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 NEW TRIAL AND VACATING THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY, THE HONORABLE JOHN S. JUDE, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

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TABLE OF CONTENTS

Page

INTRODUCTION..... 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 3

ISSUE PRESENTED..... 4

STATEMENT OF THE CASES AND THE FACTS..... 5

ARGUMENT..... 11

I. The circuit court did not err in granting Scheidell a new trial; because the circuit court, after both hearing extensive testimony and receiving DNA results, properly exercised its discretion in concluding that this newly-discovered evidence both was material and created a reasonable probability that a jury would have a reasonable doubt as to Scheidell's guilt 11

A. The circuit court, which both heard extensive testimony and received DNA results, properly exercised its discretion by concluding that the newly discovered evidence was material to an issue in the case..... 12

1. The state's concession below. 12

2. The Standard of Review.....13

3. The Evidence is material.....15

B. The circuit court, which both heard extensive testimony and received DNA results, properly exercised its discretion by concluding that a reasonable probability existed the jury would have a reasonable doubt as to Scheidell's guilt..... 25

1. The old evidence was weak... 26

2. The new evidence is strong and compelling..... 27

C. Conclusion..... 29

II. The circuit court properly granted Scheidell a new trial in the interest of justice, because the circuit court, after both hearing extensive testimony and receiving DNA results, did not erroneously conclude that the issue of identity was never fully tried..... 29

A. The state waived its challenge to the circuit court's ruling: that Scheidell was entitled to a new trial in the interest of justice..... 30

B. The state provided no examples of how the circuit court abused its discretion in finding that the controversy had not been fully tried..... 31

C. The Law-of-the-Case doctrine does not bind lower courts granting relief in the interest of justice..... 31

D. Conclusion..... 32

III. Conclusion..... 32

TABLE OF AUTHORITIES

Cases

Crane v. Kentucky,
476 U.S. 683 (1986)..... 15

Holmes v. South Carolina,
547 U.S. 319 (2006) 15, 18

Kyles v. Whitley,
514 U.S. 419 (1995). 25

Jacobson v. American Tool Cos., Inc.,
222 Wis.2d 384,
588 N.W.2d 67 (Ct. App. 1998)..... 14

McGovern v. Eckhart,
200 Wis. 64,
75 227 N.W. 300 (1929)..... 32

Schwittay v. Sheboygan Falls Mut. Ins. Co.,
2001 WI App 140, 246 Wis.2d 385,
630 N.W.2d 772..... 13

State v. Armstrong,
2005 WI 119, 283 Wis. 2d 639,
700 N.W.2d 98..... 30

State v. Avery,
2013 WI 13, 345 Wis.2d 407,
826 N.W.2d 60..... 14

State v. Brady,
130 Wis. 2d 443,
388 N.W.2d 151 (1986)..... 32

State v. Buelow,
122 Wis. 2d 465,
363 N.W.2d 255 (Ct. App. 1984)..... 18

State v. Caban,
210 Wis. 2d 597,
563 N.W.2d 501 (1997) 30

State v. Denny,
120 Wis. 2d 614,
357 N.W.2d 12 (Ct. App. 1984)..... 2, passim

State v. Dubose,
2005 WI 126, 285 Wis. 2d 143,
699 N.W. 2d 592..... 28

State v. Edwards,
2003 WI App 221, 267 Wis.2d 491,
671 N.W.2d 371..... 13

State v. Gove,
148 Wis. 2d 936,
437 N.W.2d 218 (1989)..... 13, 30

State v. Hicks,
202 Wis.2d 150,
549 N.W.2d 435 (1996)..... 29,30

State v. McCallum,
208 Wis.2d 463,
561 N.W.2d 707 (1997)..... 15

State v. Maloney,
2006 WI 15, 288 Wis. 2d 551,
709 N.W.2d 436..... 31

State v. McConnohie,
113 Wis.2d 362,
334 N.W.2d 903 (1983)..... 29

State v. Moeck,
2005 WI 57, 280 Wis. 2d 277,
695 N.W.2d 783..... 12, 23, 32

State v. Plude,
2008 WI 58, 310 Wis. 2d 28,
750 N.W.2d 42..... 25

State v. Stuart,
2003 WI 73, 262 Wis. 2d 620,
664 N.W.2d 82..... 12, 23, 24, 32

State v. Sullivan,
216 Wis. 2d 768,
576 N.W.2d 30 (1998)..... 2, passim

State v. Vollbrecht,
2012 WI App 90, 344 Wis.2d 69,
820 N.W.2d 443..... 11, passim

State v. Warrior,
2013 WI App 1, 345 Wis. 2d 397,
824 N.W.2d 927..... 30

State v. Wilson,
2015 WI 48, 362 Wis. 2d 193
864 N.W.2d 52 (2016) ..... 16, passim

Univest Corp. v. Gen. Split Corp.,
148 Wis.2d 29,
435 N.W.2d 234 (1989)..... 23, 24

Statutes

Wis. Stat § 904.04(2)(b)..... 26

Wis. Stat. § 908.03(24)..... 18

Wis. Stat. § 908.045..... 18

Other Sources

B. Garrett, Judging Innocence,
108 Colum. L. Rev. 55 (2008)..... 28

S. Gross, et al., Exonerations in the United States,
1989 Through 2003,
95 J. of Crim. Law & Criminology 523 (2005)... 28

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BRIEF OF DEFENDANT-RESPONDENT

INTRODUCTION

In the summer of 1995, in the early morning, a crash in her bathroom woke JD. She rose from her bed, investigated, found her bathroom window open, and, thinking little of it, went back to sleep. Shortly after, a man attempted to sexually assault her. The man wore a ski mask, and he covered his head with a jacket. He climbed atop JD, straddling her, and held a knife against her throat. JD, however, fought off her attacker. The man fled, and she telephoned police. She immediately accused her friend and neighbor Dan Scheidell of her attack.

Five weeks later, in the early morning, and while Scheidell was in police custody, a man crawled through the bathroom window of KC's apartment. The man, too, wore a ski mask, and he covered his head with a jacket. He also climbed atop KC while she slept, straddling her, and held a knife against her throat. He, then, raped her. The man fled, and KC telephoned police.

Both women offered police similar descriptions of their attacker: about 5'10, slender, white man between the age of 35-40. Both women, themselves, shared several important personal characteristics: single white women living alone in upper-level apartments.

At trial, Scheidell sought to introduce evidence that an unknown third party, the perpetrator who attacked KC, also attacked JD. The circuit court conducted a thorough review of both assaults, and the court concluded that the two assaults were "strikingly similar." The circuit court, however, refused to permit the jury to hear evidence of KC's attack, because the identity of the KC attacker was unknown.

