STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2016AP260
(Milwaukee County Case No. 2004CF609)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY L. WILBER,

Defendant-Appellant.

Appeal From The Final Orders Entered In The Circuit Court For Milwaukee County, The Honorable Jeffrey A. Wagner and Honorable Mary Kuhnmuench Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

In this "whodunit" case, the state's theory supporting Wilber's conviction for killing David Diaz conflicts with the physical evidence and relies merely on the facts that Wilber was being a jerk and that no evidence identified an alternative shooter.

No one saw Wilber shoot Diaz. At most, a few witnesses assumed he did, and a single witness testified that Wilber was crouching with a semiautomatic handgun *afterwards*. Diaz was shot in the back of the head with a *revolver*, not a semiautomatic, and was shot while Wilber was in front of him as Diaz stood in

the doorway between his kitchen and the living room.[1]

Despite the absence of any ricochet marks, the bullet fragments were found *behind* where Wilber had been in the kitchen, exactly where one would expect them to be had Diaz been shot from the living room.

The state nonetheless claims, as did the circuit court, that there is no reasonable probability that a jury could do anything but convict Wilber, regardless what new evidence he may provide. Yet, even if the evidence were not already insufficient for conviction, a reasonable jury easily could find grounds for acquittal in light of the identified errors and newly discovered evidence that Ricky Muniz admitted, and was seen, shooting Diaz from the living room. *E.g.*, ***United States v. Agurs***, 427 U.S. 97, 113 (1976) (errors likely to have greater impact where evidence already marginally sufficient).

I.

BECAUSE HIS FACTUAL ALLEGATIONS, IF TRUE, MANDATE A NEW TRIAL, WILBER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS NEWLY DISCOVERED EVIDENCE MOTION

A. Muniz's Admissions to Martin Are Newly Discovered Evidence

The state concedes, as it must, that Muniz's admission to having shot Diaz and why qualifies as an admission against interest. State's Brief at 17-18. Its suggestion that nothing

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[1] While an officer claimed that one witness said that Wilber pointed a semiautomatic handgun at Diaz's head as Diaz turned south to leave the kitchen (R51:286, 294-95, 303, 305-08), that witness denied the statement and its contents under oath at trial (*id.*:114, 116). Moreover, the officer's assertion conflicts with the physical evidence showing a through-and-through shot, the absence of ricochet marks, and the bullet fragments ending up north of Diaz's body.

corroborated Muniz's admission, *id.*, ignores the facts that Muniz was seen with a gun in the living room (where the shot came from), he gave Martin a revolver to get rid of (the type of weapon used to kill Diaz), and was seen shooting Diaz by Roberto Gonzalez.

Muniz's act of giving Martin a revolver to get rid of and his request for clean clothing themselves assert no facts and thus are not hearsay. Wilber's Brief at 14-15. Contrary to the state's misinterpretation of hearsay, State's Brief at 18 n.8, it is Martin's non-hearsay in-court testimony, not Muniz's words, that proves Muniz made the requests.

B. Gonzalez's Eyewitness Observation of Muniz Shooting Diaz is Newly Discovered Evidence

The state's argument regarding the newly discovered evidence that Gonzalez saw Muniz shoot Diaz confuses three separate facts: (1) that Gonzalez was at the party (which Wilber and Chernin knew before trial), (2) that Gonzalez saw someone other than Wilber shoot Diaz (that Wilber and Chernin first learned the last day of trial), and (3) that Gonzalez saw Muniz shoot Diaz (that Wilber did not learn until after his conviction and direct appeal). State's Brief at 18-20.

While Wilber knew before trial that Gonzalez was at the party and asked Chernin to investigate what Gonzalez might know, that does not establish that Wilber or Chernin knew that Gonzalez had seen Muniz shoot Diaz, nor does the disclosure during trial that other people claimed to know what Gonzalez saw while at the party, since their allegations differed from what Gonzalez actually saw and disclosed to Wilber after trial and the direct appeal. It is undisputed that neither Wilber nor his attorneys knew at trial or direct appeal that Gonzalez had seen Muniz shoot Diaz.

To the extent the state claims Wilber was negligent in learning what Gonzalez knew, State's Brief at 18-20, it ignores the fact the that the trial court prevented his trial counsel from interviewing Gonzalez at trial and, out of fear of Muniz, Gonzalez did not cooperate with counsel on direct appeal. The state's argument that Chernin acted unreasonably here also conflicts with its subsequent ineffectiveness argument that Chernin acted reasonably. State's Brief at 31. It cannot have it both ways.

