STATE OF WISCONSIN COURT OF APPEALS
DISTRICT I

Appeal No. 16AP791-CR
Milwaukee County Case No. 12-CF-1134

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ALPHONSO LAMONT WILLIS,
Defendant-Appellant.

ON APPEAL FROM THE SENTENCE, THE JUDGMENT OF CONVICTION, AND THE ORDERS DENYING POSTCONVICTION RELIEF ENTERED BY THE HONORABLE JEFFREY WAGNER

BRIEF AND APPENDIX OF ALPHONSO WILLIS, THE DEFENDANT-APPELLANT

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1. The State introduced into evidence the boots Willis was wearing when arrested and argued that those boots matched impressions left outside the murder scene. Did the introduction into evidence of these boots, which indisputably could not have left the impressions outside the crime scene, deprive Willis of a fair trial?

The circuit court ruled, without a hearing, that Willis was not deprived of a fair trial and denied Willis's alternative claims of prosecutorial misconduct, ineffective assistance of counsel, newly-discovered evidence, and interests of justice (R.63 *generally*; App. 301-306).

2. Was trial counsel ineffective for failing to introduce objective evidence of the victim's time of death, which, when coupled with a disinterested witness's testimony, would have tended to establish Willis's innocence?

The circuit court ruled, without a hearing, that Willis was not prejudiced by his trial attorney's performance in any respect (R.51 *generally*; App. 201-209).

3. Is Willis's sentence invalid because the circuit court, Judge Jeffrey Wagner presiding, did not sufficiently explain its sentence pursuant to ***State v. Gallion***, 2004 WI 42, ¶¶ 40-44, 270 Wis. 2d 535, 678 N.W.2d 197? (App. 101-110).

The circuit court ruled that Willis's sentence comported with ***Gallion*** (R.51:9; App. 209).

4. Was Willis was denied his right to due process when the jury was informed of his status as a felon?

The circuit court ruled that because Willis was accused of being a felon in possession of a firearm, the jury had to be informed of Willis's status as a felon (R.71:8-9).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Willis does not anticipate the need for oral argument in this matter. However, publication is warranted, given the unusual facts of this first-degree intentional homicide case and to remind circuit courts of their sentencing obligations.

STATEMENT OF THE CASE

Willis appeals a judgment of conviction for first-degree intentional homicide with use of a dangerous weapon as party to the crime and felon in possession of a firearm, following a jury's verdict. Willis also appeals the circuit court's decisions denying Willis's postconviction motion and his supplemental postconviction motion, both without a hearing.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Between 7:55 and 7:58 p.m. on March 2, 2012, Susan Hassel was shot to death inside her apartment at

2315 West Scott Street in Milwaukee (R.44:Ex.1 (Norman Wilkins' 911 call at 7:58 p.m.) & Ex.2 (Hassel's phone records showing outgoing phone call on her phone at 7:55 p.m.)). One of the first officers to arrive at the scene tracked a pair of impressions leading away from Hassel's apartment. One set of impressions was made by shoes; the other, by boots.

Hassel's neighbor told police Hassel dealt drugs, might have been a prostitute, and that she had been involved in numerous fights and arguments before the night of her death (R.44:Ex.3). The investigation into her death generated many suspects.

Within days of Hassel's death, however, Willis and his nephews Earnest and Antonne Jackson became the prime suspects in Hassel's death.

Willis became a suspect based upon Norman Wilkins' alleged statement to Steven Williams that someone named Alphonso pushed Wilkins into the next-door apartment after Hassel was shot. Although Steven Williams initially told officers he did not see anything that night, he later told them he saw Willis leaving Hassel's apartment shortly after the shooting. Based upon Williams' identification, Willis was arrested on March 6, 2012 and a pair of black boots he was wearing when arrested were taken as evidence (*id.*:Ex.4).

Willis's nephews Earnest and Antonne Jackson were arrested within a day of Willis's arrest (*id.*:Ex.8).

Antonne Jackson tried to flee from officers out the back door of his residence when police arrived (*id.*).

During his interrogation, Antonne admitted he knew Hassel, knew where her apartment was, and admitted he went to Hassel's apartment the night before her death to collect a debt (*id.*:Ex.9). Antonne nevertheless denied involvement in Hassel's death and was not charged (*id.*).

Earnest Jackson repeatedly lied to the police after his arrest about his whereabouts and his recollections (R.73:45-48), but eventually claimed that he saw Willis shoot Hassel (*see* R.44:¶6). In exchange for claiming he saw Willis shoot Hassel, Earnest Jackson was nicely rewarded—his felony murder charge was amended to one count of aiding a felon—which spared him the potential of more than 30 years in prison (R.73:49-50).

Willis was interrogated at least six times and he repeatedly denied his involvement in Hassel's death (R.44:Ex.5). Willis did more than simply deny his involvement—he told investigators his whereabouts the night of March 2, 2012 (*Id.*:Ex.6):

Willis said that between 7 and 8 p.m., he went to Larry Durrah's house on 23rd Street, south of Scott Street, to pick up some of his things (*id.*). There, he saw Durrah's sister-in-law shoveling snow (*id.*). Durrah's sister-in-law, later identified as Trina Jagiello, told Willis that Durrah was inside. After several attempts, Durrah did not answer, so Willis left, walking towards a bus stop on 23rd and Greenfield where he heard sirens before boarding the bus (*id.*). Then Willis took the bus to meet his girlfriend Leticia Delatorre and her two daughters at a store near 23rd & Howell Avenue to buy cigarettes (*id.*) The four of them then walked next door to a Mexican restaurant, ate, and left (*id.*).

Willis's whereabouts were corroborated by Jagiello, who testified she saw Willis while shoveling around 7:45 p.m. that night (R.72:89); by Delatorre, who told officers Willis met her and her daughters at her apartment between 7:45 and 8:30 p.m. that night (R.44:Ex.7); and by officers' verification through surveillance footage that Delatorre and Willis were at the Mexican restaurant that night.

PRE-TRIAL PROCEEDINGS

Willis was charged with first-degree intentional homicide as a party to the crime by the use of a dangerous weapon and of being a felon in possession of a firearm (R.2). His nephew Earnest Jackson was charged with felony murder-armed burglary (*Id.*).

The criminal complaint, which was signed by the trial prosecutor, alleged that "when Alphonso Willis was arrested he was wearing shoes which matched the prints on one set of the footprints" observed outside Hassel's apartment (R.2:2).

TRIAL

Trial commenced January 7, 2013.

Willis stipulated to his status as a felon and moved the court to read the charge as possession of a firearm by a "prohibited person" rather than possession of a firearm by a felon (R.71:8). The state objected, citing "confusion", and the court denied Willis's motion, explaining "that's what [the charge] is so that's what the court is going to pronounce . . ." (R.71:9).

During opening statements, the prosecutor told the jurors they would hear that Willis's boots matched boot impressions found outside Hassel's apartment:

> You will hear from officers who went to the scene and what they observed at the scene including the fact that the people who had left, the defendant and Earnest Jackson left foot prints in the snow as they walked away. And that when the defendant Alphonso Willis was arrested that he had in his possession boots. And you will be able to look at the boots and look at the footprints left in the snow and **the footprints left in the snow that were photographed and measured by the police which you will see photographs of those, matched the boots from Alphonso Willis**.

(R.71:70-71) (emphasis supplied).

Steven Williams[1] said the day of Hassel's death he was hanging out across the hall from Hassel's apartment with his cousin Ralph Williams smoking crack cocaine and drinking (R.72:34). Between 3:30 and 4:00 p.m., Steven and two other men went to Hassel's apartment to smoke crack cocaine and marijuana with her (R.72:37). Steven recalled being in Hassel's apartment until approximately 6:00, then he went back across the hall to continue drinking and to play dominoes (*id.*:38).

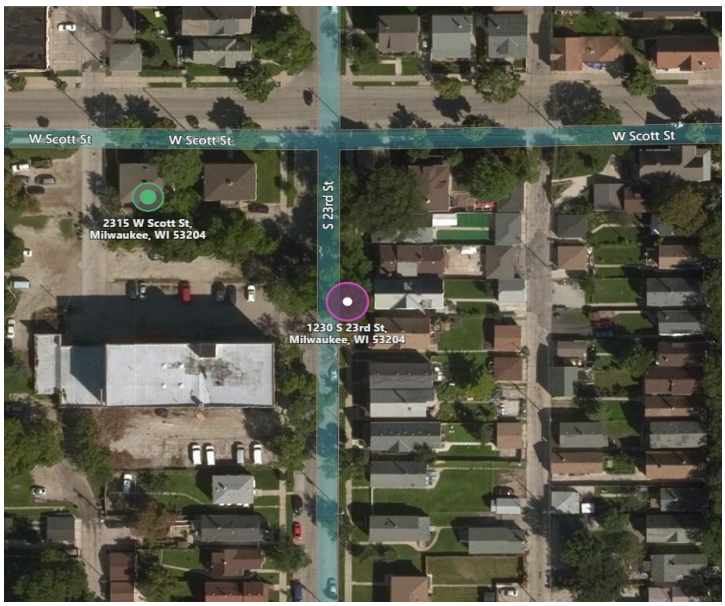
At some point, Steven heard a gunshot, got up, went to the door, opened it, and saw "another guy and [Willis] come out the door [of Hassel's apartment]." (*id.*:40). Steven claimed the other person, who he described as "short and dark skinned with low hair",

[1] For the sake of convenience, counsel will refer to Steven and Ralph Williams by their first names.

exited the apartment before Willis, who was carrying a "'smok[ing]' revolver." (*Id.*:42). Steven then went into Hassel's apartment, saw her dead on the couch, and left the apartment building without calling 911 (*id.*:44).