The Supreme Court affirmed, and, for the first time, articulated the framework to analyze the admissibility of other acts committed by third parties. The Court re-affirmed that lower courts should apply the Denny test[1], if the identity of the other-acts perpetrator is known. The Court also held, for the first time, that lower courts should apply the Sullivan test[2], if the identity of the other-acts perpetrator is unknown. After applying the Sullivan test, the Court concluded Scheidell could not introduce evidence of KC's sexual assault.

Scheidell spent the next twenty years in prison.

In 2015, at his post-conviction hearing, Scheidell presented DNA evidence that conclusively identified the third-party perpetrator of KC's sexual assault. Joseph Stephen sexually assaulted KC. In addition, Scheidell presented other newly-discovered evidence. This newly-

[1] State v. Denny, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).
[2] State v. Sullivan, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

discovered evidence included a witness who interviewed Stephen, an expert in eyewitness identification and memory formation, and an expert in sexual offender assessment and profiling. Both experts, in reaching their conclusions, applied new research that had not been available at the time of trial.

The post-conviction court, upon hearing this new evidence, granted Scheidell a new trial based upon two grounds. First, the newly-discovered evidence showed a reasonable probability that a jury would have reasonable doubts about Scheidell's guilt. Second, the interest of justice demanded a new trial.

This Court should affirm both the circuit court's holdings, because the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Scheidell requests neither oral argument nor publication, because the circuit court's order can be affirmed based upon an application of well-settled law.

ISSUE PRESENTED

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

    a. Scheidell presented newly-discovered evidence that included: (1) DNA-results that conclusively identified Joseph Stephen as the attacker of KC; (2) testimony from a person who interviewed Stephen; (3) expert testimony that applied new research in the field of eyewitness identification and memory formation; and (4) expert testimony that applied new research in the field of sex-offender profiling and assessment;

    b. The circuit court exercised its discretion in concluding that Scheidell satisfied the motive, opportunity, and direction connection prongs of Denny;

    c. The circuit court, without objection, concluded that the newly-discovered evidence was material;

    d. The circuit court exercised its discretion in concluding that the newly-discovered evidence created a reasonable probability that a jury would have a reasonable doubt about Scheidell's guilt.

The circuit court ruled that Scheidell satisfied his burden of showing that the newly-discovered evidence created a reasonable probability that a jury would have a reasonable doubt of Scheidell's guilt.

2. Did the circuit court erroneously exercise its discretion in granting Scheidell a new trial based upon the interest of justice?

The circuit court ruled that Scheidell satisfied his burden of showing that a new trial was in the interest of justice.

STATEMENT OF THE CASE AND THE FACTS

At approximately 4:45 a.m., on May 20, 1995, JD awoke to a crashing sound in the bathroom of her apartment. (69:138, 142-43). She left her bed, went to the bathroom, and noticed that her window blinds had been knocked down. (69:139-40). A short while later, JD re-awoke to find a man straddling her. (69:139-43). The attacker wore both a jacket over his head and a full-face mask with holes that revealed only his eyes and his mouth. (69:145-49). JD felt a knife against her throat. (69:146-50). The intruder attempted to rape her, but JD fought off her assailant. (69:147, 152-156, 171).

JD would later testify that she was not wearing her glasses or contact lenses during the assault, and she could not see the assailant's lips or teeth through the hole in his mask. (69:181-82, 192). She only briefly saw the man's cheekbone. (28:4). The assailant never spoke. (28:4). However, JD "testified that she could see his eyes and believed she recognized the assailant as [her friend and upstairs neighbor] Scheidell." (28:4).

Five weeks later, while Scheidell was in police custody, a second woman, KC, was sexually assaulted four blocks from JD's apartment. (28:5-6). The KC assault bore many similarities to the JD assault. In both cases, the victim awoke to her assailant straddling her at approximately 5:00 a.m. (69:22-23; 27:3-4; 34:25-26). In both case, the assailant covered his head with a mask and jacket/hood. (69:22-23; 27:3-4; 34:25-26). In both cases, the assailant pressed a knife to the victim's throat. (69:22-23; 27:3-4; 34:25-26). In both cases, the assailant had allegedly gained entrance to the victim's apartment through an elevated window. (69:22-23; 27:3-4; 34:25-26). In both cases, the victim was a single white woman living in an upper level apartment. (69:22-23; 27:3-4; 34:25-26).

THE TRIAL AND EXCLUSION OF OTHER-ACTS EVIDENCE

At trial, Scheidell attempted to offer other-acts evidence. Specifically, he sought to introduce evidence

that an unknown third-party assaulted both KC and JD (69:20). The state objected. (69:25). The circuit court held a hearing and noted that the attacks upon KC and JD were "strikingly similar." (69:41). In particular, the court observed that in both assaults:

- the victim lived in an upper apartment; (69:41).
- the assailant might have entered through a bathroom window; (69:41).
- the assailant wielded a knife; (69:41).
- the assailant wore a mask and jacket/sweatshirt over his head; (69:42).
- occurred within "four or five blocks" of each other; (69:42).
- occurred within five weeks of each other. (69:42).

The court, however, prohibited Scheidell from presenting evidence of KC's assault. (69:43). The court concluded that, because the identity of KC's attacker was unknown, Scheidell could not satisfy the elements of the alternative-perpetrator test as outlined in Denny. (69:42-44). The case proceeded to trial.

The state's case relied solely upon JD's eyewitness identification. The jury received evidence that discredited the victim's identification. JD never saw her attacker's face or hairline because he wore a mask and a nylon jacket draped across his head. (A-Ap. 103). She only saw his eyes and part of his cheek. (A-Ap. 103). She never heard her attacker's voice. (69:164). The attack occurred in the dark, and JD did not wear her eyeglasses. (69:192).

Further, the identification suffered from other weaknesses. JD claimed her attacker was drunk or "on something." (69:191). And yet, when police interviewed Scheidell less than an hour after the assault, police found no indication he had been intoxicated. (A-Ap. 6). In fact,

Scheidell looked as though he just woke. (A-Ap. 6). JD struggled with her attacker, finally fighting him off and chasing him out of her apartment. (A-Ap. 4). Police, however, found that Scheidell was neither bruised nor scratched nor flush nor out-of-breath. (A-Ap. 6).