The state's argument that Wilber was negligent in "wait[ing] nearly a decade to get Gonzalez's story," State's Brief at 19-20, misstates the applicable standard. There is no deadline for filing a due process claim under Wis. Stat. §974.06. Wis. Stat. §805.16(5).

The relevant "neglect" under the newly discovered evidence standard references the failure to discover the evidence *prior to conviction*. That is, even though evidence might be "new," as in not actually discovered before conviction, it is not properly "newly discovered" if the party unreasonably failed to seek it then.

Finally if there is any neglect, it is Chernin's failure to comply with Wilber's request that he investigate what Gonzalez knew prior to trial, which does not help the state. If Chernin acted unreasonably, that was deficient performance, merely shifting the analysis to ineffectiveness. *See* Section III, *infra*.

C. The Newly Discovered Evidence Creates a Reasonable Probability of a Different Result

There remains no rational dispute that the newly discovered evidence creates a reasonable probability of a different result. Wilber's Brief at 12-14.

The state's (and circuit court's) reference to ***State v. Denny***,

120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), misconstrues that case. State's Brief at 20. ***Denny*** addresses *circumstantial* evidence that someone else committed the offense, not direct, eye-witness testimony or admissions identifying the perpetrator. ***Denny*** is a relevance case, addressing the requirements for presenting circumstantial evidence that someone else *might* have committed the offense. Direct evidence that someone else *in fact* committed the offense is inherently relevant in a "whodunit" case such as this. Direct evidence of third party guilt avoids the "'unsupported jury speculation as to the guilt of other suspects,'" 120 Wis.2d at 622 (citation omitted), ***Denny*** is designed to avoid.

Moreover, even without the trial evidence of Muniz's dislike for Diaz and his admission to shooting Diaz to prevent him from shooting Wilber (R98:App.318), both Gonzalez's eyewitness testimony to Muniz's shooting of Diaz and Muniz's admission to it inherently satisfy ***Denny's*** relevancy requirements of opportunity and direct connection. Motive is circumstantial evidence of guilt rendered unnecessary given direct evidence of the fact.

The state's remaining prejudice argument ignores the applicable legal standards by asking the Court to join the circuit court in usurping the jury's role of assessing credibility. State's Brief at 20-21; *see* Wilber's Brief at 16-20 and authorities cited). The state does not respond to the authorities barring such judicial assumption of the jury's role, effectively conceding the point. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (that not disputed is deemed conceded).

The state's argument also relies on the fallacy that its feeble, at best speculative case against Wilber is somehow strong

enough to *mandate* conviction. The state ignores the facts that (1) its case conflicts with the physical evidence, and (2) the new evidence is direct, credible, and corroborated, as well as consistent with the physical evidence and all of the eye-witness testimony at trial, and establishes that Muniz, not Wilber, is the guilty party.

Try as it might, the state cannot overcome the facts that

- the physical evidence (location of bullet fragments, no evidence of ricochet or blood splatter to south, position of Diaz's body negating the state' cork-screw pirouette theory) conflicts with its speculative theory,[2]
- *none* of the eye-witnesses either testified or told police that they saw Wilber shoot Diaz,
- the strongest evidence against Wilber either
    - conflicts with the physical evidence and was specifically denied under oath by the supposed source (the statement attributed to Jeranek Diaz that Wilber pointed a semiautomatic at Diaz), or
    - is as consistent with Wilber's innocence (Torres' testimony that he saw Wilber crouching with a semiautomatic immediately after someone shot Diaz in the head from above with a revolver), and

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[2] Contrary to the state's repeated assertion, there is no evidence, expert or otherwise, that the physical evidence is consistent with the conviction. The closest – Dr. Jentzen's testimony that bullets can ricochet after passing through a body (R49:70-71) – is meaningless given the evidence there was no sign of such a ricochet (R47:30-31).

- that evidence such as witnesses hearing a shot from near where Diaz and Wilber were standing is meaningless; given Dr. Jentzen's testimony that the gun was fired from only 2-3 inches away (R49:57), the gun was fired near Diaz and Wilber no matter who fired it.

The state likewise cannot overcome the fact that a reasonable jury easily could credit the testimony of Martin and Gonzalez (and Wilber's experts) and that their testimony is fully consistent with the physical evidence, *all* of the eye-witness testimony, and Wilber's innocence.