Steven admitted to lying to the police on several occasions (*id.*:59-61). He also claimed that although he was high on crack cocaine that night, it made him more perceptive (*id.*:73).

Trina Jagiello testified that on March 2, 2012, she went outside her house at 1230 South 23rd Street to begin shoveling at 7:30 p.m. (*id.*:76). She was emphatic that 7:30 p.m. was not an estimate (*id.*:96). Jagiello's house (depicted with a purple dot below) is approximately one-half block east and one-half block south of Hassel's apartment (depicted with a green dot):



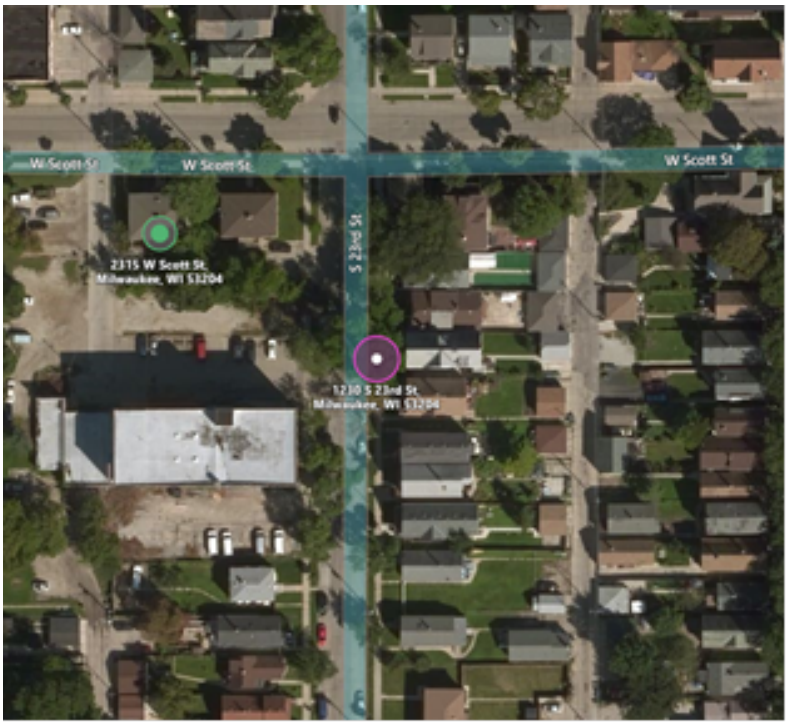
Jagiello said she was shoveling behind her house for 10-15 minutes when someone approached and said "it's Phonso, is Larry in the house"? (R.72:77). This person was Willis (*id.*:76) and Willis was asking about

Larry Durrah (*id.*:78). Jagiello said Willis was with another black male, but she could not otherwise describe him (*id.*:80).

Jagiello said that after Willis asked if Larry was home, Willis and the other male walked up to the back porch of her house, waited "maybe five or six minutes", then walked off the porch and headed south through the alley (*id.*:80-82). After she finished shoveling between 7:58 and 8:02 p.m. (*id.*:93), Jagiello walked five to six minutes to the store at 22nd and Scott (*id.*), then, as she was leaving the store, she saw a squad car heading towards 23rd and Scott (*id.*:84).

On cross-examination, Jagiello clarified that she was outside shoveling for "about 10 minutes" before Willis approached her (*id.*:89). She further clarified that she was inside the store for approximately three to four minutes (*id.*:94).

Officer Michael Hansen testified he was dispatched to the shooting at 8:02 p.m. on March 2, 2012 and arrived by 8:03 p.m. (R.72:99-100). Hansen was "one of the very first squads" to arrive (*id.*:113). Soon after he arrived, Hansen saw two separate sets of impressions (one made by shoes, the other by boots) in the freshly-fallen snow on the east side of the Hassel's apartment building (*id.*:101) (green dot on picture on next page).



Officer Hansen said he followed the impressions south between Hassel's apartment building and the apartment building immediately to the east; that the impressions then went eastbound, crossed 23rd Street, then went southbound (*id.*:101). Hansen said the boot impressions stopped in front of Jagiello's house (depicted as purple dot in picture above), whereas the shoe impressions continued southbound until they stopped in front of 1320 South 23rd Street (R.72:120).

When Hansen arrived at Jagiello's house, he was met out front by a woman who was shoveling snow, which explained why the boot impressions could not be tracked any further (*id.*:106). After Hansen tracked the impressions, he went back to the scene and placed a bucket over the boot and shoe impressions (*id.*:107).

Earnest Jackson, Willis's nephew and co-defendant, testified that "around probably six or five"

in the evening on March 2, 2012, he encountered Willis at the Open Pantry on 12th and Greenfield (R.73:14). They bought a cigar and walked to 22nd and Greenfield, then walked down Scott Street (*id.*:15). According to Earnest, he and Willis were going to go to "Mo's", but Willis decided to go to an apartment building on 23rd and Scott (*id.*:17). Once there, they walked in the unlocked common door, then Willis walked up the stairs with Earnest following. (*id.*:19).

According to Earnest, at the top of the stairs, Willis knocked on a door, a woman answered, then Willis pushed open the door into the apartment (*id.*:22). Willis told Earnest to come inside; Earnest did, and saw the woman on a couch (*id.*:23). Earnest sat on the coffee table. Earnest testified Willis asked the woman why she was "playing" him and asked her about $20 she owed him (*id.*:25). The woman said she did not have the money at that moment (*id.*:27). According to Earnest, Willis then pulled a gun out of his jacket and said "watch this." (*id.*:28). Earnest could not recall in which hand Willis was holding the gun (*id.*:29). Earnest then said the woman raised her hand, he looked down, then heard a ringing noise (*id.*:30-31).

Earnest testified he then saw the woman with a red mark on her cheek and saw Willis at the door to the apartment (*id.*:32). Earnest left first and saw someone leave the adjacent apartment (*id.*:34). Earnest said he and Willis left the apartment, walked east, then turned left and crossed the street (*id.*:37). Earnest said he and Willis walked to the backyard of a house on 23rd Street, Willis stopped to talk to a woman shoveling snow, then they continued walking south down the alley (*id.*:38). They walked down Greenfield Avenue to a gas station

past South Division High School (at 15th and Lapham), bought another cigar, a bus ticket, and the two of them parted ways without ever discussing what happened in the apartment (*id.*:39-41).

For this testimony, Earnest received substantial consideration from the government by way of an amended charge that reduced his exposure by nearly 30 years (*id.*:49-50). Earnest admitted he lied to the police on several occasions after his arrest (*id.*:45-48) and admitted that he was concerned that his brother Antonne would get in trouble for this incident (*id.*:61). Finally, Earnest said he would do whatever was necessary to get himself out of jail (*id.*:71).

Earnest testified—inconsistent with Officer Hansen's boot and shoe impression investigation—that he and Willis did not part ways after leaving Hassel's apartment (*id.*:52). Earnest also testified—inconsistent with Steven Williams' account—that his hair was not short, but that he had a fro beneath a hat (*id.*:69). Earnest further said he touched a number of things in Hassel's apartment, including the bathroom sink and the door knobs (*id.*:70).

Detective Robert Rehbein testified that when Willis was arrested on March 6, 2012, he was wearing black leather boots (*id.*:129). Rehbein explained Willis's boots were seized, inventoried, and photographed (*id.*:130-32). Detective Rehbein also testified that when the pictures of Willis's boots were taken, a ruler was placed next to them for comparison purposes (R.74:27) and Willis's boots were a size 10.5 (*id.*:29). Finally, Detective Rehbein testified Earnest never told him what type of footwear Willis was wearing on March 2, 2012

(R.73:137).

