STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP791-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALPHONSO LAMONT WILLIS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

I. Willis' boots were properly used as evidence at his trial.

A. Willis failed to show that his attorney was ineffective for not objecting to the introduction of his boots into evidence.

The attorney who represented the defendant-appellant, Alphonso L. Willis, at his trial did not object when the State sought to introduce Willis' boots into evidence (73:131), thereby waiving any right to complain about the admission of this evidence. *State v. Carprue*, 2004 WI 111, ¶ 46, 274 Wis. 2d 656, 683 N.W.2d 31; *State v. Nielsen*, 2001 WI App 192, ¶ 11, 247 Wis. 2d 466, 634 N.W.2d 325; *Holmes v. State*, 76 Wis. 2d 259, 272, 251 N.W.2d 56 (1977).

Thus, any question of whether the boots were properly admitted into evidence must be reviewed as a claim of ineffective assistance of counsel for not objecting to their admission. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Carprue*, 274 Wis. 2d 656, ¶ 47; *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 680 n.5, 556 N.W.2d 136 (Ct. App. 1996). Willis must prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305.

Since the measure of deficient performance is reasonableness, *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d

642, 734 N.W.2d 115; *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986), the inquiry regarding counsel's performance looks to whether a reasonable attorney could have reasonably believed there was no reason to object to the evidence.

Here, it was reasonable to believe that the boots were relevant evidence tending to show that Willis left the building where the victim, SH, was shot shortly after the shooting. The fact that Willis left the scene of the shooting shortly afterwards tended to show that he was involved in the crime.

Relevance is a qualitative measure. Evidence is relevant if it has "any tendency" to make a consequential fact more probable or less probable. *State v. Payano*, 2009 WI 86, ¶ 68, 320 Wis. 2d 348, 768 N.W.2d 832; *State v. Muckerheide*, 2007 WI 5, ¶ 19, 298 Wis. 2d 553, 725 N.W.2d 930; *State v. Richardson*, 210 Wis. 2d 694, 705, 563 N.W.2d 899 (1997); Wis. Stat. § 904.01.

The test for relevance is whether the evidence tends to shed any light on the subject of the inquiry. *Richardson*, 210 Wis. 2d at 707 (quoting Judicial Council Committee Note to Wis. Stat. § 904.01). This standard reflects a broad concept of relevance, with a correspondingly low threshold for the introduction of relevant evidence. *Richardson*, 210 Wis. 2d at 707.

Whether the fact to which the evidence relates is disputed by the opponent of the evidence has no bearing on whether it is relevant because the test is simply whether it tends to establish a fact urged by the proponent. *See Payano*, 320 Wis. 2d 348, ¶ 69 & n.15.

In this case, there was evidence that showed that SH was shot in her apartment at 2315 West Scott Street in Milwaukee. (72:30-31, 43; 73:17, 28, 31-32.)

When Officer Michael Hansen arrived at the apartment building shortly after 8:00 p.m., he observed two sets of footprints leading away from the northeast corner of

the building in the freshly falling snow. (72:99, 101, 107.) These were the only footprints in the vicinity of the building. (72:110.)

Under these circumstances, it was reasonable to infer that the footprints were left by the persons who were responsible for the shooting as they fled the scene of their crime.

A few days later, Detective Robert Rehbein seized the boots Willis was wearing. (73:129.)

A comparison of a photograph of the bottom of Willis' right boot, inverted to indicate what sort of impression it would leave, shows that it matches quite closely a photograph of an impression made by a right boot in the snow outside SH's apartment building. (55, Ex. 1 (photos), Appellant's Br. 21-22.)

The photos show that both the boot and the impression are about the same size and shape.

Both have lugs or ridges completely around the heel and the sole, but not the instep. The lugs or ridges on the outer edge of the soles are slightly closer to the instep than the lugs or ridges on the inner edge of the soles.

Both the boot and the impression have two stars or crosses running vertically in the heel between the lugs or ridges.

Neither has any stars or crosses in the instep.

Both have a number of stars or crosses running at an angle between the lugs or ridges on the sole, starting with a single star or cross between the first pair of lugs or ridges

Willis asserts that the arrangement of stars on the sole of his boot does not match the arrangement of stars in the impression because the pairs of stars are angled from lower left to upper right on his boot, while they appear to be angled from lower right to upper left in the impression.

