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STATE OF WISCONSIN

COURT OF APPEALS

10-12-2016 DISTRICT I

STATE OF WISCONSIN,

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

Plaintiff-Respondent,

v.

TYSHUN DEMICHAEL YOUNG,

Defendant-Appellant.

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REPLY BRIEF OF DEFENDANT-APPELLANT

Appeal No. 2016AP657 CR

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APPEALED FROM THE JUDGMENT OF CONVICTION AND SENTENCE FILED  
DECEMBER 4, 2014 THE HONORABLE JOHN SIEFERT, PRESIDING

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## **ARGUMENT**

### **I. The evidence was irrelevant.**

The State correctly asserts that while motive is not an element of a crime, it may nevertheless be a proper subject of inquiry if it meets the same standards of relevance as other evidence, citing **State v. Brecht**, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). We believe many of the cases cited by the State in support of its legal propositions illustrate why the evidence in this case was irrelevant. For example, in **Brecht**, the defendant was convicted of first degree murder. Evidence was admitted at trial of the victim's disapproval of the defendant's homosexuality, and that the victim's disapproval was conveyed to the defendant. Therefore, it was relevant evidence as to motive. Nothing in this case indicates that the defendant was aware of any reason to be angry with the victim.

The State also argues that evidence of Watson's death was relevant because it "related" to several facts of consequence; namely, intent and identity. Regarding intent, the State cites **State v. Anderson**, 230 Wis. 2d 121, 130-31, 600 N.W.2d 913 (Ct. App. 1999). In **Anderson** the defendant, who was on trial for a homicide, had previously been convicted of a sexual assault, at which trial the victim

testified. The evidence of the prior sexual assault and conviction following the victim's testimony was admitted as prior acts evidence on the issues of motive and intent. It was allowed in order to give context to his alleged statement at the time of the killing that "a dead bitch can't say anything." The testimony in this case gave no such context.

The State also argues that the evidence complained of was relevant to identity. As a general proposition that is also true. Again, however, the facts of the case cited by the State for that legal proposition are instructive. The State cited **State v. Zimmerman**, 2003 WI APP 196, ¶¶27-28, 266 Wis. 2d 1003, 669 N.W.2d 762. In **Zimmerman** evidence was admitted that the defendant was obsessed with the murder victim, who had been killed on the day of her wedding to another man. The testimony included a witness' testimony that the defendant had said that if he couldn't have the victim, no one could. **Id** at ¶16. No such statements illustrating motive were made by Mr. Young.

The State goes on to argue that the evidence about Watson's death tended to make the identity of the shooter more probable. (State Br.7) The State cites **People v. Garcia** for the stated proposition that "(t)he anniversary of a loved one's death sometimes motivates people to commit

crimes". Citing **Garcia** as relevant to this case is more than a stretch. **Garcia** has no relevance here.

In **Garcia** there was no evidentiary argument made regarding motive. In **Garcia** the defendant received the death penalty for murdering her husband. Her chief complaint was that in giving her the death penalty the court placed too much emphasis on her previous killing of her 11-month-old child. In rejecting her argument, the court noted, among other things, that the defendant had been previously convicted of numerous serious crimes, including the pistol whipping and robbery of her former husband and his girlfriend and two arsons committed on the anniversaries of her daughter's birth and murder.

The **Garcia** case had nothing to do with motivation to commit a crime. There was nothing in the case indicating that the death of the defendant's child motivated her to commit crimes. It would be an odd argument, given that in **Garcia** the "loved one" who died was killed by the defendant herself. In any event, that was a capital sentencing case with no relevance to this case.

The State also cites **Haskins v. State**, 97 Wis. 2d 408, 413, 294 N.W.2d 25 (1980), for the proposition that evidence that supports a person's desire for revenge is relevant as proof of motive. The facts in **Haskins** as well

are instructive. In **Haskins** the defendant was convicted of party to a crime first degree murder for the shooting death of one Winters. Evidence showed that the victim, Winters, had robbed Haskins. Evidence also showed that an accomplice of Haskins' held a gun to the head of Winters' girlfriend to ascertain Winters' whereabouts. The girlfriend also was injected with heroin to get her to talk. **Id** at 411. The court determined that these prior acts helped to establish the defendant's revenge motive for the killing. **Id** at 413.

There are important factual differences between our case and **Haskins**. In **Haskins** the evidence showed that Winters and two other men robbed Haskins at his home, and that Winters called after the robbery to apologize. The case indicates that Haskins pretended to accept the apology but in actuality planned to have Winters killed. It was in this context that the steps taken by Haskins' accomplices to locate Winters were admitted. The revenge motive was clearly established. There is no evidence in Young's case establishing revenge as a motive. The State's argument that "Adam", who was a friend of Mr. Young's brother, was present when someone else shot Mr. Young's brother, and was cooperating with the State to prosecute the killer, hardly establishes a motive for Young to want to shoot Adam. The State's theory is entirely speculative.

The State cites **Barrera v. State**, 99 Wis. 2d 269, 280, 298 N.W.2d 820 (1980) in support of its speculation. **Barrera** however does not help the State. The State quotes **Barrera** for the proposition that any fact which tends to prove a material fact is relevant even though it is only a link in a chain which must be proved to make the proposition at issue more or less probable. That may be true; however, this evidence is not a link in a chain, there is no chain. It is the only arguable evidence of motive. The State's faulty analysis is evident when the sentence following the quoted sentence from **Barrera** is considered. That sentence provides, "(r)elevancy is not determined by resemblance to, but by the connection with, other facts." **Id** at 280. This "anniversary" evidence was not related to any other facts that made it probative.