Lastly, police searched Scheidell's apartment. Police searched his kitchen, garbage, basement, outside alley, up and down the stairwell, under his bed, in his laundry basket, in his bedroom. (A-Ap. 6). The police found no physical evidence linking Scheidell to the attack. (A-Ap. 6). The police later conducted a second search. (A-Ap. 6). The police, again, found no relevant evidence. (A-Ap. 6).

The jury convicted Scheidell, and the circuit court imposed a 25-year sentence. (20:1).

THE COURT OF APPEAL VACATES SCHEIDELL'S CONVICTION

Scheidell appealed. The Court of Appeals reversed, concluding that the trial court applied the wrong test to analyze Scheidell's proffered third-party perpetrator evidence. (27:12-13). This Court held that Denny was an incorrect test, and this Court vacated Scheidell's conviction. (27:16-19). The state appealed.

THE SUPREME COURT ARTICULATES A NEW TEST FOR THE ADMISSION OF OTHER ACTS COMMITTED BY AN UNKNOWN THIRD-PARTY PERPETRATORS

The Wisconsin Supreme Court granted the State's petition for review. (28:8). The Court limited its inquiry to "the appropriate test for admissibility of other acts evidence committed by an unknown third party." (28:8). The Court ruled that the circuit court erred by applying Denny, because Denny presumes the defendant knows the identity of the third-party perpetrator. (28:11-12). The Court, instead, held that, when a defendant proffers evidence of an *unknown* third-party suspect, the Sullivan other-acts test governs. The Court emphasized that this new test applied exclusively to cases where a party seeks

to present other acts evidence committed by an unknown third-party perpetrator. (28:27-28).

The Court reversed the Court of Appeals and affirmed Scheidell's conviction.

SCHEIDELL LEARNS THE IDENTITY OF KC'S ATTACKER

In 2013, the state and Scheidell, now represented by Wisconsin Innocence Project, stipulated to DNA testing of a rape kit obtained during the investigation of KC's sexual assault. (32:2). The DNA test proved conclusively that Joseph Stephen raped KC. (76:43-45). Stephen was, at the time, serving a prison sentence for yet another sexual assault in Racine. (76:43-45).

THE POST-CONVICTION COURT HEARS TESTIMONY

On January 21, 2015, the circuit court heard Scheidell's motion for a new trial. Scheidell presented three witnesses.

Laura Davis testified about her post-DNA-results interview of Stephen, who, at the time, was imprisoned at Stanley Correctional Institution. (76:45-46). Stephen said he was living in Racine during the time of the 1995 assaults. (76:49). Stephen did not deny involvement in either the KC sexual assault or the JD assault. (76:50; A-Ap. 184). He also asked Davis to apologize to Scheidell for him. (76:50).

Dr. Nick Yackovich, an expert in sex-offender risk assessment, applied recent and significant research to evaluate the likelihood that Scheidell committed the JD assault. (76:124-140). This new research --- in both risk assessments and profiling --- were made in the last twenty years. (76:124-125). Yackovich testified that the JD assault had a ritualistic element. (76:130). Yackovich discussed the rarity of attacks that occurred a few blocks apart, at the same time in the morning, a few weeks after a prior attack, committed against a sleeping woman, by a man wielding a knife and concealing his face. (76:132-133). He testified about the slim likelihood that two

different individuals committed the sexual assaults of JD and KC. (76:138). Yackovich also testified that it is much more likely that someone other than Scheidell assaulted JD. (76:140).

Dr. Jeffrey Neuschatz, an expert on eyewitness identification and memory formation, testified about flawed eyewitness identification and flawed memory formation. (76:71-76). He discussed how these two areas of research have developed significantly within the past twenty years. (76:97-98). He testified about the variables that can cause a victim to make a flawed, yet sincere, eyewitness identification. (76:79). He testified that stress and the presence of a weapon can cause an eyewitness to incorrectly encode essential details. (76:83-85). He also testified about several other factors that may impact an identification. These factors, in this case, may include poor lighting conditions, the stressful nature of the incident, the presence of a weapon, and the covering of the assailant's face. (76:82-83, 85-89). Finally, Dr. Neuschatz explained the correlation between confidence in one's identification and accuracy in the identification. According to extensive recent research, experts have found a weak correlation between an eyewitness' confidence and an eyewitness' accuracy. (76: 88-90).

The state presented two witnesses: Detective Melissa Diener and JD. Diener, the Racine Police Department detective who investigated the rape of RC, authenticated two photographs. One photograph, taken in 1997, showed that Joseph Stephen, a light-skinned black male, born in 1970, weighed 145 pounds and had brown eyes. (76:159). The other photograph, also taken in 1997, showed that Scheidell, a white male, born in 1949, had gray eyes. (76:160). The state also presented the brief testimony of JD. (76:163-166). JD re-affirmed her belief that Scheidell attacked her. (76:163-66).

THE POST-CONVICTION COURT GRANTS A MOTION FOR A NEW TRIAL

The circuit court issued a Decision and Order granting Scheidell's Motion for New Trial. The court

found the new evidence created a reasonable probability that a jury would have a reasonable doubt about Scheidell's guilt. The court also granted a new trial in the interest of justice. (61:17-18).

This appeal follows.

ARGUMENT

I. The circuit court did not err in granting Scheidell a new trial; because the circuit court, after both hearing extensive testimony and receiving DNA results, properly exercised its discretion in concluding that this newly-discovered evidence both was material and created a reasonable probability that a jury would have a reasonable doubt as to Scheidell's guilt.

To receive a new trial based upon newly-discovered evidence, Scheidell bore the burden to prove, by clear and convincing evidence, four factors: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is not merely cumulative; and (4) the evidence is material to an issue in the case. State v. Vollbrecht, 2012 WI App 90, ¶ 18, 344 Wis.2d 69, 820 N.W.2d 443.

The state below conceded that Scheidell satisfied these four factors; and the circuit court appropriately found "that all four factors have been proven by clear and convincing evidence." (A-Ap. 114)

After satisfying all four factors, Scheidell bore one additional burden. He had to show that, after receiving the new evidence, a reasonable probability exists that a juror would have had a reasonable doubt about the defendant's guilt. Vollbrecht, 344 Wis.2d 69, ¶ 18. The court found that Scheidell satisfied this burden. (A-Ap. 114).

On appeal, the state argues the circuit court twice erroneously exercised its discretion. First, the state alleges, the circuit court erroneously exercised its discretion by concluding that the evidence was material. Second, the state alleges, the circuit court erred in finding that a reasonable probability exists that a jury would have a reasonable doubt as to Scheidell's guilt. In both cases, the state invites this Court to re-weigh and re-evaluate

the facts presented at the post-conviction hearing. This Court should reject that invitation.