However, this assertion fails to take into account that the impression was made by a moving boot in freshly fallen snow with snow continuing to fall over the impression.

So it is possible that there was another star on the boot making the impression, immediately above and to the left of the single star on the lower sole, that cannot be discerned on the photo of the impression because the image it made could have been cloaked by snow. The image could have become obscured because the motion of the boot kicked already fallen snow over it, or because some still precipitating snow fell onto it, in either case covering it up.

The stars do not have much depth, so it would not have taken much snow to cover the image they made.

Obscuring this single star makes the tread of the boot look significantly different. It makes the pairs of stars that remain visible appear to be angled from lower right to upper left instead of lower left to upper right.

If the star that appears on the photo of the boot immediately above and to the left of the single star on the lower sole is obscured, such as by blacking it out or covering it up, the arrangement of the remaining stars on the boot then matches the arrangement of the remaining stars on the impression, i.e., lower right to upper left.

Therefore, when the circumstances surrounding the impression of the boot are taken into consideration, Willis' boot had at least some tendency to show by comparison that his boot made the impression in the snow. It is conceivable that if the snow had not obscured the image of a star that would otherwise have been visible in the impression, the pattern of the stars in the impression would have absolutely matched the pattern of the stars on Willis' boot, making the comparison between the boot and the impression complete.

Willis argues that his "boots would only be relevant if they could have made the impressions in the snow outside [SH's] apartment." (Appellant's Br. 26.) The boots could have made the impressions. They were relevant evidence.

The boots were relevant evidence, properly admissible, because they had a tendency to prove that Willis left his

footprints in the snow while he was fleeing from the scene of a shooting in which he was involved.

But even if Willis' attorney had performed deficiently by failing to object to supposedly irrelevant evidence, Willis would still have to show that he was prejudiced because the result of his trial would have probably been different if there had been an objection. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20.

Willis cannot show prejudice, though, because even if his attorney had objected, his boot would have been properly admitted into evidence over the objection as relevant evidence of his guilt.

And even if the boot would have been excluded, the fact that Willis' footprints led away from the crime scene was proved by other, even stronger, evidence.

Earnest Jackson testified that he and Willis left SH's apartment building, went around the back, through the parking lot, across the street, and through a yard where they encountered a lady who was shoveling snow in back of her home. (73:35-38.) Jackson said that he and Willis were "speed walking" side by side. (73:36-37.)

While Jackson's credibility may have been compromised, there is no good reason to suppose that the jury did not believe this testimony, which was uncontradicted and corroborated. It cannot be inferred that the jury did not believe Jackson simply because they did not ask to have his testimony read back during their deliberations. (Appellant's Br. 35.)

Jackson's testimony was corroborated simply by the fact that there actually were two sets of footprints in the snow following the path he said he and Willis had walked, and by the fact that there was a lady shoveling snow at a home across the street from the parking lot of the apartment building. (72:101-02, 105-06.)

This woman, Trina Jagielo, testified that she was shoveling snow in the back of her home at 1230 South 23rd

Street when Willis and another man came walking up to her from the front of the house. (72:75-82.)

This means that Willis did indeed leave footprints in the snow around the house where Jackson said he went with Willis. And since the footprints around Jagielo's house led back to the apartment building (72:101-02), this means that Willis did leave the apartment building on foot, making footprints in the snow at that location.

The result of Willis' trial would have been the same with or without the admission of his boots into evidence.

Being unable to show either deficient performance or prejudice, Willis failed to show that his attorney was ineffective for failing to object to the admission of his boot as evidence.

Willis was not entitled to an evidentiary hearing on this claim of ineffective assistance because the record conclusively shows he was not entitled to relief. *State v. Balliette*, 2011 WI 79, ¶¶ 18, 50, 336 Wis. 2d 358, 805 N.W.2d 334; *Allen*, 274 Wis. 2d 568, ¶ 15.

B. The interest of justice does not require a new trial when a disputed issue of fact was presented for the jury to determine.

Relying on *State v. Hicks*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996), Willis asserts that he should get a new trial in the interest of justice because the jury was presented with evidence that was later determined to be inconsistent with the facts. But this case is nothing like *Hicks*.