Through Detective Rehbein and Officer Hansen, the State introduced more than 20 exhibits pertaining to Willis's boots and the route the boot and shoe impressions traversed:

- exhibits 32, 33, 34, 35, 36, 37, 38, and 39, which were pictures of shoe and boot impressions next to Hassel's apartment building (R.72:108-116; *see also* R.21).
- exhibit 40, which was a picture of a cone covering the boot impression (R.72:110, 116);
- exhibit 44, which was a picture of a shoe impression (*id.*:108);
- exhibit 51, which was a picture of the boot impression in the snow (R.73:139);
- exhibits 52, 53, 54, and 55, which were close up pictures of exhibit 51 (*id.*; R.72:107-08 & 112);
- exhibit 77, on which Officer Hansen drew the route that the impressions traversed (R.72:104);
- exhibits 88, 90, and 91, which was the inventory sheet of Willis' boots and the actual boots Willis was wearing when arrested (R.73:130-131); and
- exhibits 100, 101, 102, and 103, which were pictures of the bottoms of the boots Willis was wearing when arrested (R.74:26-29).

Prior to closing arguments, the parties agreed upon certain stipulations; namely, Willis was a felon, many items in Hassel's apartment were subjected to

fingerprint analysis (including matches, a cigarette box, beer cans, glasses, cups, and a bottle), and none of the items found in Hassel's apartment matched to Willis or Earnest Jackson (*id.*:42).

No evidence of Hassel's time of death was introduced (see tr.'s generally).

During the evidentiary portion of trial, the State presented no testimony, witness or otherwise, that the boots Willis was wearing when arrested matched the boot impressions outside Hassel's apartment (*see* tr.'s generally).

Although there was no direct evidence, testimony, or an expert's opinion that Willis's boots actually made the boot impressions, the prosecutor argued for that precise inference in closing without objection:

> When the defendant is arrested he's wearing boots. And you can look at the pictures of those boots, you can look at the boots. Like I said, because the footprints in the snow aren't the best and they are melting, I don't expect anyone to become an expert and look at them, but I think a layperson can say, 'Look, these are the same type of boots, same size of boots.' **What a coincidence that the boot prints that are running from the scene are those same boots that are being worn by Alphonso Willis . . . days later**.

(R.74:74-75) (emphasis supplied). The prosecutor doubled-down on the inference in rebuttal closing without objection:

> When the defendant is arrested he is wearing shoes with the same types of soles as are in the boot

> footprints. These are not coincidences, these are facts that you have.

(R.75:25). The jury's determination of guilt seemingly hinged on the boot evidence, as its only request during deliberations was to see "[b]oots, pictures of bootprints, right and left, Google maps, directions of the footprints. Back porch [of Jagiello's house] picture." (R.75:35). Those items were provided to the jury without objection and the jury found Willis guilty of both counts.

SENTENCING

Willis was sentenced on April 5, 2013 (R.77; App. 101-110). The state recommended Willis be sentenced to 45 years of initial confinement (R.77:4). The prosecutor painted Willis as a thug and a bully—the type of person who would involve his nephew in a murder of a vulnerable woman trying to protect herself (*id.*:7). This involvement, the prosecutor claimed, was indicative of Willis' character of a manipulator; a person who would groom a young man to commit vicious crimes to collect minor debts.

The defense recommended consideration for release to extended supervision after 25 years (*id.*:24). Willis' counsel described Willis as a person who had a difficult and traumatic childhood, moving from shelter to shelter, without any meaningful adult supervision (*id.*:21). He also disputed the contention that Willis had groomed his nephews; rather, this was indicative of Willis' good character in attempting to provide necessities for his nephews—a luxury Willis never had. Willis's counsel also told the circuit court about Willis's work history and efforts to better himself through

education (*id.*:23). In short, Willis' counsel described Willis as having a number of redeeming qualities who was undeserving of a life sentence.

Willis used his opportunity for allocution to proclaim his innocence and to seek to have a number of *pro se* pleadings read into the record (*id.*:25-31).

The court's sentencing remarks in this case, for a conviction of first-degree intentional homicide, take a little more than six transcript pages (*see* R.77:31-40; App. 101-110). Although the circuit court's remarks are reproduced in full in the appendix, those parts that could be described as being tailored to Willis's case are as follows:

> The description of the offense is outlined by the facts as reported by those witnesses who testified, including the nephew who is Mr. Jackson, and which the court does in fact consider an aggravating factor because of the fact that he got his nephew involved in this homicide case.
>
> And what occurred is basically that he showed up at Ms. Hassel's house to collect money for the purchasing of drugs, and with a caliber weapon, in which he was a felon, which he was not supposed to possess in the first place, and shooting the victim of the offense within a short range. Because the victim held up her arm, it did go through the arm, and then had a significant effect on - - to the extent where she died as a result of that gunshot wound. And it did have a shotgun-like effect, as the state had stated, based upon the injuries that were received and testified to by the pathologist.
>
> I am familiar with the offender's interview. I'll take that into consideration. His juvenile record, which

consists of some contacts, probation, extensions, revocations. He was at Ethan Allen. He's been revoked as a juvenile. As an adult, he had that fleeing case, and then those armed robbery cases that were mentioned here on the record.

While incarcerated in the state institution, he did complete several certifications: parenting, treatment, and obtained his HSCD (sic). Unfortunately, it didn't help as much as it should have because subsequently thereafter, while he was on extended supervision, he committed this crime of first-degree intentional homicide and felon in possession of a firearm.

You can't minimize those - - those other contacts as an adult. And where there were at least three other victims that he was a party to, that he, I'm sure, terrorized while he and his friend were committing the armed robberies with a weapon.

He has some work histories, as the court had stated. That he was an absconder at one time. He was released on extended supervision in 2011, did some work. And then while on extended supervision he incurred the offenses that he's here on today's date.

I take into consideration the significant relationships that he's had. Although I question the significant relationship paragraph, which is the last paragraph, but that's his self-reporting, I would - - I would guess.

His academic and educational skills. And the court doesn't give any weight for that.

The court takes into consideration employment history, alcohol and drug history that's stated as an emotional and mental health history also.

There is no doubt that he had a chaotic upbringing. And it's certainly unfortunate that there wasn't any parental involvement. And it is a sad commentary not only as to Mr. Willis but other young men and women in this community.

But that doesn't depreciate the seriousness of the offense that's before the court.

He's 29 years old. He's here because of the first-degree intentional homicide, use of a dangerous weapon, possession of a firearm by a felon.

A young lady, who was very vulnerable, lost her life as a result of Mr. Willis' direct involvement. And his background is one of - - his character is reflected - - his character is reflected in his background. And it's one of a legacy of sadness that he's left behind to a number of different victims that he's preyed upon. And the last victim being the one who he's taken the life from.

This is a horrific offense. A human life was, in fact, taken. There's going to be a significant amount of time so he's no longer any danger to the community and to others who have a right to walk the streets of this community without being terrorized by Mr. Willis.

And it has a significant effect on the community as a whole, the offense, because of the amount of guns that are on the street and the amount of drugs that are on the street. So there are a lot of aggravating factors.

. . .

The court will, on the first-degree intentional homicide, impose a sentence of life imprisonment. Being eligible for release to extended supervision - - well, the court's going to impose a life sentence,

> with eligibility for release to extended supervision on April 5 in the year 2058. That's 45 years in. And the court will impose an additional - - the ten-year extended supervision for a total of 55 years.
>
> On the felon in possession, the court's going to impose ten years; five years of confinement, five years of extended supervision. The court will make that concurrent to what he's serving as to the life sentence. The court will make this consecutive to the time that he's serving now because he was on extended supervision at the time that he committed this offense.
>
> He's to report to Dodge.
>
> . . .
>
> We need to put something on the record. Okay. Let's go back on the record with this case.
>
> When the court sentenced the defendant, the court added an additional extended supervision. It should be the defendant's eligible for release to extended supervision in the year 2058, which is 45 years, on April 5 of that date, 2058. That's a life sentence, with the eligibility for release to extended supervision. That's the sentence.

(R.77:31-40; App. 101-110).

DISPOSITION IN THE CIRCUIT COURT

Willis moved for postconviction relief, arguing his trial attorney was ineffective for failing to introduce evidence of Hassel's time of death, which, coupled with Jagiello's testimony, established that Jagiello met with Willis before Hassel's death (R.44). This claim and Willis's claim that the trial court inadequately explained

its sentence were denied without a hearing (R.51; App. 201-209).

After Willis filed his notice of appeal, he moved this Court to allow for the filing of a supplemental postconviction motion based upon the improper introduction of important yet inadmissible physical evidence—his boots—at trial. Willis's supplemental postconviction motion (R.55) was also denied without a hearing (R.63; App. 301-306) in an order that incorporated the State's response brief "as part of its decision" (R.63:6; App. 306; State's response brief at App. 401-418).