The state, here and below, also clings desperately to the law-of-the-case doctrine. This doctrine, the case law makes clear, does not apply in cases such as this. The law-of-the-case doctrine "is not an absolute rule that must be inexorably followed in every case." State v. Moeck, 2005 WI 57, ¶25, 280 Wis. 2d 277, 695 N.W.2d 783. "In days past, Wisconsin rigidly followed the law of the case, refusing to touch issues previously determined, but that is no longer the case." State v. Stuart, 2003 WI 73, ¶ 24, 262 Wis. 2d 620, 664 N.W.2d 82. Courts, in fact, have "disregarded the rule of law of the case in the interests of justice." Moeck, 280 Wis. 2d 277, ¶25 (internal quotation and punctuation omitted). Court have also disregarded the law-of-the-case doctrine when the court receives new facts and evidence. Stuart, 262 Wis. 2d 620, ¶ 24 (holding that the law-of-the-case doctrine does not apply to instances with "substantially different evidence").

In sum, the circuit court did not erroneously exercise it discretion in granting a new trial based upon newly-discovered evidence. The circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. Therefore, this Court should affirm the order of the circuit court.

A. The circuit court, which both heard extensive testimony and received DNA results, properly exercised its discretion by concluding that the newly discovered evidence was material to an issue in the case.

1. The State's concession below

As an initial matter, the state, below, conceded that Scheidell satisfied the materiality prong. The circuit court

found: "that all four [newly discovered evidence] factors have been proven by clear and convincing evidence. Those factors are not contested." (A-Ap. 114). In fact, in its closing, the state argued that the post-conviction court need only decide whether the evidence was "material enough ... to find that there is a reasonable probability of a different result." (A-Ap. 313). These are important concessions of fact, and these concessions of fact below should bind the state now. Therefore, the state has waived any challenge to the first-four factors, including the materiality factor. State v. Gove, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989).

But, even should this court find that the state made no concession, the state clearly failed to raise this issue with sufficient prominence before the post-conviction court. The post-conviction court clearly believed that the state had conceded the issue, a well-supported and reasonable belief based upon the state's written and oral arguments. Such a failure should prevent the state from raising the issue on appeal. State v. Edwards, 2003 WI App 221, ¶ 8, 267 Wis.2d 491, 671 N.W.2d 371; Schwittay v. Sheboygan Falls Mut. Ins. Co., 2001 WI App 140, ¶ 16, 246 Wis.2d 385, 630 N.W.2d 772 n. 3 (“A party must raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling.”).

For these reasons, this Court should decline to entertain the state's materiality argument.

2. The Standard of Review

The state's brief provides a confusing explanation of the standard of review in a newly discovered evidence case. The state urges this court to adopt a de novo standard because the post-conviction court did not preside over the trial. State's Brief at 12. And yet, one page later, to review the question of materiality, the State urges this court to apply an exercise-of-discretion standard. State's Brief at 13 ("Whether other-acts evidence is admissible is a discretionary question for the circuit court.").

Recent case law has not applied the state's proposed de novo standard even when the post-conviction judge differs from the trial judge. In State v. Vollbrecht, for example, the court of appeals reviewed the post-conviction judge's order pursuant to an erroneous-exercise-of-discretion standard of review. Vollbrecht, 344 Wis.2d 69, ¶ 18. The post-conviction judge differed from the trial judge. (Sauk County, the Honorable Virginia Wolfe presiding at trial)(Sauk County, the Honorable Steven G. Bauer presiding over post-conviction proceedings). Vollbrecht is not an isolated instance.

First, this court need not address this complicated issue here. Under any standard, this Court has ample grounds to affirm.

Second, the Wisconsin Supreme Court, in State v. Avery, held that "The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion." State v. Avery, 2013 WI 13, ¶ 22, 345 Wis.2d 407, 826 N.W.2d 60. In Avery, the Honorable Patricia McMahon presided at trial; the Honorable Dennis R. Cimpl presided over post-conviction.

Third, if the court does choose to decide the standard of review, then this Court should adopt the clearly erroneous standard. Here, the circuit court received evidence including testimony from five witnesses. The circuit court had to make determinations about both the testimony's weight and the testimony's credibility; such determinations receive higher deference because the circuit court "has the opportunity to observe the witnesses' demeanor and gauge the testimony's persuasiveness." Jacobson v. American Tool Cos., Inc., 222 Wis.2d 384, 389-390, 588 N.W.2d 67 (Ct. App. 1998). Further, to evaluate materiality, the circuit court almost exclusively relied upon facts received at the post-conviction hearing. Therefore, the court did not rely exclusively or primarily upon record evidence. For these

reasons, this Court should adopt a clearly-erroneous standard.

Lastly, however, in an abundance of caution, Scheidell now applies the erroneous-exercise-of-discretion standard, used by this Court in Vollbrecht. This standard has firm basis in the case law. See e.g. State v. McCallum, 208 Wis.2d 463, 486 ¶ 44, 561 N.W.2d 707 (1997)(Abrahamson J., concurring)("whether the evidence is material to an issue [... is an] evidentiary determinations that ordinarily are addressed to the discretion of the circuit court. A circuit court's determination of these issues should be reviewed by an appellate court using the erroneous exercise of discretion standard.").

3. The Evidence is material

Scheidell sought to introduce evidence that a third-party, Joseph Stephen, committed the assault on JD. In order for such third-party evidence to be material, Scheidell had to satisfy the test articulated in Denny; that is, Scheidell had to demonstrate that Stephen had: (1) motive; (2) opportunity; and (3) a direct connection to the crime that is not remote in time, place or circumstances. Vollbrecht, 344 Wis.2d 69, ¶25.[3] "The admissibility of evidence is committed to the circuit

[3] Although Denny governs the admissibility of other acts committed by known third-party perpetrators, the Constitution "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that that they are asserted to promote." Holmes v. South Carolina, 547 U.S. 319, 326 (2006). The opportunity to present a complete defense "would be an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence." Crane v. Kentucky, 476 U.S. 683, 690 (1986). Mr. Scheidell's complete defense includes two key components. First, Mr. Scheidell seeks to discredit his accuser. Second, he seeks to introduce evidence that another man, serial rapist Joseph Stephen, committed a "strikingly similar" attack only five weeks after, and four blocks away from the J.D. assault. The third-party perpetrator evidence Mr. Scheidell seeks to admit is critical to both components of Mr. Scheidell's complete defense.

court's discretion and we will not reverse such decisions if there is a reasonable basis in the record." Id.