In *Hicks*, the State's theory that hairs found at the scene of the crime came from the defendant was later shown to be wrong by DNA evidence that excluded the defendant as the source of one of the hairs. *Hicks*, 202 Wis. 2d at 163-64. The State did not dispute the fact that the DNA evidence excluded Hicks as the source of evidence on which it relied at the trial. *See Hicks*, 202 Wis. 2d at 157-58. The supreme court reversed Hicks' conviction in the interest of justice

because "the jury was presented with evidence and argument that was later found inconsistent with the facts." *Hicks*, 202 Wis. 2d at 163.

This case is different from *Hicks* because here the State's evidence and argument at the trial are not inconsistent with any conclusively established or conceded facts. Although Willis thinks it is "indisputable" that his boot did not make the impression in the snow outside SH's apartment, the State has shown why that view is not only disputable but wrong.

When the circumstances in which the impression was made are taken into account, it is reasonable to infer that the impression was in fact made by Willis' boot. That inference is confirmed by the testimony of Earnest Jackson that Willis did indeed walk from SH's apartment building to Trina Jagielo's house, and by the testimony of Jagielo that Willis was at her home on foot

Obversely, Willis is mistaken when he asserts that his boot did not make the impression because he fails to consider the circumstances in which the impression was made as well as the testimony of the eyewitnesses.

There is a difference between "the facts" and the defendant's version of the facts. Just because the defendant interprets evidence differently from the way the evidence is interpreted by the State does not make that evidence inconsistent with "the facts." The evidence is only inconsistent with the defendant's version of the facts.

This dispute about what the evidence proved simply created an issue of fact for the jury to determine. If, like Willis, they ignored the circumstances in which the impression was made, they could find that there was not a match between the boot and the impression. But if they did consider the relevant circumstances, they could reasonably determine that Willis' boot made the impression in the snow.

This is plainly not the kind of case Willis attempts to portray where the State's evidence could have led the jury to

find a fact that has now been determined to be indisputably incorrect.

Furthermore, the supreme court reversed Hick's conviction in the interest of justice because the evidence was inconsistent with a fact that was critical in the case. *Hicks*, 202 Wis. 2d at 171.

But the fact that Willis' boot matched the footprint in the snow outside SH's apartment building was not a critical fact in this case. It was merely some evidence of the more important fact that Willis walked away from that building.

The footprint was not the only evidence tending to establish the fact that Willis walked away. There was also the testimony of Jackson and Jagielo that established, independently of the footprint, that Willis in fact walked away from the building where SH was shot.

The power of discretionary reversal should be used cautiously, judiciously and infrequently, only in exceptional cases. *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60.

A case that merely presents a disputed issue of fact for the jury to determine is not exceptional.

Willis is not entitled to a new trial in the interest of justice in this ordinary case of disputed evidence.

C. The prosecutor properly argued that Willis' boots made the footprints in the snow.

Prosecutors may comment on the evidence, detail the evidence, analyze the evidence, put a reasonable interpretation on the evidence, draw just inferences from the evidence, argue from the evidence to a conclusion, and state that the evidence convinces them and should convince the jurors. *State v. Draize*, 88 Wis. 2d 445, 454, 456, 276 N.W.2d 784 (1979). Inferences may be drawn as long as there is an evidentiary basis, however slight, for the logical conclusion the prosecutor draws. *See State v. Smith*, 2003 WI App 234, ¶¶ 23-24, 268 Wis. 2d 138, 671 N.W.2d 854.

It was perfectly reasonable for the prosecutor to argue that Willis' boots left the footprints in the snow outside SH's apartment, considering the circumstances in which the impressions were made and the supporting eyewitness testimony.

There is no reason to fault the prosecutor and reverse Willis' conviction just because Willis thinks a different inference should be drawn from the evidence.

D. Willis failed to show that his attorney was ineffective for failing to find an expert witness whose testimony was unnecessary, inadmissible and unpersuasive.

Expert testimony is required only when the question to be decided by the trier of fact is beyond the knowledge and experience of the average juror. *State v. Owen*, 202 Wis. 2d 620, 632, 551 N.W.2d 50 (Ct. App. 1996); *Drexler v. All American Life & Cas. Co.*, 72 Wis. 2d 420, 428, 241 N.W.2d 401 (1976). *See Burnett v. Alt*, 224 Wis. 2d 72, 83, 589 N.W.2d 21 (1999).