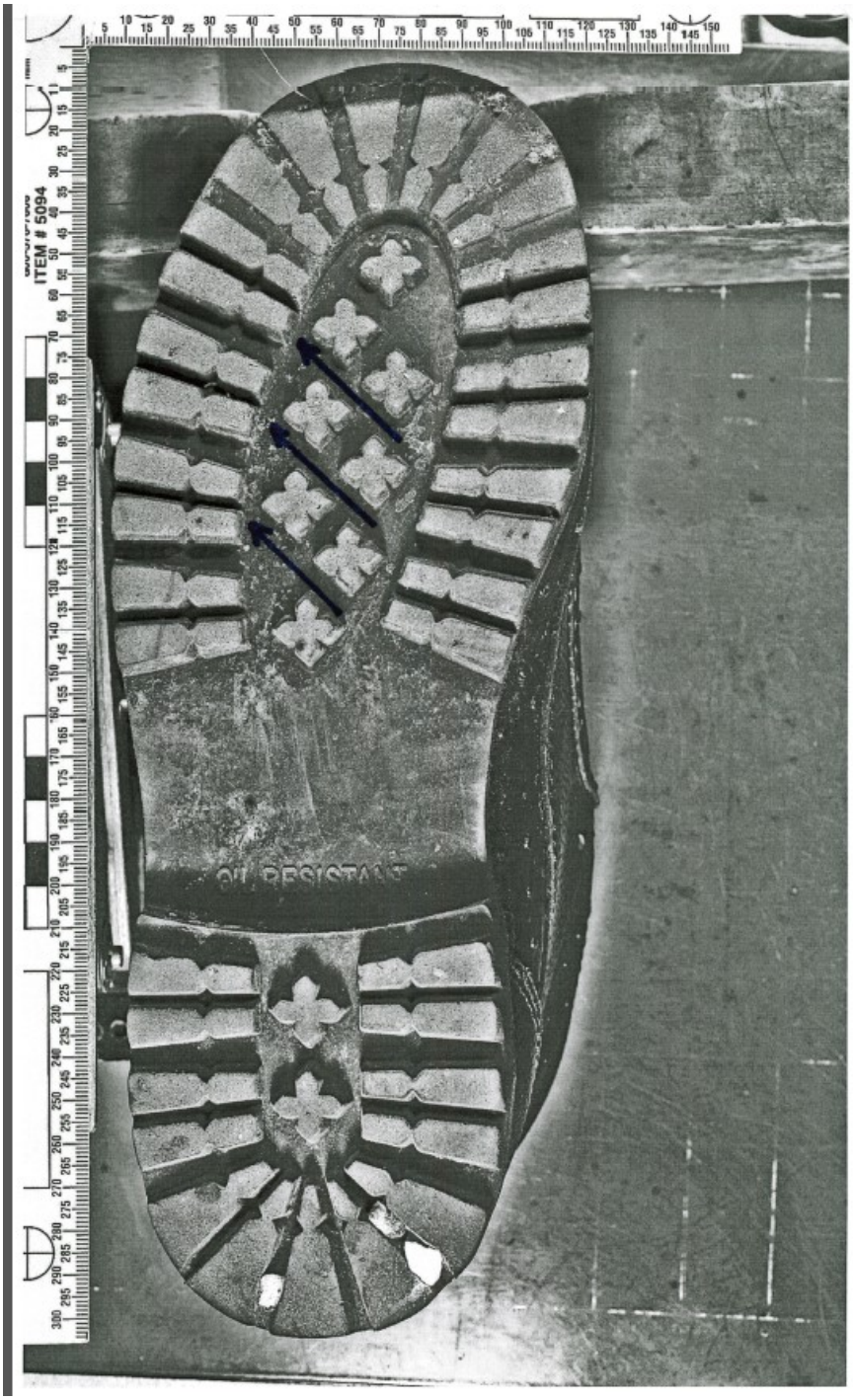
Willis now appeals (R.64).

ARGUMENT

I.
The Unobjected-To Introduction of Willis's Boots Into Evidence And the State's Improper Arguments Therefrom Require a New Trial

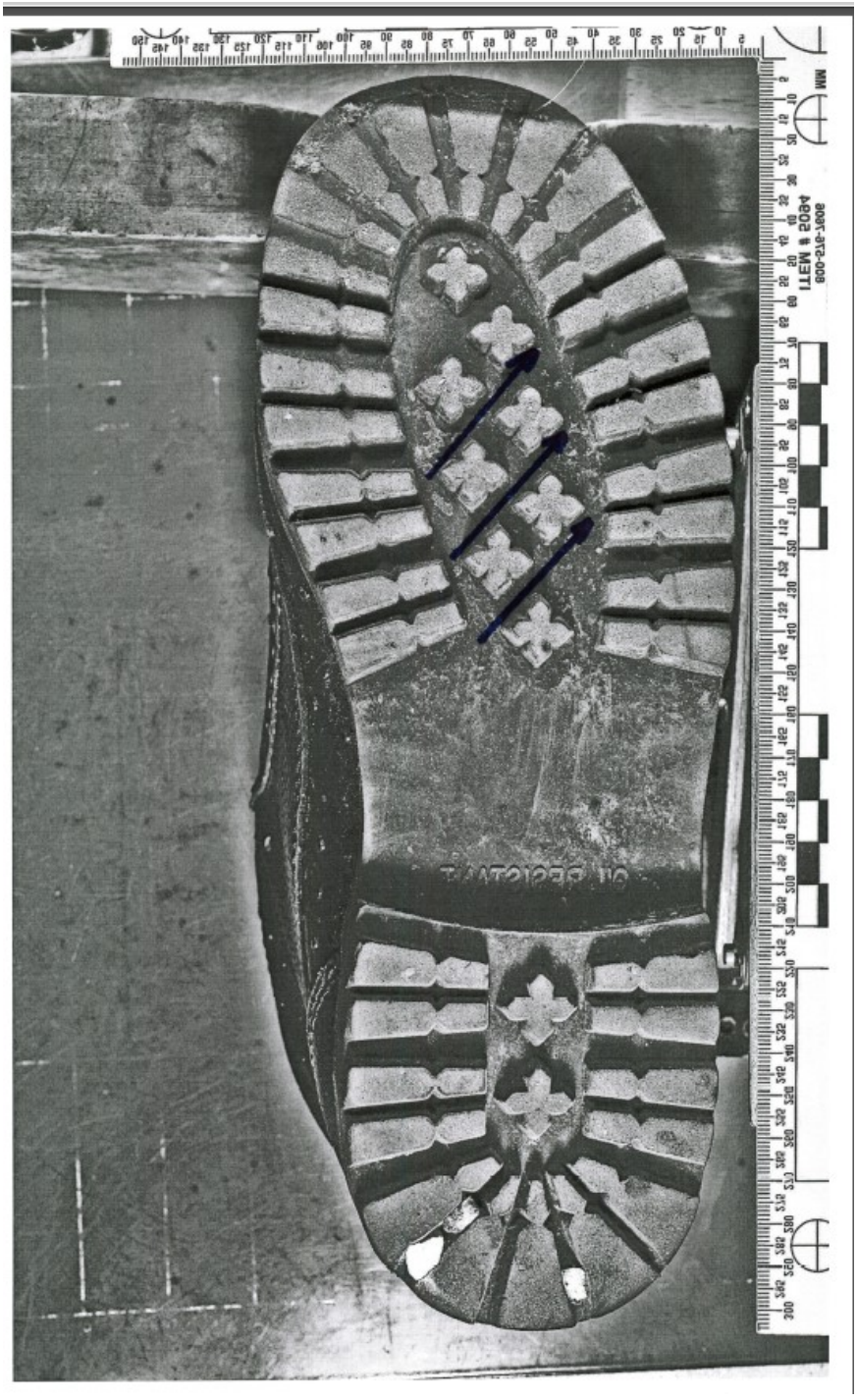
It is indisputable that the boots Willis was wearing when arrested did not and could not have left the impressions outside Hassel's apartment. The impressions left outside Hassel's apartment were made by different boots.

