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

REPLY BRIEF OF PLAINTIFF-APPELLANT

BRAD D. SCHIMEL
Wisconsin Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF CONTENTS

Cases

Statutes

Other Authority

ARGUMENT

I. The circuit court erred in granting a new trial based on newly discovered evidence.

This Court should reverse the circuit court's decision granting the newly discovered evidence claim. Scheidell failed to prove the materiality prong of the newly discovered evidence test, and the court erroneously concluded that there was a reasonable probability of a different result.

Scheidell first faults the State for "urg[ing] this court to adopt a de novo standard" of review. (Scheidell's Br. 13-14.) But *State v. Herfel*, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971), holds that when the postconviction court differs from the trial court, this Court applies de novo review. *Herfel* is good law, *see State v. Tobatto*, 2016 WI App 28, ¶ 14, 368 Wis. 2d 300, 878 N.W.2d 701, and it is consistent with the standard that appellate courts review de novo whether due process warrants a retrial. *State v. Coogan*, 154 Wis. 2d 387, 395, 453 N.W.2d 186 (Ct. App. 1990).

Scheidell ignores *Herfel* and instead isolates a sentence in *State v. Vollbrecht*, 2012 WI App 90, 344 Wis. 2d 69, ¶ 18, 820 N.W.2d 443, stating that this Court reviews a court's grant of a new trial based on newly discovered evidence for an erroneous exercise of discretion. (Scheidell's Br. 14-15.) But under *Vollbrecht*, this Court reviews de novo whether a reasonable probability of a different outcome exists. 344 Wis. 2d 69, ¶ 18.

And even if this Court reviews the circuit court's decision on materiality for an erroneous exercise of discretion, the outcome is the same. The circuit court, in determining that the evidence was material under *Denny*, failed to examine the relevant facts, apply the proper legal standard, and reach a reasonable conclusion.

A. Newly discovered evidence that Stephen assaulted K.C. was not material to the prosecution of J.D.'s attack.

Scheidell failed to prove materiality, i.e., that DNA evidence that Stephen was K.C.'s attacker satisfied the *Denny* test showing that Stephen had (1) motive, (2) opportunity, and (3) direct connection to the crimes against J.D. (State's Br. 11-30.)

Contrary to Scheidell's claim that the State "conceded that Scheidell satisfied" the first four newly discovered evidence factors (Scheidell's Br. 11), the State expressly challenged materiality. (*See* 54:6-8; 76:170-71; A-Ap. 313-14.) For support, Scheidell invokes only the appendix[1] where the circuit court wrote incorrectly that the first four newly discovered evidence factors "are not contested." (Scheidell's Br. 11, 12-13). His forfeiture claim is baseless.

1. Scheidell proved only weak motive and failed to satisfy the opportunity prong under *Denny*.

Again, Scheidell proved, at best, a weak motive. (*See* State's Br. 14 n.5, 24 n.11.) Scheidell's arguments to the contrary are unpersuasive. (Scheidell's Br. 16-17.) Even if a pattern of behavior shows motive, Stephen had not yet engaged in any pattern of sexual assault at the time of J.D.'s assault. In any event, that evidence does not strengthen a generalized motive to sexually assault.

As for opportunity, Scheidell ignores the postconviction court's statement that Scheidell's offer that

---

[1] With few exceptions, Scheidell cites to the appendix, not the record in his argument, contrary to Wis. Stat. § 809.19(1)(e). Moreover, many of those cites—including the one discussed above—do not support his propositions.

Stephen lived in Racine in 1995 did not satisfy that prong. (57:10; A-Ap. 110.) Instead, Scheidell reiterates that Stephen was in Racine,[2] Stephen did not deny involvement in K.C.'s attack, Stephen apologized to Scheidell, and Stephen had the "skills" to commit the crimes against J.D. because he later assaulted other women. (Scheidell Br. 18-19.) But none of that supports a finding that Stephen had opportunity to attack J.D. *See State v. Wilson*, 2015 WI 48, ¶ 68, 362 Wis. 2d 193, 864 N.W.2d 193 (noting that presence at crime scene or evidence of access to weapon generally is required to show that the third party actually committed the crime).

Scheidell also faults the State for producing "no evidence to suggest that Stephen lacked the opportunity to assault J.D." (Scheidell's Br. 19.) But Scheidell had the burden to prove opportunity by clear and convincing evidence. He failed.