"When the expert evidence is directed to ordinary phenomena easily observable by any person of ordinary intelligence, it is unnecessary and improper . . . ." *Ladwig v. Jefferson Ice Co.*, 141 Wis. 191, 196, 124 N.W. 407 (1910). When the expert testimony departs from the "very simple and obvious considerations known to every person of ordinary intelligence," it is "demonstrably incorrect." *Ladwig*, 141 Wis. at 196.

The opinion of the expert Willis hired after his trial was based, in the expert's own words, on nothing more than "comparisons . . . conducted between the snow impression and the reversed image" of Willis' boot. (55, Ex. 1, ¶ 15.) Thus, the expert did nothing more than look at the impression left by a boot in the snow, look at the tread of Willis' boot and compare the two to see whether he thought

that the pattern on the bottom of the boot matched the pattern in the snow.

That is something anyone could do. Anyone—attorneys, judges, jurors, could look at the impression, look at Willis' boots and compare the two.

While the expert prepared a photo showing a reverse image of Willis' right boot, jurors could have simply flipped the boot image in their minds or just used Willis' left boot, which presumably had the same tread pattern as the right boot, for comparison.

Moreover, anyone could look at the impression, look at Willis' boots and do a better job comparing the two than Willis' expert because they could take into account the circumstances in which the impression was made. They could take into account the fact that the loose snow could have covered up the impression made by one of the stars on Willis' boot. They could take into account the fact that when that star is covered on the tread of Willis' boot, his boot exactly matches the impression left in the snow.

It was not deficient performance to fail to hire an expert who could not provide any testimony which was admissible into evidence, and which in any event was demonstrably incorrect because it departed from the very simple and obvious considerations known to every person of ordinary intelligence.

Nor was Willis prejudiced by his attorney's failure to hire the new expert.

First, the expert's testimony would not have been admitted into evidence because it did not qualify as expert testimony. It did not tell the jury anything they could not figure out for themselves.

Second, even if the testimony had been admitted it would have been discounted by the jury because it was fatally unpersuasive due to the expert's failure to consider the circumstances in which the snow impression was made.

Third, it is reasonably probable that a jury that did consider the circumstances in which the impression was made, along with the eyewitness testimony relating to the footprints, would come to the conclusion that the footprints in the snow were made by Willis as he fled the scene of the crime.

Willis failed to show that his attorney was ineffective for failing to hire an expert who had no discernible value to the defense.

Willis was not entitled to an evidentiary hearing on this claim of ineffective assistance because the record conclusively shows he was not entitled to relief. *Balliette*, 336 Wis. 2d 358, ¶¶ 18, 50; *Allen*, 274 Wis. 2d 568, ¶ 15.

E. The opinion of Willis' new expert does not qualify as newly discovered evidence.

The cornerstone of a claim of newly discovered evidence is the discovery of the evidence after the defendant was convicted. *State v. Sorenson*, 2002 WI 78, ¶ 26, 254 Wis. 2d 54, 646 N.W.2d 354; *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Evidence does not qualify as newly discovered if the defendant knew about it before his conviction. *State v. Williams*, 2001 WI App 155, ¶ 12, 246 Wis. 2d 722, 631 N.W.2d 623.

A new appreciation of the importance of evidence known previously does not transform the old evidence into newly discovered evidence. *Williams*, 246 Wis. 2d 722, ¶ 16; *State v. Fosnow*, 2001 WI App 2, ¶¶ 9, 13, 240 Wis. 2d 699, 624 N.W.2d 883; *Vara v. State*, 56 Wis. 2d 390, 394, 202 N.W.2d 10 (1972). It does not matter what caused the known evidence to acquire new significance. *State v. Bembenek*, 140 Wis. 2d 248, 256-57, 409 N.W.2d 432 (Ct. App. 1987). So merely recycling and reformulating existing information into a new format presented by a new witness does not generate new evidence. *Williams*, 246 Wis. 2d 722, ¶¶ 15-16.

The evidence consisting of an impression in the snow and Willis' boots from which a comparison could be made was known before Willis was convicted. Photos of both, as well as the boots themselves, were introduced into evidence at his trial. (73:130-31, 139; 74:26-27.) The prosecutor argued to the jury that Willis' boots made the impression. (74:74-75.)

The opinion of Willis' expert regarding a comparison between items that were in evidence at the trial is simply a new appreciation of the importance of this existing evidence. It is not newly discovered evidence.