Below is a picture of the bottom of Willis's right boot as seized and photographed by the State (arrows added by defense forensic analyst James Streeter, whose explanation is below) (R.55:Ex.1):

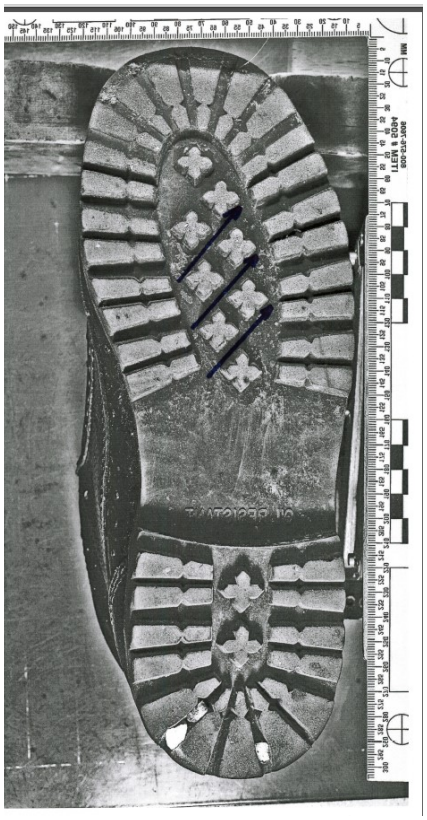


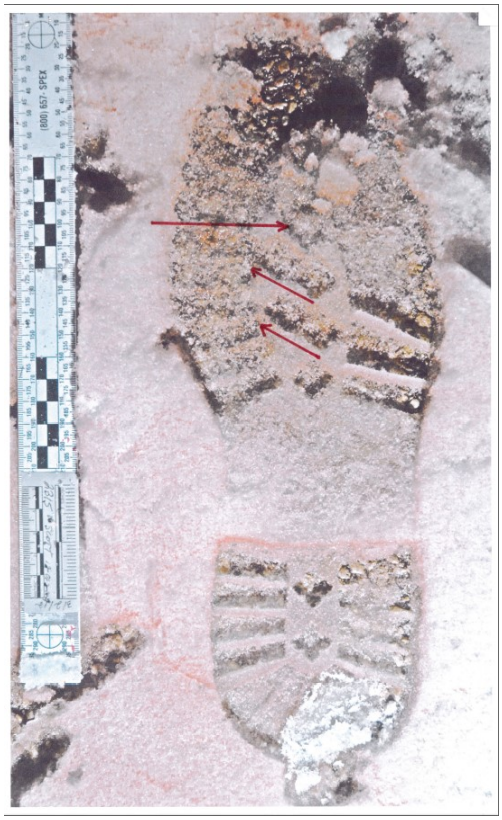
The next picture is that of the boot impression preserved by Officer Hansen and later photographed by the State (arrows added by Streeter) (R.55:Ex.1):

The next picture is that of the bottom of Willis's right boot, mirrored to reflect how a right boot would have created an impression in the snow (arrows added by Streeter) (R.55:Ex.1):



When the preceding two images are compared next to one another (as should have been done), it is obvious that Willis's right boot did not and could not have made the impression outside Hassel's apartment:





Look closely at the direction of the lugs near the arrows. On the boot, they travel in one direction; on the impression, they travel in the opposite direction. The same results is obtained by imagining the first image of Willis's right boot flipped over and placed in the snow. Accordingly, even without the use of forensic analysis, it is indisputable that Willis's boot did not leave the impression outside Hassel's apartment.

Despite this indisputable fact, Willis nevertheless retained the services of James L. Streeter, a forensic examiner, to determine whether it was possible Willis's

boots made the boot impressions outside Hassel's apartment. Streeter reviewed the relevant portions of discovery, the relevant trial transcripts, subjected the evidence to testing, and concluded that Willis's boots could not have left the boot impression outside Hassel's apartment.

Streeter explained that the impression in the snow was produced by a right article of footwear, and that the outsole pattern of the footwear is "very common"—reportedly used by more than a thousand manufacturers in their products. He wrote that this outsole pattern is referred to as a "Vibram" style, in which "the 'lugs' are the elements that are positioned on the outside parameter of the outsole and the 'stars' are the four-pointed elements located between the lugs in the toe and heel portions of the outsole pattern." (R.55:Ex.1).

Streeter explained that law enforcement placed scales next to Willis's boots and the boot impressions to "enable the production of natural size ("one-to-one") photographs of the impressions and outsoles for inter-comparison purposes." (R.55:Ex.1). Such one-to-one photographs were, however, never created.

Streeter also explained that, once a suspect's footwear has been obtained, "the footwear and the photographs of the footwear impression should have been submitted to the . . . laboratory for comparison purposes." It does not appear that such a comparison was ever done by the State. However, if Willis's boots had been submitted, Streeter described that the following procedures would have been employed: the lab would have coated the outsole of Willis's boot with

an ink or powder, which would have then been applied to a transparent piece of paper; once an impression of Willis's boot were made, it would have been overlaid upon a photograph of the impression made in the snow for comparison purposes.

Streeter performed these necessary steps and concluded the following:

> When comparisons were conducted between the snow impression and the reversed image [of Willis's boot], and associated transparencies of this image, it can be seen that the flow of stars in the toe pattern of the suspect article of footwear travel in the opposite direction as those appearing in the snow impressions. . . . **Based upon this observation it is the opinion of the undersigned that the suspect shoe did not produce the snow impressions**.

(R.55:Ex.1) (emphasis supplied). Streeter's opinion confirms the obvious, as demonstrated above—Willis's boots did not make the impressions in the snow outside Hassel's apartment. The ramifications of this indisputable fact will be addressed in turn.

A.
The Boots Were Irrelevant and Therefore Improperly Admitted Into Evidence

"Evidence which is not relevant is not admissible." WIS. STAT. § 904.02. Simply put, "as a matter of law, a judge has no discretion to admit irrelevant evidence." ***Bittner by Bittner v. American Honda Motor Co., Inc***, 194 Wis. 2d 122, 147, 533 N.W.2d 476 (Ct. App. 1995). Evidence is irrelevant unless it has "any tendency to make the existence of any fact that is

of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01.

Willis's boots would only be relevant if they could have made the impressions in the snow outside Hassel's apartment. Because, as demonstrated above, Willis's boots could not have made those impressions, the boots were irrelevant.

B.
Willis's Boots' Improper Admission Into Evidence Requires A New Trial

The fact that Willis's boots were irrelevant means the trial court had no discretion to accept them as evidence. This error gives rise to a number of distinct yet interwoven claims:

C.
Interests of Justice

i.
Standard of Review

"To maintain the integrity of our system of criminal justice, the jury must . . . at the very least, not be presented with evidence on a critical issue that is later determined to be inconsistent with the facts." ***State v. Hicks***, 202 Wis. 2d 150, 171, 549 N.W.2d 435 (1996). Thus, the interests of justice requires a new trial whenever the real controversy was not fully tried. WIS. STAT. § 752.35; ***State v. Henley***, 2010 WI 97, ¶ 63, 328 Wis. 2d 544, 787 N.W.2d 350; ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). The real controversy is

not fully tried when the jury hears improperly admitted evidence that "so cloud[s] a crucial issue." ***Wyss*** at 735-36. If the jury hears improperly admitted evidence that clouded a crucial issue, then the Court is not required to find that a different result is likely at a retrial. ***Id.***; ***see also Hicks*** at 160.

ii.
Application

As demonstrated above, Willis's boots were improperly admitted into evidence because they were irrelevant.

The introduction of Willis's boots and the State's arguments about the importance of those boots in opening and closing clouded the crucial issue at trial of whether Willis was involved in Hassel's murder. The State argued that the boot evidence corroborated each and every meaningful aspect of the State's case.

Most significant to the State's theory of prosecution was the existence of independent and objective physical evidence obtained by "very good police work"—the boots and the route the boots traveled (*id.*:69, 74). The boot evidence corroborated the testimony of Jagiello, who the State rightfully said "has really no motive whatsoever to fabricate" her testimony (*id.*:69). Jagiello's testimony placed Willis within a half-block of the scene of the crime around[2] the time of Hassel's death.

[2] As will be more fully explained below, when coupled with evidence of Hassel's time of death, Jagiello's testimony actually established that she met with Willis before Hassel's was killed, which would have helped Willis's defense (*see* Section II below).

Jagiello's testimony that Willis was around the crime scene around the time of the crime clearly was not enough—the State needed witnesses who placed Willis inside Hassel's apartment. However, the only two witnesses who placed Willis inside Hassel's apartment the night of her death were both of dubious credibility.

Earnest Jackson was an alleged accomplice:

- who testified "I always have memory issues" (R.73:59);
- who feared for his brother Antonne, who knew Hassel, had been to her apartment the night before her death, and who ran from the police when officers attempted to arrest him;
- who was given a huge break by the State despite originally facing 30 years imprisonment;
- who had a significant motive to lie in order to obtain the benefit of his bargain;
- who repeatedly lied to the police;
- whose presence inside Hassel's apartment could not be corroborated by any of the exhaustive tests done by the State; and
- whose description of the scene and Hassel did not comport with reality (as examples, he said he and Willis walked about 10 blocks after meeting up around 5 or 6 p.m.; describing Hassel as wearing glasses when she was not (R.75:9) and explaining that he and Willis never parted ways when Officer Hansen described the impressions going separate ways at Jagiello's house (R.72:120)).