The Wisconsin Supreme Court recently clarified the scope and application of the Denny test. First, the Court noted, "a defendant's proffered evidence need *not* individually satisfy all three prongs of the Denny test." State v. Wilson, 2015 WI 48, ¶ 53, 362 Wis. 2d 193, 864 N.W.2d 52 (2016). Instead, "[s]ome evidence provides the foundation for other evidence." Id. The Court reiterated, "[F]acts give meaning to other facts, and certain pieces of evidence become significant only in the aggregate, upon the proffer of other evidence." Id. (quoting Vollbrecht)(brackets in original). In short, circuit courts must examine the nuance provided by all the facts to determine whether the defendant provided support for each prong of the *Denny* test.

a. Stephen, whom DNA linked to the sexual assault of KC, and who was convicted in 1998 for yet another sexual assault, had a motive to sexually assault JD.

To determine whether Stephen had motive to sexually assault JD, the court must ask: "did the alleged third-party perpetrator have a plausible reason to commit the crime?" Wilson, 362 Wis. 2d 193, ¶ 57. Scheidell "is not required to establish motive with substantial certainty." Id. at ¶ 63.

Although the state does not now contest the circuit court's motive finding, this court should know the strength of the motive evidence. If the evidence of the third party's motive is strong, then this evidence will impact the way this Court evaluates the other two prongs of the Denny test. Wilson, 362 Wis. 2d 193, ¶ 64.

The circuit court found that Stephen had motive. The circuit court found the testimony of Dr. Yackovich, an expert in sex-offender risk assessment, relevant to motive. Yackovich testified that sexual assault is a crime of violence, power and control, and sexual gratification. (A-Ap. 110). Sexual assault perpetrators tend to exhibit

particular patterns of behavior. (A-Ap. 110). Stephen has committed two other rapes; therefore, he had motive to commit other rapes. (A-Ap. 8-10).

The post-conviction court's decision concurs with the findings of the trial court. In 1995, the trial court found "the motive is clear in the instant case. The motive is to commit a sexual assault." (69:40-41).

Therefore, the circuit court correctly held that Scheidell satisfied his burden of showing motive.

b. Stephen had an opportunity to sexually assault JD.

To determine whether Stephen had an opportunity to sexually assault JD, the court must ask: "Could [Stephen] have committed the crime, directly or indirectly?" Wilson, 362 Wis. 2d 193, ¶ 58. This prong is often satisfied by showing that the third-party perpetrator was either at the crime scene or known to be in the vicinity. Id. ¶ 65. Opportunity may also be established by showing that "the third party had the realistic ability" to commit the crime; that is, the third-party perpetrator had the requisite skills, capacity, or ability to carry out the act. Id. ¶ 66, 90.

In evaluating opportunity, courts weigh the strength of the defendant's evidence – that the third party could have committed the crime – against the State's evidence that the third party could not have committed the crime. Id. ¶ 69. The court should not weigh the defendant's evidence that a third-party perpetrator likely committed the crime against the State's evidence that the defendant likely committed the crime – even when the evidence against the defendant is overwhelming. Id. The strength of the State's evidence cannot be the basis for excluding evidence of a third party's opportunity. Id. *See generally* Holmes v. South Carolina, 547 U.S. 319 (2006).

The state's brief does not allege that the circuit court misapplied the law. Instead, the state begs this

court to re-evaluate and re-weigh evidence of opportunity. The state calls the evidence of opportunity "threadbare," but, in truth, the record amply supports the circuit court's finding that Stephen had the opportunity to commit the assault.

Laura Davis testified that she interviewed Stephen.[4] Stephen explained that he lived in the Racine area from 1978 until his conviction in 1999. (A-Ap. 191-192). Further, Stephen didn't deny involvement in the crime when provided an opportunity to do so. (A-Ap. 193). Instead, he apologized to Scheidell. (A-Ap. 193).

Further, Stephen has committed at least two other sexual assaults. The DNA proves he assaulted KC. (A-Ap. 8). A jury convicted Stephen of yet another sexual assault in Racine in 1998. State vs. Elliot R Maddock, Racine

[4] The state suggests that Davis' interview with Stephen is inadmissible hearsay, because the statement was not against his penal interest. First, the circuit court correctly ruled that evidence is admissible as a statement against interest. (A-Ap. 191, 193, 197). This ruling is entitled to considerable deference. State v. Buelow, 122 Wis. 2d 465, 476, 363 N.W.2d 255 (Ct. App. 1984). Second, the state engages in selective editing of the statute. The state fails to include the full statutory language that permits statements that would subject Stephen to: "civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace." Wis. Stat. § 908.045(4). Third, the evidence is not central to the circuit court's decision and order. The court placed particular weight on the DNA-evidence and the expert testimony. Lastly, such statements would be admissible under the residual hearsay exception, which provides an exception to the hearsay rule for "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." Wis. Stat. §§ 908.03(24) & 908.045(6). In this case, Stephen's statements bare sufficient indicia of trustworthiness, because he made these important concessions during a conversation in which he was being accused of sexual assault. He must have known that such statements might be used against him in any subsequent prosecutions.

County Case Number 1999-CF-12.[5] (A-Ap. 10). These two sexual assaults demonstrate that Stephen possessed the requisite skills, capacity, or ability to sexually assault JD. The sexual assault of KC required Stephen to identify a single-white woman to victimize, to identify the upper-level apartment in which she lived, to climb through her bathroom window, to straddle his sleeping victim, to wield a knife, to sexually assault the victim, to mask his appearance, and to flee. These skills were necessary to commit the sexual assault of JD.

The state, on appeal, cites no evidence to suggest that Stephen lacked the opportunity to assault JD. Instead, the state criticizes the circuit court's finding. Likewise, at the post-conviction hearing, the state proffered little evidence to show Stephen lacked opportunity. The state argued that differences, in the physical appearance of Scheidell and Stephen, mitigated any evidence of opportunity. The court, however, reviewed these differences, examining photos of the two men side-by-side, and rejected their significance. The state also provided JD's testimony, who reiterated her belief that Scheidell was the person who attacked her. However, this evidence begs the question. The court does not assess whether the state's case against Scheidell was compelling. Instead, it must assess whether the state has demonstrated that Stephen could not have committed the crime.

In sum, Scheidell presented strong evidence that Stephen had the opportunity to assault JD; whereas, the state presented virtually no evidence that Stephen did not have such an opportunity. The record amply supports the circuit court's conclusion that Scheidell satisfied his burden. Therefore, this Court correctly found that Scheidell satisfied his burden of showing opportunity.

c. The evidence demonstrates a direct connection between the sexual assaults of KC and JD.