2. Instead of finding a direct connection, the court reweighed the existing features of the two attacks and deemed them similar.

Under *Denny*'s direct connection test, Scheidell failed to prove (1) a direct connection between Stephen and J.D.'s assault and (2) that the third-party other-act satisfies *State v. Sullivan*, 216 Wis. 2d 768, 786, 576 N.W.2d 30 (1998). (State's Br. 14-16.)

---

[2] Scheidell's claim that "Stephen explained that he lived in the Racine area from 1978 [to] 1999" (Scheidell's Br. 18) is not supported by his appendix cite. There, Stephen apparently said that he was in Racine during the summer of 1995, which, again, does not clearly include May 1995.

a. Scheidell failed to identify a direct connection between Stephen and J.D.'s attack.

Scheidell does not respond to the State's arguments that he presented nothing to satisfy *Denny*'s direct connection requirement, such as evidence that Stephen was near J.D.'s apartment on the night of the attack, evidence of self-incriminating statements, or evidence linking Stephen to J.D.'s attack. (State's Br. 20.)

Instead, Scheidell claims that the supreme court found a host of similarities between the two crimes, introduces "new" newly discovered evidence, and asserts—without support—that the circuit court properly assessed both the old and new points of similarities in concluding that Scheidell satisfied the direct connection prong. None of that is right.

Scheidell writes that "[t]he existing similarities, found by the Wisconsin Supreme Court, are, by now, well known" and presents a table purporting to summarize the court's identified similarities between K.C.'s and J.D.'s attacks. (Scheidell's Br. 21-22.) The table does not represent the supreme court's decision.[3] In paragraph 49, the court

[3] The State also disputes the accuracy of the table. Scheidell fails to identify where in the appellate record he found the information within it. He misstates certain facts and avoids certain details. For example, K.C.'s attacker woke her with his hand on her back, not straddling her. (23:11, 13.) Scheidell's description of both attackers wearing a mask and "covered face with jacket" leaves out that J.D.'s attacker wore a black ski mask and a purple and green nylon jacket draped around his head (69:148-49, 180, 187), whereas K.C.'s attacker wore a grey hooded sweatshirt and "possibly" a white mask over his face (23:13). J.D.'s attacker likely entered through a door, not her window. Moreover, J.D.'s attacker and K.C.'s attacker appeared to use different knives in the attacks. (23:11, 13; 69:150-51.)

summarized Scheidell's argument for why K.C.'s attack was similar to J.D.'s. *State v. Scheidell*, 227 Wis. 2d 285, 308, 595 N.W.2d 661 (1999). (A-Ap. 177.) But the court largely rejected Scheidell's points:

> 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.

Id. The court then detailed the numerous differences between the assaults, particularly how the assailants approached and assaulted their victims. *Id.* at 308-10.

Here, the postconviction court, contrary to the law of the case, simply reweighed the same features that the supreme court held to be dissimilar and reached a different result. (57:11-12; A-Ap. 111-12.) But nothing about the DNA evidence identifying Stephen as K.C.'s attacker called into question the supreme court's assessment that K.C.'s attack was dissimilar to J.D.'s attack.

Confronted with that truth, Scheidell labors to create "new" newly discovered evidence. (Scheidell Br. 22-23.) But Yackovich's testimony is not newly discovered. Scheidell did not present it in his original motion to the court (34; A-Ap. 119-67.) Scheidell told the postconviction court that it was not stand-alone newly discovered evidence (76:104, 119, 166; A-Ap. 247, 262, 309). Moreover, Yackovich offered no testimony stating that the prevailing understanding of how

frequently home intruder rapes occurred changed since 1995.[4]

Incredibly, Scheidell also argues that he has gray eyes, and that that is new evidence countering J.D.'s claim that her attacker's eyes were brown. (Scheidell's Br. 22, 28.) Scheidell's eye color, which he has to have been aware of since childhood, is not new evidence. And even if he had gray eyes, he could have challenged J.D.'s trial testimony that the attacker's eyes were brown. He did not, presumably because his eyes appear to be brown.[5]

b. Scheidell cannot satisfy *Sullivan*'s similarity requirement.

Again, the supreme court previously deemed K.C.'s attack to be dissimilar (and thus irrelevant) to a prosecution of J.D.'s attack. That is the law of the case, and DNA evidence that K.C.'s attacker was Stephen—who cannot be reasonably mistaken for Scheidell—does not now render K.C.'s assault similar to J.D's. (State's Br. 16-20.)