But even a defendant who establishes that he has newly discovered evidence is not entitled to reversal of his conviction unless there is a reasonable probability that a jury, looking at the evidence available when the defendant was convicted and the new evidence now available to the defendant, would find that the new evidence changes the factual picture so significantly that it would have a reasonable doubt about the defendant's guilt. *State v. Plude*, 2008 WI 58, ¶¶ 32-33, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Love*, 2005 WI 116, ¶¶ 43-44, 284 Wis. 2d 111, 700 N.W.2d 62.

For the reasons outlined above, that would not happen in this case.

First, the expert's testimony would not have been admitted into evidence because it did not qualify as expert testimony since it did not tell the jury anything they could not figure out for themselves.

Second, even if the testimony had been admitted it would have been discounted by the jury because it was fatally unpersuasive due to the expert's failure to consider the circumstances in which the snow impression was made.

Third, a jury that did consider the circumstances in which the impression was made, as well as the eyewitness testimony relating to the footprints, would have probably

come to the conclusion that the footprints in the snow were made by Willis as he fled the scene of the crime.

The opinion of Willis' newly found expert does not qualify as newly discovered evidence.

II. Willis failed to show that his attorney was ineffective for failing to introduce evidence of several telephone calls.

Willis faults his attorney for failing to introduce evidence of telephone calls that he claims would have established the time of the victim's death. But Willis provides no explanation for how or why these calls would have established the time the victim died.

The first call is a 911 call made at 7:58 p.m., notifying the police that SH had been shot. (44, Ex. 1.)

Willis simply assumes that this call was made immediately after the shooting. But there is nothing in the record to support any such assumption. There is nothing to indicate how long after the shooting the call was made.

What is known is that the 911 call was not made by Steven Williams, the person who found SH after she was shot. (72:39-44.) Williams' response to his grisly discovery was to gather up the belongings he kept in SH's apartment and leave the scene with them. (72:71-72.) So it is likely that the caller, Williams' uncle Norman (72:38, 44), waited at least until after Williams had collected his things and left the building before finally deciding to call the police.

Willis does not explain why his attorney should have introduced evidence that proved absolutely nothing regarding the time SH was shot or the time she died. Nor does Willis explain how this immaterial evidence could have possibly changed the result of his trial had it been admitted.

Second, there was actually a set of two very short calls, each lasting only seconds, one made at 7:51 p.m., the other at 7:55 p.m., both made from SH's cellphone to

"Sweet." (44, Ex. 2.) The police found the cellphone clutched in the victim's hand. (44, Ex. 2.)

Willis assumes that SH was alive and conscious when these calls were made. But evidence in the record shows that she may have already been dead or close to death at that time.

The medical examiner, Dr. Brian Peterson, testified about a phenomenon known as a cadaveric spasm where a person who is dead or dying, although otherwise limp, clutches an object, like a cellphone, in their hand. (74:17.) Doctor Peterson said that this phenomenon is seen most often in drowning cases, and that, although SH was shot, the bullet ripped open vessels in her neck causing her to drown in her own blood. (74:9-10.)

Thus, it is possible that SH made the calls at 7:51 and 7:55, but did so spasmodically an appreciable amount of time after she had been shot.

And it is the time SH was shot, rather than the time she died after being shot, that would be significant in this case.

Doctor Peterson testified that he could not determine how long it took for SH to die after she had been shot, but that she did not die immediately. (74:16.)

Willis did not wait around for SH to die. He fled from her apartment immediately after shooting her, the smoking gun still in his hand. (72:39-42.) So it is the time SH was shot that would be instrumental in assessing whether he could have committed the crime and still arrived at Jagielo's house a block or so away sometime between about 7:40 p.m. and 7:55 p.m. (72:76-77, 92.)

Although the time SH was shot was not established scientifically or testimonially, there is some evidence that it was before 7:40 p.m.

SH's telephone records show that she placed a brief call to "Steve," perhaps Steven Williams, at 7:33 p.m., and another brief call to "Jerry" at 7:36 p.m. (44, Ex. 2.) It is

plausible that SH placed these calls trying to summon help as she was being confronted by Willis. (73:25-28.) It is possible that her last attempt to call for help came just before she was shot.

If Willis shot SH around 7:36 p.m., he would have had plenty of time to speed walk to Jagielo's house within the time frame she gave for his arrival.