[5] Elliot Maddock is an alias of Joseph Stephen. This fact is not disputed. See State's Brief. Page 2. Fn. 1.

To determine whether Stephen had a direct connection to the sexual assault of JD, the court must ask: "“[I]s there evidence that the alleged third-party perpetrator actually committed the crime?” Wilson, 362 Wis. 2d 193, ¶59. "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." Id. ¶71 (italics in original). The "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." Id.

The court's analysis of direct connection may be informed by the analysis of opportunity and motive. Id. ¶ 64 ("It may be that the strength and proof of a third party's motive to commit the crime is so strong that it will affect the evaluation of the other prongs."). "[F]acts give meaning to other facts,” and certain pieces of evidence become significant only in the aggregate, upon the proffer of other evidence." Id. ¶ 53 (internal quotation and citation omitted)(Bracket in original).

Here, in short, Scheidell must prove a direct connection between Stephen and the assault of JD.[6] The

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[6] Under Sullivan, to show the other acts of an unknown third-party perpetrator, the moving party must show: "a nearness of time, place, and circumstance." Sullivan, 216 Wis.2d at 786. In Denny, when the third-party perpetrator is known, a party is required to show a direct connection between the two events. The state’s brief illogically conflates these two showings. State's brief at 15.

The Sullivan showing is both different, and in the case of alternative perpetrator evidence, higher than the Denny test.

When the third-party perpetrator is unknown, the need for heightened similarities between the two crimes is logical because the similarities are the *only* evidence of perpetrator’s identity. The court must reason backward from the facts of the crime to determine whether the same party

state, again, does not allege that the circuit court applied the wrong law; instead, the state, again, asks this court to re-evaluate and re-weigh the evidence.

In finding that Scheidell established a connection between the assaults of KC and JD, the circuit court properly considered the points of similarity between the KC assault and the JD assault. The existing similarities, found by the Wisconsin Supreme Court, are, by now, well known.

	JD Assault	KC Assault
Crime Date	May 20, 1995	June 27, 1995 (Five weeks later)
Crime Time	Approximately 5:00 AM	Approximately 5:00 AM
Location	400 7th St. Racine, WI	922 Grand Ave. Racine, WI (Four blocks apart)
Victim	Single, young, white female	Single, young, white female
Disguise	Mask. Covered face with jacket	Mask. Covered face with jacket
Attacker Description, as described by victim	5'10 in height. White. Slender	5'10 in height. White. Slender
Intruder Entrance	Through window	Through window
Weapon Used	Knife	Knife

committed a different but similar crime. When a defendant offers similar acts of another to prove identity in this way, the *Sullivan* test asks whether the similarities between the two crimes are such that a signature could be seen between the two crimes. Similarities must be such that they reflect the imprint of the perpetrator. The *Sullivan* test creates a high hurdle for defendants attempting to introduce evidence of an unknown third-party perpetrator. Therefore, "[e]vidence of an unknown third party, who is alleged to have committed the crime charged, is most often deemed too speculative to be admissible." Wilson, 362 Wis. 2d 193 ¶ 106 (Ziegler, J., concurring).

Assault Type	Attempted sexual assault by genital or anal contact	Attempted sexual assault by genital or anal contact
Assault Method	Attacker straddled victim in her sleep	Attacker straddled victim in her sleep

(A-Ap. 11); Scheidell, 227 Wis.2d at 308.

In addition, during post-conviction litigation, the court learned several newly-discovered additional similarities. JD identified her attacker by looking at his eyes, and she testified that her attacker's eyes were brown. (65:15)(69:181). The state presented evidence that Scheidell had gray eyes. (A-Ap. 302-303); (A-Ap. 168)(Scheidell eye color). Stephen has brown eyes, matching JD's description of the masked attacker. (A-Ap. 169)(Stephen eye color). Therefore, this fact---that Stephen has the same eye color as the JD attacker---constitutes important newly discovered evidence.

Second, the circuit court heard testimony that only a small percentage of individuals could commit the JD assault. At the post-conviction hearing, Dr. Yackovich gave context to the similarities between the two assaults. Through this testimony, the court learned several new persuasive similarities.

- "home intruder rape by someone with a mask and knife is a very small percent of the overall rapes that at least we are aware of." (A-Ap. 112)(circuit court opinion quoting testimony).
- The similarities between the two attacks were more than coincidence (A-Ap. 112-13).
- The two attacks shared a ritualistic element. (A-Ap. 112-13).
- "it is less likely that two separate individuals committed the attacks." (A-Ap. 112-13).
- The dissimilarities were insignificant, "less impactful" (A-Ap. 277).

- “it would be much more likely that someone else other than Dan committed [the J.D. assault].” (A-Ap. 283).

In short, Dr. Yackovich made clear that only a small portion of the population could have committed these assaults. This observation is important. In Vollbrecht, the post-conviction court found a direct connection, in part, because "[O]nly a minute percentage of the male population would desire to sexually assault a woman...." Vollbrecht, 344 Wis. 2d 69, ¶34 (quoting the post-conviction court).

The court, in the present case, analyzed both the new and existing points of similarities, and, therefore, the court concluded that Scheidell demonstrated a direct connection between the assaults of KC and JD. Facing this new compelling evidence, the state, on appeal, makes two weak arguments.

First, the state argues that the lower court ignored the law of the case. This argument is completely without foundation. The law-of-the-case doctrine recognizes that “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.” Univest Corp. v. Gen. Split Corp., 148 Wis.2d 29, 38, 435 N.W.2d 234 (1989). "In days past, Wisconsin rigidly followed the law of the case, refusing to touch issues previously determined, but that is no longer the case." State v. Stuart, 262 Wis. 2d 620, ¶ 24. The law-of-the-case doctrine "is not an absolute rule that must be inexorably followed in every case." Moeck, 280 Wis. 2d 277, ¶25.

The courts have identified a series of instances in which the doctrine does not apply. Courts, in fact, have "disregarded the rule of ‘law of the case’ in the interests of justice." Id. ¶25. Courts have also disregarded the law-of-the-case doctrine when the court receives new facts and evidence. Stuart, 262 Wis. 2d 620, ¶ 24 (holding that the law-of-the-case doctrine does not apply to instances with "substantially different evidence"). Further, the

courts have disregarded the doctrine when the appellate court and the trial court decided different questions. *See e.g.* Univest Corp, 148 Wis.2d at 38-39.

