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STATE OF WISCONSIN

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C O U R T O F A P P E A L S

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT 2

Appeal No. 17AP 680
Waukesha County Case No. 15CF70

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRIN L. MALONE,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGMENT OF CONVICTION AND DENIAL OF THE
DEFENDANT-APPELLANT'S MOTION FOR POST-CONVICTION RELIEF,
HON. LLOYD V. CARTER PRESIDING**

DEFENDANT-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities.....ii
Argument.....1
I. The Circuit Court Erred in Admitting Other Acts
Evidence.....1
II. Mr. Malone’s Trial Attorney Provided Ineffective
Assistance.....2
III. Mr. Malone is Entitled to a New Trial in the Interest
of Justice.....6
IV. The State Denied Mr. Malone His Due Process Right to a
Fair Trial.....11

Conclusion.....13
Certification.....14

TABLE OF AUTHORITIES

CASES

1. *Bradley v. State*, 36 Wis.2d 345, 359-59a, 153 N.W.2d 38
(1967).....12
2. *Maclin v. State*, 92 Wis. 2d 323, 284 N.W.2d 661
(1979).....12
3. *State v. D’Acquisto*, 124 Wis.2d 758, 763, 370 N.W.2d
781 (1985).....9
4. *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12,
17 (Ct. App. 1984).....6
5. *State v. Johnson*, 153 Wis.2d 121, 449 N.W.2d 845
(1990).....3
6. *State v. Lambert*, 68 Wis.2d 523, 533, 229 N.W.2d 622
(1975).....12
7. *State v. Murphy*, 188 Wis.2d 508, 524 N.W.2d 924 (Ct.
App. 1994).....1-2
8. *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665
N.W.2d 305.....4-5
9. *State v. Walli*, 2011 WI App 86, 334 Wis.2d 402, 799
N.W.2d 898.....7-8
10. *United States v. Atkinson*, 297 U.S. 157, 160
(1936).12
11. *Washington v. Smith*, 219 F.3d 620
(7thCir.2000).....4-5

ARGUMENT

I. The Circuit Court Erred in Admitting Other Acts Evidence

The State argues that this case is similar to *State v. Murphy*, 188 Wis.2d 508, 524 N.W.2d 924 (Ct. App. 1994). In that case, the court permitted the use of other acts evidence of ten robberies occurring in 1987 at Murphy's trial for two armed robberies in 1992. *Id.* at 518. However, Murphy had confessed to the 1987 crimes. *Murphy*, 188 Wis.2d at 514, 520. The court limited the other acts evidence to the testimony of one witness, that being the detective who took Murphy's confessions to the 1987 crimes. *Id.* at 514.

In the present case, the trial court did not limit how the other acts evidence came in at all, and, even more importantly, Mr. Malone did not confess to the Brookfield robbery and it was never proven that he committed it. In addition to arguing that the Brookfield robbery was not sufficiently similar to the Waukesha robbery Mr. Malone also argued that there was insufficient proof that he had committed the Brookfield robbery in the first place.

The *Murphy* Court was also evaluating the similarities between ten 1987 robberies and two 1992 incidents. *Id.* at 512-13, 514-17. The evidence of the ten prior robberies that Murphy had confessed to established the "imprint of

the defendant" that was also present in the pending cases. Further, the similarities were less common. Those included the fact that four of the 1987 robberies were of dry cleaning businesses, as were both of the 1992 cases. *Id.* at 519-20. In four of the 1987 robberies and one of the 1992 robberies Murphy used a knife. *Id.* at 513, 514-17.

In this case the court admitted the evidence of one prior robbery, not ten, and Mr. Malone did not confess to that crime. A firearm was used in each robbery rather than the less-common use of a knife. The similarities between the robberies did not identify Mr. Malone as the perpetrator. Jerica Cotton and Kenneth Thomas admitted to their roles in both robberies and the similarities between the crimes pointed to them (30:2).

