scheidell is not entitled to a new trial based on newly discovered evidence, this case is light years away from the "exceptional" case warranting a new trial in the interest of justice. *Cf. Armstrong*, 283 Wis. 2d 639, ¶154 (granting a new trial in the interest of justice where DNA evidence directly disproved the prosecution's key physical evidence). As explained above, Scheidell already litigated the third-party other-acts issue in his direct appeal. His postconviction motion simply seeks another bite at the apple with evidence establishing, at most, another point of dissimilarity between the assaults. Because the issue of identity was fully tried, there is no basis for this court to grant a new trial in the interest of justice in this case. Given that, and because the circuit court based its decision granting a new trial in the interest of justice on its incorrect applications of the law and facts, its exercise of discretion in granting the new trial in the interest of justice was clearly erroneous.

Again, this court must reverse. As with the circuit court's decision granting a new trial on the newly discovered evidence, justice demands that this court deny Scheidell relief.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this court reverse the decision and order of the circuit court granting Scheidell a new trial based on newly discovered evidence and in the interest of justice, and remand to the circuit court with instructions to reinstate the vacated judgment of conviction.

Dated this 6th day of January, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9896 words.

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Sarah L. Burgundy
Assistant Attorney General

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 6th day of January, 2016.

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