II.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION

There is no dispute that, until the misguided decision in ***State v. Kaster***, 2006 WI App 72, ¶9, 292 Wis. 2d 252, 714 N.W.2d 238, is overruled, actual innocence is insufficient to satisfy the "sufficient reason" requirement of Wis. Stat. §974.06(4). *See* Wilber's Brief at 20-21 n.11. Remand under ***State v. Sutton***, 2012 WI 23, 339 Wis.2d 27, 810 N.W.2d 210 (2012), would have cured that defect easily, allowing Wilber to add the obvious ineffectiveness of post-conviction/appellate counsel claim, but the state objected, preferring a game of litigation "gotcha" over providing Wilber a fair opportunity to have his claim heard.

On the merits, the state simply ignores the fact that its speculative theories directly conflict with the undisputed physical evidence: i.e., that the shot was through-and-through, that the bullet would have continued traveling in the same direction unless it hit something, that the bullet fragments ended up north of Diaz's body in a straight line signifying the shot came from the living room to the south while Wilber was north

of Diaz, that Diaz's body position was inconsistent with the type of "corkscrew pirouette" necessary to the state's speculation, and that there was *no* evidence of either blood spray to the south or any ricochet as would be necessary for the state's theory.

There was no expert testimony supporting the state's speculative theories, and it cited none. *See* State's Brief at 30. Dr. Jentzen's testimony that a bullet would not necessarily continue on a straight line if it bounced off of something (R49:70-71) is meaningless given that the police found no evidence of a ricochet (R47:30-31).

Since the state raised ineffectiveness of post-conviction counsel, State's Brief at 28-30, it is fair to note that its argument on the merits fails and that this sufficiency claim is far stronger than the feeble claims raised by post-conviction counsel. Legal insufficiency of the evidence would have been apparent from the record and goes directly to Wilber's innocence, unlike the feeble and harmless technicalities they post-conviction counsel raised regarding evidence that someone had burned shoes that could not have been Wilber's or that Wilber was shackled for misconduct during closing arguments.

III.

WILBER IS ENTITLED TO A HEARING ON HIS CLAIM THAT TRIAL COUNSEL DENIED HIM THE EFFECTIVE ASSISTANCE OF COUNSEL

If the state is correct that Chernin's failure to investigate Gonzalez was negligent, such that Gonzalez's evidence of having witnessed Muniz shoot Diaz is not newly discovered evidence, State's Brief at 18-19, then that failure was unreasonable and therefore deficient performance. *E.g.*, ***Strickland v. Washington***, 466 U.S. 668, 688 (1984) (equating unreasonableness with deficient performance).

The state's suggestion that the record disproves Wilber's affidavit that he told Chernin Gonzalez was at the party and asked him to find out what Gonzalez saw is false. The fact that there was no reason to identify Gonzalez or any of the others in the living room (*see* R51:137 (10-13 unidentified people in "front room")) at trial does not rationally suggest they were not there. Wilber's Brief at 16-17. Moreover, Wilber sought remand in part to present witnesses corroborating the fact that Gonzalez *was* at the party. The state opposed remand and should not now be allowed to rely on claimed deficiencies in the record it helped cause.

Nor does Chernin's comment that neither he nor Wilber knew that Gonzalez supposedly had seen Isaiah shoot Diaz negate the fact that Wilber asked Chernin to investigate Gonzalez. Wilber knew that Gonzalez was there, not what Gonzalez saw, and Chernin did not know what Gonzalez saw because he unreasonably failed to investigate Gonzalez.

Beyond conclusory assertions, the state does not dispute, and thus concedes, that Chernin's failure to consult with experts regarding the physical evidence was deficient performance. State's Brief at 31-33. ***Charolais Breeding Ranches****, supra*. Its prejudice argument, moreover, fails for the same reason as before. The circuit court's reasoning on which it relies vastly overstated the strength of the state's case, ignored the contrary witness testimony, ignored the physical evidence, and ignored the mandate to view the evidence most favorably to the defendant, instead usurping the jury's role in assessing credibility and weight of evidence. *See* 1-2, *supra*; Section I,C, *supra*; Wilber's Brief at 20-23, 28-29

Given that this was a "whodunit" case, expert testimony that the defendant could not have committed the offense given

the physical evidence cannot help but create a reasonable probability of a different result, especially when combined with newly discovered eyewitness testimony and admissions that someone else committed the offense in a manner consistent with the physical evidence and trial testimony.