The State's second witness who placed Willis at the scene of the crime was Steven Williams. Steven spent the day of Hassel's death smoking crack cocaine, marijuana, and drinking alcohol (R.72:34). He too, like Earnest Jackson, lied to the police on several occasions (*id.*:59-61) and left the apartments without calling 911, even though his drug-using friend Hassel was dead (*id.*:44). As if more evidence were needed to establish the dubiousness of Stevens' testimony, he persisted in saying that smoking crack cocaine made him more perceptive of reality (*id.*:73)

According to the State's theory, however, Earnest and Stevens' testimony was corroborated by the boot evidence and by Jagiello, because any doubt as to the reliability of their testimony was erased by the fact that Willis's boots traveled from Hassel's apartment to Jagiello's house.

The State clearly saw Willis's boots and the path of the impressions as significant to this case. They were referenced in opening statements by the prosecutor. The State introduced more than 20 exhibits related to Willis's boots. The importance of Willis's boots to the State's case was hammered home during the State's closing and rebuttal closing, when the prosecutor repeatedly argued that Willis's boots were clearly indicative of Willis's guilt. It is unsurprising then that the jury's only request during deliberations was to see the evidence concerning Willis's boots and the path the prints traveled, because this was the State's best evidence of guilt.

As is clear, however, Willis's boots could not have made the impressions at the crime scene, thus the

boot evidence did not corroborate any of the witnesses' testimony. Instead, the jury was "presented with evidence on a critical issue that is later determined to be inconsistent with the facts." ***State v. Hicks***, 202 Wis. 2d at 171. Because the boot evidence clouded the crucial issue at trial, a new trial must be granted in the interests of justice.

D.
Improper Closing Argument

i.
Standard of Review

"Prosecutors may not ask jurors to draw inferences that they know or should know are not true." ***State v. Weiss***, 2008 WI App 72, ¶ 15, 312 Wis. 2d 382, 752 N.W.2d 372. The use of the phrase "know or should know" suggests that the state has a duty to discover and not willfully blind itself to the falsity of its argument. ***See, e.g., Giglio v. U.S.***, 405 U.S. 150, 152 (1972); ***State v. Sturgeon***, 231 Wis. 2d 487, 505, 605 N.W.2d 589 (Ct. App. 1999). In other words, the state cannot make arguments with reckless disregard for the truth. ***See U.S. v. Tierney***, 947 F.2d 854, 860-861 (8th Cir. 1991); ***Jackson v. Brown***, 513 F.3d 1057, 1075 (9th Cir. 2008). When a prosecutor knows or should know he is arguing a false inference, a new trial is required unless, in light of the entire proceeding, the error is not harmless. ***See Weiss*** at ¶¶ 16-17.

ii.
Application

For the reasons stated above, there can be no dispute that the inference sought by the prosecutor—that Willis's boots made the impressions outside of Hassel's apartment—was not true.

For the reasons that follow, the prosecutor either knew or should have known that this inference was false:

The State's trial attorney is one of the most experienced prosecutors in the Milwaukee County District Attorney's Office. He was admitted to the state bar in 1982 and his name appears near the top of the D.A.'s Office's seniority-ranked letterhead. Given the prosecutor's lengthy tenure, it is eminently reasonable to infer he knew the State crime lab includes a "Fingerprint and Footwear Identification Unit"[3]. That unit's website boasts "[e]ach footstrike carries with it the possibility of identification of the [criminal's] footwear as the sole source of that mark", implying it exists to help prosecutors make cases by connecting suspects to crime scenes. The record, however, contains no indication the State submitted Willis's boots to the lab for comparison or identification.

Despite the apparent lack of involvement by the State crime lab, it is clear the prosecutor intended to argue that Willis's boots made the impression outside Hassel's apartment. The criminal complaint (signed by

[3] *See* https://wilenet.org/html/crime-lab/analysis/imprint.html, last accessed December 8, 2015.

the trial prosecutor) proclaimed that Willis's boots "matched the prints on one set of the footprints" (R.2:2). This untrue inference was repeated by the prosecutor during opening statements and both of the State's closing arguments.

Given (1) that Willis's boots did not leave the impression outside Hassel's apartment; (2) the State knew it could have tested Willis's boots to prove they left the impressions; and (3) the State intended to, and actually did, argue that Willis's boots left the impression outside Hassel's apartment, the circuit court should have granted an evidentiary hearing to determine whether the prosecutor knew or should have known he was asking the jury to draw a false inference. ***See, e.g., Alcorta v. Texas***, 355 U.S. 28, 31 (1957) and ***Giglio***, 405 U.S. at 152.

Willis further asserts that, if the State knew or should have known it was arguing false inferences to the jury, such conduct is not harmless, and, in any event, the State has the burden of proving the harmlessness of such misconduct. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

iii.
The Error Was Not Harmless

In the interest of completeness, Willis will address harmless error. Several factors are to be considered, as an aid, in determining whether an error was harmless:

> the frequency of the error, the importance of the erroneously admitted evidence, the presence or

> absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

State v. Hale, 2005 WI 7, ¶ 61, 277 Wis.2d 593, 691 N.W.2d 637. Every factor weighs in Willis's favor:

(1) The error occurred frequently, during each day of Willis's three-day trial: in opening statements, during Detective Rehbein's testimony, during Officer Hansen's testimony, repeatedly during closing arguments, and finally, when the jury asked to see Willis's boots.

(2) The importance of the erroneously admitted evidence was great. The Supreme Court instructs that the best evidence of the importance of improperly admitted evidence is found by "taking the word of the prosecutor" at closing—where, here, the prosecutor argued that Willis's boots were compelling circumstantial proof that he killed Hassel. ***See Kyles v. Whitley***, 514 U.S. 419, 444 (1995).

(3) Nothing could corroborate the boot evidence because Willis's boots did not leave the impressions.

(4) There was certainly no evidence, untainted or otherwise, introduced that duplicated the boot evidence.

(5) The nature of the defense was that Willis did not commit the crime charged. As such, any

improperly admitted evidence tending to link him to the crime was prejudicial, and especially here, where the tainted boot evidence bolstered the otherwise dubious credibility of the only two witnesses who placed Willis at the scene of the crime.

(6) Likewise, the nature of the State's case was greatly propped up by the false inferences from the boot evidence argued by the State and tending to link Willis to Hassel's apartment.

(7) Finally, and most importantly, the evidence against Willis was hardly overwhelming. There was no objective physical evidence tying Willis to the crime scene by way of fingerprints, DNA, cell phone records, or the like. The murder weapon was never recovered. Willis did not confess or in any implicate himself, despite being interrogated at least six times. The State's two primary witnesses were inconsistent, both lied to police, one had a strong motive to lie, and the other was impaired by a day of using intoxicating substances. Indeed, with the boot evidence excluded, the state's case rested on two witnesses—Steven Williams and Earnest Jackson—whose dubious reliability was exposed at trial.

Williams was under the influence of at least cocaine when he allegedly observed Willis, he lied to the police on at least one occasion, and his description of Willis's co-actor was inconsistent with Earnest Jackson's description of himself that evening (*compare* R.72:40, describing co-actor as "short and dark skinned with low hair" *with* R.73:69, Earnest Jackson stating he was wearing an afro beneath a hat).

The jury also apparently[4] discounted Earnest Jackson's testimony for what it was—a successful attempt to save his own skin by removing more than 30 years of prison exposure. The jury heard that Jackson was concerned about his brother getting in trouble (who fled arresting officers and admitted being in Hassel's apartment the night before), heard that Earnest Jackson would do whatever it took to clear himself, and heard that he repeatedly lied to the police.

Finally, if the jury had known Hassel's time of death, then it could have readily concluded that Jagiello met with Willis before Hassel was killed, which further undercut the State's theory of the case (*see* Section II below).

Accordingly, for all these reasons, if the Court finds that the State knew or should have known it was asking the jury to draw a false inference, it is clear that the State cannot prove beyond a reasonable doubt that the false inferences repeatedly argued by the prosecutor at closing "did not contribute to the verdict obtained." ***State v. Anderson***, 2006 WI 77, ¶ 114, 291 Wis. 2d 673, 717 N.W.2d 74.

At the very least, this Court must remand the matter for an evidentiary hearing because Willis alleged sufficient material true facts to entitle him to relief. ***State v. Allen***, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether this standard has been met is a question of law that this Court reviews *de novo*. ***Id.*** As

[4] Recall that the jury sought evidence pertaining to Willis's boots, and did not, for example, ask to have Earnest Jackson's testimony read back to them.

amply demonstrated above, Willis has met his burden under ***Allen***.

E.
Ineffective Assistance of Counsel

By not objecting to the State's introduction of the boot evidence, trial counsel failed to provide Willis with the effective assistance of counsel.

i.
Standard of Review

A defendant alleging ineffective assistance of counsel first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176 (1986), ***quoting Strickland v. Washington***, 466 U.S. 668, 688 (1984). It is not necessary to demonstrate total incompetence of counsel; rather, one serious error may warrant reversal. ***Kimmelman v. Morrison***, 477 U.S. 365, 383 (1986); ***see U.S. v. Cronic***, 466 U.S. 648, 657 n.20 (1984). The deficiency prong of the ***Strickland*** test is met when trial counsel's errors resulted from oversight rather than a reasoned defense strategy. ***See Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572 (1989).

Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "The defendant is not required [under ***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, 147 Wis.2d at 354, ***quoting Strickland***, 466 U.S. at 693.

Instead, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." ***Id.*** at 357.

"Reasonable probability," under this standard, is a "'probability sufficient to undermine confidence in the outcome.'" ***Id.***, ***quoting Strickland***, 466 U.S. at 694. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362, 393-394 (2000). In addressing this issue, the Court normally must consider the totality of the circumstances. ***Strickland***, 466 U.S. at 695.

ii.
Application

The boot evidence was irrelevant. Trial counsel was therefore deficient for not objecting to its admission, not objecting to the State's opening statement, and for not objecting to the State's closing arguments.

Trial counsel also was deficient for failing to meaningfully test the State's evidence by procuring an expert witness to rebut the State's claimed link[5] between Willis's boots and the crime scene. It was objectively unreasonable and there could be no rational strategic basis for defense counsel to fail to seek to exclude or rebut damning yet false evidence circumstantially tying Willis to the crime scene. ***See Manning v. Bowersox***, 310

[5] This "link" was claimed in the complaint, so there could be no surprise to trial counsel that the State would advance the claim at trial (R.2).

F.3d 571, 577 (8th Cir. 2002); ***Atkins v. Attorney General of State of Alabama***, 932 F.2d 1430, 1432 (11th Cir. 1991); ***Lyons v. McCotter***, 770 F.2d 529, 534 (5th Cir. 1985). Furthermore, even if trial counsel failed to seek to exclude this evidence based upon oversight, that too was deficient. ***See Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572 (1989).

Trial counsel's deficiencies prejudiced Willis. As detailed above, Willis's boots were the most significant evidence at trial, and the evidence against Willis was hardly overwhelming. Given the relative weakness of the State's case and the importance of the boot evidence, it is clear that trial counsel's identified deficiencies prejudiced Willis; that is, the taint of counsel's errors are "sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694; *see* Section I, D, iii above.

At the very least, this Court must remand the matter for an evidentiary hearing because Willis alleged sufficient material true facts that entitled him to relief. ***State v. Allen***, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether this standard has been met is a question of law that this Court reviews *de novo*. ***Id.*** As amply demonstrated above, Willis has met his burden under ***Allen***.

F.
Newly-Discovered Evidence

If the Court finds that Willis's trial counsel was not deficient for failing to seek an expert's opinion about the false connection between Willis's boots and

the impressions outside Hassel's apartment, then it must find that Streeter's opinion meets the criteria for newly-discovered evidence.

i.
Standard of Review

To obtain a new trial based upon newly-discovered evidence, a defendant must show that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Plude***, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42, ***citation omitted***.

When the defendant meets these criteria, the Court must determine "if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***Id***. at ¶ 33, ***quoted source omitted***. In other words, the Court should consider "whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt." ***Id.***

ii.
Application

If the Court finds that trial counsel was not deficient for failing to seek Streeter's (or another expert's) opinion, then Willis has met the four criteria for a newly-discovered evidence claim. Streeter's opinion that Willis's boots did not make the impression

outside Hassel's apartment was discovered after conviction. Although Willis believes his trial counsel was negligent in seeking this evidence, if the Court finds his counsel was not deficient for not seeking same, then the Court must find that Willis was not negligent in seeking this evidence. Certainly, the boot evidence was material to an issue in the case, as it was used to argue that Willis was at the crime scene. Lastly, this evidence was not cumulative—there was nothing like it introduced at trial.

Additionally, if Streeter's opinion had been introduced in the defense case-in-chief, as ***Plude*** requires this Court to consider, it would have inflicted a crippling blow to the State's case. It would have called into question the State's opening statement, would have rendered Detective Rehbein's testimony about Willis's boots useless to the jury, and most importantly, it would have prevented the State from making improper closing arguments tying Willis's boots to the crime scene.

The circuit court found that there was not a "reasonable probability that [Streeter's] opinion would lead to a different outcome at a second trial." (R.63:5). This finding is subject to *de novo* review as a question of law. ***State v. Plude***, 2008 WI 58 at ¶ 33. For all the reasons stated, the circuit court's finding must be reversed.

II.
Trial Counsel Was Ineffective For Failing to Introduce Evidence of Hassel's Time of Death

A.
Standards

To establish a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland***, 466 U.S. at 688***; see also State v. Pitsch***, 124 Wis. 2d 628, 640-42, 369 N.W.2d 711 (1985).

B.
Application

Willis was deprived of the effective assistance of counsel because trial counsel failed to introduce the time of Hassel's death, which would have undercut the State's theory of prosecution.

The State's theory of prosecution was that Willis went to Hassel's apartment with Earnest Jackson, where Willis shot Hassel and they then walked to Jagiello's house. The State's theory was bolstered by the above-demonstrated false link between Willis's boots and the boot and shoe impressions and escaped scrutiny because Hassel's time of death was not introduced.

However, if trial counsel had introduced that Norman Wilkins' called 911 at 7:58 p.m. and described Hassel having been shot, and if counsel had introduced

Hassel's phone records[6], which showed an outgoing phone call at 7:55 p.m., then the jury would have concluded that Hassel was killed between 7:55 and 7:58 p.m.

If this information had been considered with Jagiello's emphatic testimony that she encountered Willis sometime between 7:40 and 7:45 p.m., then the State's entire theory of prosecution would be undercut. Hassel's time of death information was consistent with Willis's accounting of his whereabouts—which was consistent with his innocence. Accordingly, counsel's failure to introduce this information was deficient.

Furthermore, counsel's deficiencies in this regard prejudiced Willis because there was a reasonable probability that if this information had been introduced through Wilkins' 911 call and Hassel's phone records, Willis would not have been convicted as charged.

At the very least, this Court must remand the matter for an evidentiary hearing because Willis alleged sufficient material true facts that entitled him to relief. ***State v. Allen***, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether this standard has been met is a question of law that this Court reviews *de novo*. ***Id.*** As amply demonstrated above, Willis has met his burden under ***Allen***.

[6] Both items were produced in the course of discovery.

C.
The Cumulative Effect of Trial Counsel's Deficiencies Prejudiced Willis

Finally, when a defendant alleges multiple deficiencies by trial counsel, prejudice should be assessed based on the cumulative effect of these deficiencies. ***State v. Thiel***, 2003 WI 111, ¶ 59, 264 Wis.2d 571, 665 N.W.2d 305.

Here, in addition to trial counsel's failure to introduce the time of Hassel's death, trial counsel failed to object to the introduction of Willis's boots into evidence and/or to seek an expert witness to testify that Willis's boots did not leave the impressions outside Hassel's apartment.

If trial counsel had objected to the introduction of Willis's boots and introduced Hassel's time of death, the State's theory of prosecution would have fallen apart. The State would not have any objective evidence or testimony placing Willis inside Hassel's apartment, only the word of Earnest Jackson and Steven Williams. The State's star witness—Trina Jagiello—would have been helpful to Willis, because her testimony would have meant she met with Willis before Hassel's death and would have meant that Willis was walking away from her house and Hassel's apartment around the time of Hassel's death.

Jagiello's testimony would have also cast doubt on Earnest Jackson's story, but if and only if her testimony was coupled with Hassel's time of death. Her testimony coupled with the time of Hassel's death would have required the jury to disbelieve Earnest's

story that Willis and Earnest walked to Jagiello's house after Hassel was shot because the State's proffered timeline would not have made any sense.

Indeed, if counsel had introduced Hassel's time of death and coupled it with Jagiello's testimony, every aspect of Jackson's testimony would have been suspect. Counsel could have easily argued that Jackson was simply lying about the entire incident. After all, Jackson could not accurately describe what Hassel was wearing, his prints and DNA were not found in the apartment, Williams described someone inconsistent with Earnest's self-description leaving Hassel's apartment, and Earnest's story about where he and Willis walked did not match Officer Hansen's investigation.

Moreover, without the boot evidence, the State could not argue that this objective physical evidence corroborated the testimony of its two dubious citizen witnesses. Their already dubious testimonies would have been contradicted by one another and unsupported by any objective evidence.

Accordingly, although trial counsel's deficiencies individually create a reasonable probability of a different outcome; considered cumulatively, they create a profound basis for this Court to doubt the reliability of Willis's murder conviction.