Here, the circuit court granted the motion in the interest of justice. Therefore, the doctrine should not apply. Here, the court received a slew of new, substantial, and different evidence. Therefore, the doctrine should not apply. Lastly, the circuit court decided a substantially different question than the question decided by the Supreme Court. In 1998, the Wisconsin Supreme Court assessed the admissibility of evidence that an unknown perpetrator committed the crime under a Sullivan analysis. The issue presented now is the admissibility of evidence that a known perpetrator committed the crime under a Denny analysis. Therefore, and again, the law-of-the-case doctrine should not apply.

The state also makes the weak argument that Dr. Yackovich's testimony was not newly discovered evidence. This, too, is plainly untrue. The circuit court recognized that Dr. Yackovich "testified about significant developments in the field of sex offender profiling which have occurred over the past 20 years." (A-Ap. 116). In fact, Dr. Yackovich made clear that, since 1995, researchers have gained new and significant insight into the methods by which inaccurate identifications and memories form. (A-Ap. 261-62). Dr. Yackovich applied this new research to reach his conclusions.

Therefore, both state's arguments should fail.

In conclusion, the circuit court learned facts that directly connected Stephen and the JD assault. The circuit court held that these new similarities, combined with the existing similarities, established a direct connection between Stephen and JD. Therefore, this Court should affirm the circuit's court's conclusion that the new evidence was material.

B. The circuit court, which both heard extensive testimony and received DNA results, properly exercised its discretion by concluding that a reasonable probability existed the jury would have a reasonable doubt as to Scheidell's guilt.

The circuit court did not erroneously exercise its discretion in finding that Scheidell's newly discovered evidence created "a reasonable probability . . . that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42. Using Plude as its guide, the circuit court found that a reasonable probability existed that the "jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." (A-Ap. 113).

In determining whether, a reasonable probability exist, the court asks, in the face of the new evidence, whether the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995). That is, the court asks whether the new evidence "undermines confidence in the outcome of the trial." Id. The question is not "whether the defendant would more likely than not have received a different verdict with the evidence." Id.

The post-conviction court considered how the newly discovered evidence impacted all the other evidence in the case. (A-Ap. 113-17). In assessing the old and new evidence, the post-conviction court found that the new evidence gave Scheidell the ability to construct an alternative theory. (A-Ap. 114). And given the new information on the identity of the alternative suspect, Scheidell would be able to subpoena him as a witness. (A-Ap. 114). Scheidell would be able to introduce evidence that Stephen committed two sexual assaults in Racine during that time period,[7] one of them strikingly similar to

[7] Wis. Stat 904.04(2)(b).

the crime at hand. The jury would then be able to weigh the credibility and demeanor of the witnesses when determining the ultimate question in the case. (A-Ap. 114).

The new evidence completes Scheidell's narrative and sets up a comparison that favors Stephen's guilt. The circuit court, in reaching this conclusion, did not err.

1. The old evidence was weak.

The post-conviction court observed that the state, at trial, presented a "paucity of evidence." (A-Ap. 114). The police never found any physical evidence linking Scheidell and the assault. Scheidell never made any incriminating statements. The post-conviction court correctly observed: "the sole evidence to support the verdict against Scheidell is the identity evidence from the victim." (A-Ap. 111).

At trial, the jury received evidence that discredited the victim's identification. JD never saw her attacker's face or hairline because he wore a mask and a nylon jacket draped across his head. (A-Ap. 103). She only saw his eyes and part of his cheek. (A-Ap. 103). She never heard her attacker's voice. (69:164). The attack occurred in the dark, and JD did not wear her eyeglasses. (69:192).

Further, the identification suffered from other weaknesses. JD claimed her attacker was drunk or "on something." (69:191). And, yet, when police interviewed Scheidell less than an hour after the assault, police found no indication he had been intoxicated. (A-Ap. 6). In fact, Scheidell looked as though he just awoke. (A-Ap. 6). JD struggled with her attacker, finally fighting him off and chasing him out of her apartment. (A-Ap. 4) And, yet, police found that Scheidell was neither bruised nor scratched nor flush nor out-of-breath. (A-Ap. 6).

To be clear, police searched Scheidell's apartment. Police searched his kitchen, garbage, basement, outside alley, up and down the stairwell, under his bed, in his laundry basket, in his bedroom. (A-Ap. 6). The police

found no physical evidence linking Scheidell to the attack. (A-Ap. 6). The police later conducted a second search. (A-Ap. 6). The police found no relevant evidence. (A-Ap. 6).

2. The new evidence is strong and compelling

The circuit court heard several pieces of newly-discovered evidence.

First, and perhaps most importantly, the court learned the identity of KC's attacker. DNA conclusively proved that Stephen assaulted KC. This KC attack, as the trial court noted, is strikingly similar to the JD assault. (A-Ap. 101) (A-Ap. 108).

Second, the court placed weight upon testimony of Dr. Jeffrey Neuschatz, an expert in eyewitness identification. Neuschatz discussed scientific research exploring eyewitness identification and victim memory: two areas of research that have developed significantly within the past twenty years. (A-Ap. 240-41)(Neuschatz testimony);(A-Ap-115)(circuit court order and opinion). Neuschatz applied this research to reach his conclusion that several factors could contribute to a victim's misidentification of her attacker; these factors include "poor lighting conditions, the stressful nature of the incident, the presence of a weapon, and the covering of the assailant's face." (A-Ap. 116). Specifically, Neuschatz shared new research that shows stressful situations may cause a victim to misidentify and misremember faces. (A-Ap. 223-227). Victims, such as JD, have trouble accurately remembering faces when the victim "fears that they are going to be harmed or that they are in fear for their life." (A-Ap. 226). Further, a victim may suffer from weapon focus. Weapon focus, in the words of the court, "draws attention from the attacker and focuses the attention on the weapon." (A-Ap. 116).[8]

[8] The Wisconsin Supreme Court has acknowledged that eyewitness testimony is “often hopelessly unreliable,” and that misidentification is “the single greatest source of wrongful convictions in the United States.” State v. Dubose, 2005 WI 126, ¶ 30, 285 Wis. 2d 143, 163, 699 N.W. 2d 592.

Third, the new evidence included the testimony of Dr. Yackovich. This evidence, already described in detail, had three significant takeaways. First, Scheidell is unlikely to have committed this assault. Second, whoever attacked KC most likely attacked JD. Third, only a small portion of the population could commit either assault.