Scheidell complains that the State's law-of-the-case argument is "completely without foundation," (Scheidell's Br.

---

[4] Scheidell writes that "Dr. Yackovich made clear that, since 1995, researchers have gained new and significant insights into the methods by which inaccurate identifications and memories form. (A-Ap. 261-62.)" (Scheidell's Br. 24.) Not so. In that testimony, Yackovich stated that the science involving *sex offender risk assessments* has advanced since 1995.

[5] The Department of Corrections lists Scheidell's eye color as brown. *See* https://offender.doc.state.wi.us/loc. He also appears to have brown eyes in the photo on his Racine booking sheet. (52; A-Ap. 168.) That sheet's designation of his eye color as gray appears to be a typo in which his hair color (gray) was mis-entered in the row designating his eye color.

21-23), but his supporting arguments are unconvincing (Scheidell's Br. 23-24):

- Although the circuit court has discretion in appropriate circumstances to disregard the law of the case for interest-of-justice claims, the claim at issue is a newly discovered evidence claim.

- There is not "a slew of new, substantial and different evidence." The only new evidence is DNA testing identifying Stephen, who looks nothing like Scheidell, as K.C.'s attacker. That is not substantial and different evidence relevant to Scheidell's guilt.

- The supreme court and circuit court ultimately decided the same, not a "substantially different," question. Although the supreme court decided whether the evidence satisfied *Sullivan*, whereas the circuit court applied *Denny*, *Denny* evidence still has to pass the *Sullivan* test.[6] Again, the evidence of K.C.'s assault did not satisfy *Sullivan* the first time around; evidence of Stephen's dissimilar appearance from Scheidell cannot call into question that holding.

---

[6] Scheidell incorrectly argues that *Sullivan* does not apply or that its hurdle is higher than *Denny*'s. (Scheidell's Br. 20-21 n.6). When a defendant seeks to admit third-party evidence to prove identity, the three-step *Sullivan* test applies. When that third party is known, the defendant has the additional burden of satisfying *Denny*. *See State v. Vollbrecht*, 2012 WI App 90, ¶ 29, 344 Wis. 2d 69, 820 N.W.2d 443; Daniel D. Blinka, Wisconsin Evidence § 404.7, at 214-26 (3d ed. 2008).

B. The circuit court wrongly concluded that a reasonable probability of a different result existed.

Scheidell does not respond to the State's argument that the evidence against him was strong (State's Br. 30-32), other than to complain that the State relied on circumstantial evidence and J.D.'s identification. (Scheidell's Br. 26-27.) But "[i]t is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

And Scheidell ignores the many weaknesses of his defense. (Scheidell's Br. 26.) To name a few, Scheidell told police that J.D. was drunk on the night of the attack (70:84), but denied saying that at trial. (70:175-76.) Scheidell claimed that he never left his apartment after arriving home the morning of the attack (70:84-85; 147), but a witness saw that Scheidell's car had moved sometime after Scheidell had arrived home. (70:221-22, 224-25.) And when police first arrived, Scheidell suggested that J.D.'s attacker entered through her bathroom window (70:33), which he somehow knew to be unlocked that night. (69:213; *see* 71:21-22.)

Scheidell then claims that he has not one but five pieces of newly discovered evidence, and calls them strong and compelling. (Scheidell's Br. 27-28.). He's wrong.

His claim that the "[K.C.] attack, as the trial court noted, is strikingly similar to the [J.D.] assault" (Scheidell Br. 27) is wrong because the supreme court already deemed the K.C. assault dissimilar.

Laura Davis's testimony that Stephen did not deny involvement in the K.C. attack is hearsay,[7] and it adds nothing linking Stephen to J.D.'s attack.

As for Neuschatz and Yackovich, Scheidell never presented those doctors' testimony as newly discovered evidence. Neuschatz never provided that the research he discussed about circumstances that can impact perception changed what was understood about perception in 1995. Again, the court instructed the jury to consider all of the circumstances affecting J.D.'s identification, including "those factors which might affect human perception and memory," "the mental state of the witness," "other circumstances of the observation," and how any intervening time may have skewed J.D.'s memory. (State's Br. 27; *see* 71:76.)[8] As for Yackovich, Scheidell does not respond to the State's points that Yackovich's testimony is not new, relevant, or admissible.