Willis does not explain why his attorney should have introduced evidence of phone records that, if anything, tended to show a plausible time frame for the relevant events in the case. Willis does not explain how the jury's verdict of guilt would have probably been different if his attorney had introduced evidence that, in the context of other evidence in the case, would have tended to show that he was guilty.

Willis failed to show that his attorney was ineffective for failing to introduce evidence of several telephone calls.

Willis was not entitled to an evidentiary hearing on this claim of ineffective assistance because the record conclusively shows he was not entitled to relief. *Balliette*, 336 Wis. 2d 358, ¶¶ 18, 50; *Allen*, 274 Wis. 2d 568, ¶ 15.

III. The circuit court adequately explained the sentence it imposed.

Circuit courts have considerable discretion in determining the appropriate sentence for a particular defendant in a particular case. *Compare State v. Ramel*, 2007 WI App 271, ¶ 12, 306 Wis. 2d 654, 743 N.W.2d 502, *with State v. Grady*, 2007 WI 81, ¶ 31, 302 Wis. 2d 80, 734 N.W.2d 364, *and State v. Odom*, 2006 WI App 145, ¶ 7, 294 Wis. 2d 844, 720 N.W.2d 695. On review, a sentence is presumed to be reasonable. *Grady*, 302 Wis. 2d 80, ¶ 32; *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998).

The reviewing court should search the record to determine whether the sentence can be sustained as a

proper discretionary act. *Ramel*, 306 Wis. 2d 654, ¶ 9; *Odom*, 293 Wis. 2d 844, ¶ 8. If the reasons given for the sentence indicate the application of legally relevant factors to the facts of record, a sentence should be affirmed. *Grady*, 302 Wis. 2d 80, ¶ 33; *Odom*, 294 Wis. 2d 844, ¶¶ 7-8; *State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984); *McCleary v. State*, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971).

A case will be remanded for resentencing only when an erroneous exercise of discretion is clearly shown. *Grady*, 302 Wis. 2d 80, ¶ 32; *Lechner*, 217 Wis. 2d at 418-19; *McCleary*, 49 Wis. 2d at 278.

In this case it is apparent that the circuit court believed that a lengthy period of incarceration was required because Willis presented a significant danger to the community. (77:37.)

This was because Willis had committed other crimes in the past where he terrorized his victims with a gun, because he had a gun on the day of this crime even though he was prohibited from possessing one, and most of all because he unhesitatingly shot and killed a helpless, unarmed, unresisting woman over a $20 drug debt. (77:34-37.) Anyone who would kill another human being over something so trivial without thinking twice would present a very significant danger of killing someone else for any number of reasons, or no reason at all.

Although the court did not recite chapter and verse in articulating the reasons for Willis' sentence, it said enough to show that it did exercise discretion in selecting a sentence that would protect the public for a reasonable length of time.

IV. The State was permitted to advise the jury that Willis was a convicted felon to prove an element of the crime of possession of a firearm by a felon.

Willis concedes that Wisconsin courts have not accepted his contention that the State should not be

permitted to advise the jury that a defendant who is charged with being a felon in possession of a firearm is indeed a felon. Actually, the courts have expressly rejected this argument.

In *State v. Nicholson*, 160 Wis. 2d 803, 807, 467 N.W.2d 139 (Ct. App. 1991), the court explained that the crime of felon in possession of a firearm has two elements, one of which is that the person in possession of the firearm must have been convicted of a felony. Noting that the prosecution is required to prove all elements of the crime charged, the Court said,

> When a prosecutor presents evidence before the jury of the defendant's status as a convicted felon, he or she is properly establishing one of the two elements of the charged crime. Therefore, it is not reversible error for the trial court to permit the revelation to the jury of the defendant's felon status. Reversible error would only arise when the nature of that felony were revealed to the jury despite the offer to stipulate.

Nicholson, 160 Wis. 2d at 807-08 (citing *State v. McAllister*, 153 Wis. 2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989)).

Willis' right to due process was not violated when the State properly proved an element of the crime with which he was charged.

CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

Dated September 30, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5,276 words.

Dated this 30th day of September, 2016.

_____
THOMAS J. BALISTRERI
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 30th day of September, 2016.

_____
THOMAS J. BALISTRERI
Assistant Attorney General