The facts of the cases at issue here identify Mr. Thomas and Ms. Cotton, but not Mr. Malone, and the similarities between the offenses were common to many armed robberies. The circuit court's decision to admit the other acts evidence was clearly erroneous.

II. Mr. Malone's Trial Attorney Provided Ineffective Assistance

The State addresses only the prejudice prong of the *Strickland* analysis for a claim of ineffective assistance

of counsel. (State's Br. 24). Mr. Malone maintains that his trial counsel's performance was deficient.

A. Other Acts Hearing

In his post-conviction motion Mr. Malone argued that the omitted video would have prevented the court from finding that Mr. Malone was the second suspect in the Brookfield robbery had the video been showed at the other acts motion hearing (68:12). The court stated at that hearing that there were limitations on the identity because the individuals were masked (83:17). Mr. Malone argued that the video showing the suspect's bare hand would have removed those limitations. (68:12).

The trial court found that the omitted clip would not have changed its decision. (83:33). Given the limited evidence connecting Mr. Malone to the Brookfield robbery, video showing the suspect's hand to be a different color than Mr. Malone certainly weighs against the admissibility of the other acts evidence. Mr. Malone maintains that the trial court's decision was incorrect. Further, this Court reviews the prejudice prong of the *Strickland* analysis without deference to the trial court's conclusions. *State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845 (1990).

B. Trial

The State argues that the video showing the second suspect's hand did not provide any better information about the suspect's race than the obscured view of his face. (State's Br. 25). The State bases this argument on the fact that the skin tone of the suspect's hand matches that of the exposed portion of his face. (State's Br. 25). For that reason, the State claims that the evidence showing the robber's hand to be white was cumulative and omitting it was not prejudicial. (State's Br. 25-26).

The omitted video clip in this case was not merely cumulative. In *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305, the Wisconsin Supreme Court stated

The nature of the credibility evidence in this case cannot be characterized as merely cumulative.

We find instructive on this matter *Washington v. Smith*, 219 F.3d 620 (7th Cir.2000), a decision of the Seventh Circuit Court of Appeals concerning a Wisconsin case that had denied an ineffective assistance of counsel claim largely on grounds that omitted evidence of additional alibi witnesses was merely cumulative. We find the following reasoning particularly relevant to assessing Thiel's claim:

The impact of three more witnesses corroborating Washington's alibi would not have been "cumulative" as the Wisconsin Court of Appeals believed. Evidence is cumulative when it "supports a fact established by existing evidence," *Black's Law Dictionary* 577 (7th ed.1999), but Washington's whereabouts on the day of the robbery was far from established-it was the issue in the case. The fact that [another witness] had already testified to facts consistent with Washington's alibi did not render additional testimony cumulative. Indeed,

the additional testimony ... would have added a great deal of substance and credibility to Washington's alibi. *Id.* at 634.

As in *Washington*, the veracity of JoAnn's claims of sexual relations with Thiel was not established to such a degree that additional evidence could not have further undermined her credibility and generated reasonable doubt as to Thiel's guilt.

State v. Thiel, 2003 WI 111, ¶¶ 78-79, 264 Wis. 2d 571, 613-14, 665 N.W.2d 305, 326.

The same is true in this case. The jury did see a portion of the second suspect's face, and the skin tone did match the skin tone of the hand in the omitted clip. However, the small portion of the face that was visible did not establish the race of the suspect to a degree that additional evidence could not have undermined Mr. Malone's identification as the suspect. In *Washington* the suspect's whereabouts on the day of the crime was the only issue at trial; here, the identity of the second suspect was the only issue. If three additional alibi witnesses would not have been cumulative evidence then neither would three additional seconds of video.

The State further points to still images taken from surveillance video from the tavern/apartment building on the night of the Waukesha robbery. (State's Br. 26). Although the State is correct that Jerica Cotton identified one of the people in those images as Mr. Malone, he is not

identifiable in the images themselves. Ms. Cotton's testimony that that was Mr. Malone is no different than her testimony that Mr. Malone accompanied her on the robbery.