At the end of the section of its brief addressing relevance, the State indicates that the State did not admit the evidence as third-party suspect evidence. We recognize that. We cited **State v. Wilson** to argue that speculative evidence is inadmissible.

The State next argues that the potential for prejudice did not outweigh the probative value of the evidence. We disagree. The State correctly observes that evidence that is highly relevant has great probative value, while evidence that is only slightly relevant has low probative value. We have already argued that we don't believe this evidence was relevant at all. If it was relevant, it was only minimally so. Again, the fact that a friend of the defendant's brother was present when his brother was shot, by someone else, and was cooperating in the prosecution of the shooter, could only, at most, be minimally probative as to why the defendant would attempt to kill that friend.

The State also argues that the court was not mistaken about the facts when it admitted the evidence. It argues that it was aware that the State might be unable to elicit testimony that Young blamed Adam for Watson's death. Contrary to the State's argument, we believe this shows that the court's decision to overrule the defense objection was unreasonable. The court stated that the evidence would be relevant "(i)f, for example, one of the victim/witnesses says he told me he shot me because this is in retaliation for my brother, clearly relevant." (R.40:17). The court was undoubtedly correct, there was no such evidence however.



When the defense objected at trial, the objection should therefore have been sustained.

### **III. The error was not harmless.**

The State argues that the admission of the evidence was harmless for a number of reasons. First it argues that the evidence was cumulative and that the defense did not object to similar testimony later in the trial. (State Br. 12.) The State argues that the only objection came during Adam's testimony. The State is really arguing that the failure to object to the later testimony precludes consideration of the court's decision to admit the evidence. This is incorrect. In **Silberman v. Roethe**, 64 Wis. 2d 131, 150-151, 218 N.W.2d 723 (1974), the supreme court observed, "in light of the trial court's general overruling of defense counsel's objections, the failure to renew the objection was not a waiver of objection to this type of testimony."

There was no need for counsel to continue to object. He had been overruled and the evidence had been admitted. Had his earlier objection been sustained, counsel surely would have objected to the later testimony, or counsel would have been ineffective for not objecting.

The State then argues that this evidence benefited Young. That is simply incorrect. There is no basis in fact

for such an argument. The State did not introduce the evidence to aid the defendant. The evidence was used to ascribe a motive to the defendant in a case where the shooting otherwise made no sense. It did not benefit Mr. Young.

The State finally argues that this was minor testimony. That is also incorrect. Motive was an important issue in the case.

As we pointed out in our brief, in its opening statement the defense argued that the shooting made no sense. It noted that motive was not an element of the offense, but argued that it was something important for the jury to consider. The defense argued that motive was important because it was not a random shooting, but a shooting at a home. The defense noted that someone went to the house in the middle of the day, rang the doorbell, asked for a specific individual, waited for that person to come to the door and then fired shots inside the house. The defense indicated that there had to be a motive, and that was something for the jury to consider (R.41:14).

The defense noted that the two persons who identified the defendant were brothers with multiple criminal convictions. The defense also noted that their sister could

not identify the defendant. There was no physical evidence. (R.41:14,15,16) .

In its closing argument the State attempted to address the defense's obvious argument that there was no reason for the defendant to shoot Adam. The State argued that when Adam's mom asked him who shot him and why, Adam said it was the defendant, but argued that Adam didn't want to tell his mother why (R.43:53). The State then ran through the elements of the offenses and began its substantive argument regarding attempted intentional homicide by arguing that it was not a recklessly endangering safety case, because the defendant was at the house with the intent to kill. The State began its argument regarding intent to kill by stating: "Now, to the first element, that he intended to kill (Adam), what evidence is there of that? You heard that the day this happened, November 10 of 2013, was the one-year anniversary of the defendant's brother's death. (Adam) was targeted because of that day's significance." (R.43:56). Then, at the end of its initial summation to the jury the State, after identifying some "nitpicking" the defense might do regarding the type of weapon used, ended by saying: "What does that matter? ... But if you look at all the evidence, all the consistency with the identification, the fact that this happened on the

anniversary of the defendant's brother's death, there can be only one verdict, and that's that the defendant went to the house to get his revenge." (R.43:66).

In its rebuttal argument the State again stressed the importance of the shooting occurring on the anniversary of the death of Mr. Young's brother. It argued: "to believe the defendant's version of what happened, you have to believe that he's the unluckiest man in the world, that on the year anniversary of his brother's death, some random person shows up at the (B's) residence for absolutely no reason ... ." (R.43:92). At the very end of its summation the State argued: "What happened here, ladies and gentlemen, was much simpler. The defendant, after living with his grief, living with the grief of his mother, of his family--You saw her grief on the stand, she's still rightfully heartbroken about what happened to her son--the defendant had to live with that three times a day for a year. And on the one-year anniversary, he had enough. He went over to the (B's) house, asked for (Adam). When (Adam) came out, he opened fire because he was trying to kill him." (R.43:95).

Clearly the State recognized the importance of this evidence. It was not of minor importance.

Dated: \_\_\_\_\_, 2016.

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**CERTIFICATION**

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief in non-proportional type with a courier font and is 11 pages long including this page.

Dated: \_\_\_\_\_, 2016.

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**CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 § 809.19(12).

I further certify that this electronic brief is identical to the printed form of the brief filed as of this date.

A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: \_\_\_\_\_, 2016.

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