Fourth, Laura Davis testified that she interviewed Stephen. Stephen explained that he lived and worked in the Racine area from in 1995 until his conviction in 1999. (A-Ap. 191-192). Further, Stephen did not deny involvement in the crime when provided an opportunity to do so. (A-Ap. 193). Instead, he apologized to Scheidell. (A-Ap. 193).

Fifth, JD identified her attacker by looking at his eyes, and she testified that her attacker's eyes were brown. (65:15)(69:181). First, the record shows that Scheidell has grey eyes. (A-Ap. 168)(Scheidell eye color). But, upon learning the identity of Stephen, the post-conviction court learned that Stephen has brown eyes. This fact---that Stephen has the same eye color as the JD attacker---constitutes important newly discovered evidence. (A-Ap. 302-303);(A-Ap. 169)(Stephen eye color).

Therefore, weighing the old evidence and the new evidence, the circuit court did not erroneously exercise it discretion in concluding that a reasonable probability existed that the jury would have a reasonable doubt as to Scheidell's guilt.

Of the first 200 persons exonerated through DNA, 158 (79%) involved eyewitness misidentification. B. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 60 (2008). This problem appears to be particularly prevalent in violent sexual crimes. A University of Michigan study of 340 exonerations revealed that mistaken eyewitness identification was involved in 88% of rape and sexual assault wrongful convictions. S. Gross, et al., Exonerations in the United States, 1989 Through 2003, 95 J. of Crim. Law & Criminology 523, 530 (2005).

C. Conclusion

The circuit court found the new evidence is material; the court also found that the new evidence creates a reasonable probability that a jury would have a reasonable doubt about Scheidell's guilt. The court did not erroneously exercise its discretion when reaching these conclusions. Therefore, this Court should affirm the circuit court's grant of a new trial based upon newly-discovered evidence.

II. The circuit court properly granted Scheidell a new trial in the interest of justice, because the circuit court, after both hearing extensive testimony and receiving DNA results, did not erroneously conclude that the issue of identity was never fully tried.

Courts may also grant a new trial in the interest of justice. To do so, Scheidell must prove either: "the real controversy has not been fully tried" or "it is probable that justice has for any reason miscarried." State v. Hicks, 202 Wis.2d 150, 160-161, 549 N.W.2d 435 (1996). The circuit court found that Scheidell satisfied the first prong. (A-Ap. 117-118).

The state argues that, in reaching this conclusion, the circuit court erred. The state's undeveloped argument should fail. First, the state failed to timely object and present arguments against this claim in the circuit court. Second, the state fails to offer any facts or law or reason to substantiate this claim. Third, the state, again, can seek no refuge in the law of the case.

To be clear, "where a trial court grants a motion for a new trial in the interest of justice, an appellate court should only reverse if the trial court abused its discretion." State v. McConnohie, 113 Wis.2d 362, 368, 334 N.W.2d 903 (1983). "We have frequently said that, whether or not we would have agreed with the decision of the court, we will uphold the discretion of a court we are reviewing if the decision made on appropriate facts and

the correct law is one which a court reasonably could have reached." Id. at 369. (internal citation omitted). "Thus, where either a court of appeals or a trial court in the appropriate exercise of its discretion, grants a reversal, such court has a limited right to make a decision, which this court would not have agreed with *ab initio*, without being reversed." Id. at 370 (italics in original).

For these reasons, this Court should affirm the circuit court's grant of a new trial based upon the interest of justice.

A. The state waived its challenge to the circuit court's ruling: that Scheidell was entitled to a new trial in the interest of justice.

A fundamental appellate principle is that a party alleging error on appeal has the burden of establishing that the error was first raised in the circuit court, by reference to the record. State v. Caban, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (citing Gove, 148 Wis. 2d at 940-41). Failure to raise issues below deprives the opposing party and the circuit court a full opportunity to consider them and creates serious concerns of fairness and notice. Caban, 210 Wis. 2d at 605.

The only exceptions to this fundamental principle of waiver are rare and discouraged. When the issue presented is exclusively of law, involving no questions of fact, the exception would apply. State v. Warrior, 2013 WI App 1, 345 Wis. 2d 397, 824 N.W.2d 927. However, interest of justice claims present a mixed question of law and fact. Hicks, 202 Wis. 2d at 159-60, State v. Armstrong, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98. And when questions of fact are at issue in post-conviction, the circuit court's decision will be overturned only when the court of appeals finds that the lower court misused its discretion in interpreting the facts or applying the law to the facts. Id.

The state never responded to Scheidell's interest of justice claim in the circuit court – not in its Response to his motion for new trial, and not in closing arguments in the post-conviction hearing. Now, for the first time, the state raises on appeal the circuit court's decision to grant a new trial in the interest of justice. Because the state had the opportunity to raise the issue below but chose not to do so, allowing it to raise the issue now would undermine the forfeiture rule, raising serious concerns of fairness and notice to Scheidell. Therefore, this Court should decline to entertain the state's interest-of-justice argument.

B. The state provided no examples of how the circuit court abused its discretion in finding that the controversy had not been fully tried.

"[T]he real controversy has not been 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, 288 Wis. 2d 551, 709 N.W.2d 436, n.4 (citation omitted).

Rather than challenging the circuit court's findings or reasoning, the state simply argues that the issue of identify has already been litigated and that Scheidell is merely seeking to take another bite at the apple. However, the state ignores all of the evidence that the circuit relied upon, including evidence never presented to a jury. Therefore, this Court should reject the state's arguments.

C. The Law-of-the-Case doctrine does not bind lower courts granting relief in the interest of justice.

The state does not argue that, in granting a new trial in the interest of justice, the circuit court violated law-of-the-case doctrine. The state, of course, has good reason not make such a futile argument. The case law is

clear and constant. "Courts have the power to disregard the rule of law of the case in the interests of justice and to reconsider prior rulings in a case." Moeck, 280 Wis. 2d 277, ¶25 (internal punctuation omitted); McGovern v. Eckhart, 200 Wis. 64, 75 227 N.W. 300 (1929); Stuart, 262 Wis. 2d 620, ¶ 24; State v. Brady, 130 Wis. 2d 443, 447, 388 N.W.2d 151 (1986). For this reason, to justify reversal, the state could not rely upon the law-of-the-case doctrine.

D. Conclusion

For these reasons, this Court should affirm the circuit court's grant of a new trial based upon an interest of justice.

III. Conclusion

For these reasons, this Court should affirm the decision and order of the circuit court.

Dated this 6th day of September, 2016.

Respectfully Submitted

X_____

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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. The length of the brief is 8,832 words.

_____
Steven Wright

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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.

I further certify that: 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.

_____
Steven Wright