III.
The Circuit Court Failed To Adequately Explain Its Sentence

"[A] good sentence is one which can be reasonably explained." ***McCleary v. State***, 49 Wis.2d

263, 282, 182 N.W.2d 512 (1971). More than thirty years later, ***State v. Gallion*** reaffirmed the principles of ***McCleary*** and reiterated that a circuit court must follow a "basic framework" in order for its sentence to deserve a presumption of validity. ***Gallion***, 2004 WI 42, ¶¶ 1, 40, 270 Wis. 2d 535, 678 N.W.2d 197.

The "basic framework" by which a circuit court must abide in order to fashion a presumptively valid sentence is as follows: (1) it must specify the objectives of sentencing on the record (***id.***:¶ 40); (2) it must identify which of those objectives are of the greatest importance in that particular case (***id.***:¶ 41); (3) it must describe the facts relevant to those objectives (***id.***:¶ 42); (4) it must explain, in light of the facts of the case, why the particular components of the sentence imposed advance the specified objectives (***id.***); (5) it must identify the factors considered in arriving at its sentence and indicate how those factors fit the objectives and influenced its decision, taking into account aggravating and mitigating factors (***id.***:¶ 43) and (6) it must impose a sentence that calls for "the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." (***id.***:¶ 44).

As it appears has been happening since at least 1994[7], Judge Wagner explained that he does not approach sentencing with "the inflexibility that bespeaks a made-up mind and always tailors a sentence to fit the particular circumstances of the case and the individual characteristics of the person before the court." (R.77:31; App. 101).

Here, Judge Wagner's sentence utterly failed to follow the "basic framework" required for a presumptively valid sentence, which makes resentencing necessary. Judge Wagner followed only step one of the ***Gallion*** framework; that is, he recited the general sentencing objectives (R.77:31-32; App. 101-02), albeit nearly every conceivable sentencing objective.

However, Judge Wagner did not really identify which of the more-than-20 identified sentencing objectives were most important in Willis's case, other than to claim—after reciting nearly every possible sentencing objective—that its goal was to "reach[] an objective of sentencing that would include the recommendations by both counsel, what you've stated, the protection of the community, punishment, rehabilitation, deterrence." (*id.*:32; App. 102). Indeed,

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[7] *See Appellant's Brief in State v. Hudson*, 95-CR-2856, at page 38, available online at http://libcd.law.wisc.edu/~wb_web/will0102/48775c46.pdf (accessed 3/24/15). There, the Appellant wrote:

> As he has done in numerous cases, Judge Wagner assured Mr. Hudson that 'the court does not approach sentencing with the inflexibility that bespeaks a made up mind. And the Court always—does taylor (sic) a sentence that fits the particular circumstances of the case and particular individual characteristics of the defendant.'

even if Judge Wagner's aforementioned statement qualified as his identification of the most important sentencing objectives in this case, only one was later referenced—protection of the community—when Judge Wagner said "this is a horrific offense. A human life was, in fact, taken. There's going to be a significant amount of time so he's no longer any danger to the community . . ." (R.77:37; App. 107).

Other than Judge Wagner's claim that he was considering punishment, rehabilitation, and deterrence, he did not later identify or explain why those objectives were of the greatest importance in Willis's case. Accordingly, Judge Wagner failed to abide by step two of the ***Gallion*** framework.

Judge Wagner did not follow step three of the ***Gallion*** framework either. Step three requires the Court to describe which facts of the case are relevant to the most important identifiable sentencing objectives. Here, Judge Wagner simply stated some of the facts of the case, but did not describe why those facts were relevant to his sentencing objectives.

Judge Wagner also failed to follow step four of the ***Gallion*** framework. Judge Wagner did not explain, in light of the facts of the case, why the particular components of his sentence advanced the specified "most important" sentencing objectives. Judge Wagner did not explain, for example, why defense counsel's suggested 25-year sentence was inappropriate, given Willis's redeemable qualities like his work history or attempts at earning a higher education. Nor did Judge Wagner explain why 45 years in prison furthered the protection of the public any more than a 20-year

sentence.

Judge Wagner also failed to follow steps five and six of the ***Gallion*** framework. He did not describe the factors taken into account in arriving at his sentence (much less how those factors fit the objectives and influenced his decision), and he did not explain why his sentence was the least amount of confinement consistent with the protection of the public, gravity of the offense, and the rehabilitative needs of the defendant. Instead, Judge Wagner based his sentence on "the entire record in this case and . . . upon those factors the court must take into consideration upon sentencing . . ." (R.77:37; App. 107).

Judge Wagner recited sentencing objectives, some facts of the case, and came to a conclusion about Willis's sentence. It is clear from the sentencing transcript that "one could simply 'fill in the blank' by inserting any crime and any sentence of any number of years . . ." ***State v. Hall***, 2002 WI App 108, ¶ 17, 255 Wis. 2d 662, 648 N.W.2d 41. As in ***Hall***, "while the sentencing record reflects 'decision-making,' *i.e.*, the trial court decided to sentence [Willis to 45 years in prison], the court failed to demonstrate 'a process of reasoning . . . based on a logical rationale,' *i.e.* sufficient justification" for its sentence. ***Id.***; ***quoting McCleary***, 49 Wis. 2d at 277. The result in ***Hall*** 14 years ago compels the same result here: resentencing.

IV.
Willis Was Denied His Due Process Rights When The Jury Was Informed of His Status as a Felon

WIS. STAT. § 941.29(1)(a) (2011-2012), the "felon-in-possession" law, is the only crime prosecuted in Wisconsin in which a jury is automatically apprised that a defendant has a prior criminal record, regardless of whether he takes the stand in his own defense. By informing the jury Willis was a convicted felon, the circuit court violated fundamental precepts of the law of evidence, as well as basic principles of due process.

Once Willis stipulated to his prior felony, evidence that proved the felon status element of the offense was not relevant under WIS. STAT. § 904.02, and its prejudicial effect on the jury substantially outweighed any probative value under WIS. STAT. § 904.03. The State was not seeking to admit evidence of Willis's felony conviction as prior acts under WIS. STAT. § 904.04(2)(a), and the State rightfully did not have the opportunity to use Willis's prior convictions for the purposes of impeachment under WIS. STAT. § 906.09(1) because he did not testify.

Nevertheless, once the jury was told of Willis's status as a felon, the substantial likelihood of prejudice to Willis was clear: the jury may have concluded that he was guilty because he is a criminal. *See* 7 Daniel Blinka, Wisconsin Practice: Wisconsin Evidence § 609.1, at 418 (2d ed. 2001) (citations omitted).

Willis's concern was borne out in *voir dire*, when jurors expressed their inability to remain impartial knowing Willis was a felon. Juror 3 said he would

presume Willis possessed a firearm because he was a felon (R.71:53). Juror 25 said "I think it [Willis's commission of a crime] would be more likely if he had a past problem." (R.71:54). Juror 21 agreed and could not "necessarily say it is going to impair me to be fair or impartial or not. It is definitely something that is now kind of on the canvas." (*id.*:56).

In any other case, it would be wholly inappropriate to inform a jury that the defendant is a felon. This problem can easily be rectified through bifurcated proceedings, as other jurisdictions have done. ***State v. Davidson***, 351 N.W.2d 8, 11-12 (Minn. 1984); ***United States v. Mangum***, 100 F.3d 164, 171 (D.C. Cir. 1996).

While it is clear that permitting a jury to learn the accused's status as a felon when the accused stipulates to the prior felony and does not testify violates fundamental precepts of the law of evidence, as well as basic principles of due process, Willis understands that Wisconsin's appellate courts have not yet accepted this logic. ***See, e.g., State v. McAllister***, 153 Wis. 2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989); ***State v. Nicholson***, 160 Wis. 2d 803, 807, 467 N.W.2d 139 (Ct. App. 1991). He accordingly raises this claim solely to preserve it for ultimate review by a court with authority to correct the error.

CONCLUSION

For the reasons stated, Willis respectfully requests that this Court reverse the circuit court and order a new trial.

Dated this 15th day of August, 2016.

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FORM AND LENGTH CERTIFICATION

This brief conforms to the rules contained in WIS. STAT. (Rule) § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,683 words.

Dated this 15th day of August, 2016.

/s/ Geoffrey R. Misfeldt
Geoffrey R. Misfeldt
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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. (RULE) § 809.19(12)

I have submitted an electronic copy of this brief, which complies with the requirements of WIS. STAT. (Rule) § 809.19(12). This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 15th day of August, 2016.

/s/ Geoffrey R. Misfeldt
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APPENDIX CERTIFICATION

Filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. (RULE) § 809.19(13)(f)

I have submitted an electronic copy of this appendix which identical in content and format to the printed form of the appendix filed as of this date.

Dated this 15th day of August, 2016.

/s/ Geoffrey R. Misfeldt
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STATE OF WISCONSIN COURT OF APPEALS
DISTRICT I

Appeal No. 16-AP-791CR
Milwaukee County Case No. 12-CF-1134

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ALPHONSO L. WILLIS,
Defendant-Appellant.

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