IV.

WILBER IS ENTITLED TO A HEARING ON HIS CLAIM THAT POST-CONVICTION COUNSEL DENIED HIM THE EFFECTIVE ASSISTANCE OF COUNSEL

Beyond erroneously suggesting that Wilber's underlying claims (insufficiency of the evidence and ineffectiveness of trial counsel) lack merit, the state does not dispute that his post-conviction counsel's failure to raise those claims denied him the effective assistance of post-conviction counsel. State's Brief at 25-33.

V.

THE COURT ERRONEOUSLY EXERCISED ITS DISCRETION BY DENYING REMAND

The state's brief establishes that the Court's assumption in denying Wilber's remand request – that there was no need for remand – was incorrect. Throughout its response, the state (like the court below) relies on supposed pleading defects or factually inaccurate assumptions that could be easily cured on remand.

For instance, the state repeatedly asserts that no one saw Gonzalez at the party. State's Brief at 21, 31, 34, 35. That is false. Remand Motion at 7.

The state similarly claims that Wilber forfeited his insufficiency argument by not showing "sufficient reason" why it was not raised previously, State's Brief at 28-29, but the failure to allege ineffectiveness of post-conviction/appellate counsel

likewise could have been cured easily on remand.

The circuit court (R99:15-16; App. 15-16) and the state claim that Gonzalez's identification of Muniz as the shooter conflicts with the assertion made at trial that he would identify "Isaiah" as the shooter. State's Brief at 21. Yet, Gonzalez in fact never said anyone else was the shooter, a fact remand would have made clear. Remand Motion at 7-8.

VI.

A NEW TRIAL IS APPROPRIATE IN THE INTERESTS OF JUSTICE

The state's interests of justice argument simply repeats the same misleading or inaccurate talking points it relies on throughout its brief, ignoring the at best marginal sufficiency of the state's evidence, the fact that the conviction conflicts with the undisputed physical evidence, and the fact that the evidence of Wilber's innocence denied to the jury is both admissible and fully consistent with the physical evidence and eyewitness testimony at trial. State's Brief at 34-35.

Conclusory assertions about the "strength" of the state's case do not change the fact that, absent the evidence confirming Wilber's innocence, the real controversy was not fully tried. Nor do they change the fact that, even if the trial evidence is deemed marginally sufficient, there exists "a substantial probability of a different result on retrial" given the new evidence and the fact that the conviction conflicts with the undisputed physical evidence. ***Vollmer v. Luety***, 156 Wis.2d 1, 16-17, 456 N.W.2d 797 (1990).

VII.

THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN REFUSING TO ORDER THE STATE TO PROVIDE WILBER COPIES OF PHOTOGRAPHS DISCLOSED TO HIS PRIOR LAWYER IN PRETRIAL DISCOVERY

The state persists in attempting to shoehorn its concealment of previously-disclosed evidence into a legal standard that does not apply. State's Brief at 21-25; *see* Wilber's Brief at 38-40. Wilber does not seek "discovery;" the evidence already was disclosed as discovery prior to trial. Rather, Wilber merely seeks copies of that which was previously disclosed to Attorney Chernin because Chernin failed to obtain copies and to turn them over to Wilber (R83:1). Requiring Wilber to satisfy a strict standard for post-conviction discovery thus makes no sense.

The state expends 25% of its total argument on this claim. Yet tellingly, it still has provided no rational justification for concealing copies of the previously disclosed evidence from Wilber and his experts, effectively conceding that the reason is to prevent Wilber from making use of that evidence to prove his innocence.

The state's reliance on forfeiture is misplaced. Wilber's motion was not based exclusively on due process and noted that post-conviction discovery standards do actually not apply to his situation (R83:8-10).

CONCLUSION

Danny Wilber therefore respectfully asks that the Court vacate his judgment of conviction, dismiss the charge against him and, if such relief is not granted, remand the matter to the circuit court for production of the requested photographs and a

hearing on his motion for a new trial.

Dated at Milwaukee, Wisconsin, June 2, 2018.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,951 words.

_____

Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Robert R. Henak

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 2nd day of June, 2018, I caused 10 copies of the Reply Brief of Defendant-Appellant Danny Wilber to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Robert R. Henak

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