Moreover, the court assesses the likelihood of a different result by weighing the old evidence against the newly discovered evidence, not every piece of evidence that Scheidell may seek to use in a new trial. *See State v. Plude*,

---

[7] Contrary to Scheidell's response (Scheidell's Br. 18 n.4), the court did not rule that Davis's interview was admissible as a statement against interest. It allowed only Davis's statement that Stephen did not dispute the content of a document. (76:54; A-Ap. 197.) In any event, the State maintains (State's Br. 22-23) that nothing Stephen said (or did not say) to Davis was a statement against interest.

[8] In his motion, Scheidell presented only pre-1995 sources regarding how conditions can affect a witness's identification. (34:18; A-Ap. 136.) The post-1995 sources he now cites (Scheidell's Br. 27-28 n.8) do not cure that omission. Nor do they address situations, like here, where the witness knows and recognizes her attacker during the attack.

2008 WI 58, ¶ 33, 310 Wis. 2d 28, 750 N.W.2d 42. Again, Neuschatz's and Yackovich's testimony is not new. Scheidell could have sought to present experts at trial to emphasize the limits to eyewitness identification and to opine that Scheidell did not fit the profile of a sex offender. Scheidell may well wish to try to present that evidence at a new trial. But that does not make it new evidence factoring into the reasonable-probability analysis.

In sum, the circuit court improperly re-evaluated the evidence of K.C.'s attack contrary to the supreme court's decision. The court lacked grounds to ignore the law of the case. Further, the court erred in concluding that there was a reasonable likelihood of a different result. This Court should reverse.

II. This is not a "truly exceptional" case warranting a new trial in the interest of justice.

When a defendant fails, as Scheidell did, to demonstrate entitlement to a new trial based on newly discovered evidence, a circuit court may grant a new trial in the interest of justice if it provides reasons why the case is so "truly exceptional" to warrant such relief. *State v. Avery*, 2013 WI 13, ¶ 55 & n.19, 345 Wis. 2d 407, 826 N.W.2d 60. Rather than doing that, the court relied on the same reasoning it used to grant the newly discovered evidence claim. It wrote that the real controversy of J.D.'s assailant's identity was not tried because "the jury never had the opportunity to judge the ability of the victim to reliably make those distinctions" under the circumstances. (57:18; A-Ap. 118.) For the reasons above, those are not "truly exceptional" circumstances warranting relief.

Rather than explain why the court soundly exercised its discretion, Scheidell complains that the State forfeited its objection to the court's decision. (Scheidell's Br. 30-31.) But

the postconviction court granted the interest-of-justice claim on the same grounds it granted the new trial claim—all grounds that the State opposed—and not based on any perceived forfeiture by the State. (54:1-8.) Moreover, even if the forfeiture rule applies to interest-of-justice claims,[9] the State's argument that the circuit court improperly exercised its discretion in granting a new trial in the interest of justice is not "blindsiding" the court or Scheidell. *See In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155.

And the State does not concede that the law of the case is inapplicable in this context. (Scheidell's Br. 31-32). The supreme court's decision deeming evidence of the K.C. attack irrelevant precludes a finding that the real controversy was not tried. (State's Br. 35.) Although the circuit court may disregard the law of the case in the interest of justice, that discretionary decision requires "'cogent, substantial, and proper reasons.'" *State v. Moeck*, 2005 WI 57, ¶ 25, 280 Wis. 2d 277, 695 N.W.2d 783. Those reasons don't exist. Scheidell already litigated the similarity of the K.C. attack. The DNA evidence identifying Stephen as K.C.'s attacker does not link the two attacks or cast doubt on the supreme court's decision that the attacks were dissimilar. Moreover, at trial Scheidell aggressively challenged J.D.'s ability to identify him given the attack conditions, and repeatedly emphasized that he was not a likely rapist. The real controversy was tried. The circuit court improperly exercised its discretion in granting a new trial on this ground.

---

[9] Given that a circuit court may grant a new trial in the interest of justice sua sponte, *see Behning v. Star Fireworks Mfg. Co.*, 57 Wis. 2d 183, 188, 203 N.W.2d 655 (1973), the forfeiture rule arguably does not apply with the same force to interest-of-justice claims as it does other claims.

CONCLUSION

This Court should reverse the postconviction court's decision and remand with instructions to reinstate the vacated judgment of conviction.

Dated this 19th day of October, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

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 2998 words.

_____
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 19th day of October, 2016.

_____
SARAH L. BURGUNDY
Assistant Attorney General