The State also argues that Mr. Thomas' sister testified that "the bald guy" was at her apartment the night of the Waukesha robbery and left alone, but acknowledged giving a statement to police saying that he had left with Mr. Thomas and had a lot of money when he returned. (State's Br. 26-27). This actually supports Mr. Malone's argument—Ms. Thomas had already lied about what happened, and video showing the second suspect to be white would have further discredited her testimony.

The State's final argument is that Mr. Malone did not identify who the second suspect was. (State's Br. 27). However, "evidence that simply affords a possible ground of suspicion against another person should not be admissible." *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12, 17 (Ct. App. 1984). Mr. Malone could not simply point to another perpetrator even if he knew who it was.

Trial counsel performed deficiently, and Mr. Malone was prejudiced as a result. The Court should reverse the circuit court and remand the case for a new trial.

III. Mr. Malone is Entitled to a New Trial in the Interest of Justice

The State argues under *State v. Walli*, 2011 WI App 86, 334 Wis.2d 402, 799 N.W.2d 898 “[W]hen evidence in the record consists of disputed testimony and a video recording, [this Court] will apply the clearly erroneous standard of review when [it is] reviewing the trial court’s findings of fact based on that recording.” (State’s Br. 30).

In *Walli*, the arresting officer testified at a suppression hearing that he had seen Walli cross the center line while driving. *Id.* at ¶ 14. However, whether the video showed the lane deviation or not was disputed. *Id.* As a result, “the trial court’s ruling involved not simply the review of the video, the court also evaluated the credibility of the officer and weighed all of the evidence.” *Id.* at ¶ 14.

Here, there was no eyewitness testimony contradicting the video. The trial court did not have to assess whether to believe a witness’s account of what happened. The court’s ruling in this case *did* involve simply the review of the video without having to assess the credibility of competing witness testimony.

The *Walli* Court also stated “Because *State v. Binette*, 33 S.W.3d 215 (Tenn.2000), is factually distinguishable from this case—Munnik’s testimony of what he observed accompanies the video recording—we reject

Walli's reliance on that decision. We leave for another day the scenario in *Binette* where the video recording is the only evidence of the alleged criminal conduct." *Id.* n.5. That is precisely the issue in this case. Although Mr. Malone maintains that the trial court's findings were clearly erroneous, this Court should apply the de novo standard because the issue involves the simple review of a video without having to weigh witness credibility.

A. The Real Controversy Was Not Fully Tried

Mr. Malone argues the real controversy was not fully tried because the jury was denied the opportunity to view important evidence bearing on the identity of the suspect, which was the only issue in the case. There is no question the jury was denied the opportunity to view the video showing the suspect's bare hand. The State never denied that the clip was omitted from the trial exhibit and the trial court specifically found it was omitted (82:31-32).

The State's entire argument on this issue is that the lighting in the video caused a black man to appear white (without changing the color of any other dark objects in the video) and that the trial court's ruling that no reasonable juror could determine the suspect's race was not clearly erroneous. (State's Br. 30-32). The State ignores the fact that this was a question for the jury to decide,

and the jury was denied the opportunity to do so because the State edited this portion of the video out of the exhibit shown at trial. That is the essence of Mr. Malone's claim that the real controversy regarding the identity of the suspect was not fully tried.

A defendant asserting the real controversy was not fully tried does not need to show a probability of a different result on retrial. *State v. D'Acquisto*, 124 Wis.2d 758, 763, 370 N.W.2d 781 (1985). The State's arguments that the video was washed out and the race of the suspect cannot be determined are irrelevant. The omitted clip is important evidence bearing on the identity of the suspect and the jury was erroneously denied the opportunity to view it. That is all Mr. Malone needs to prove. *State v. Avery*, 2013 WI 13, ¶ 102, 345 Wis.2d 407, 826 N.W.2d 60. Requiring him to prove that a reasonable juror would believe the suspect in the video was white is no different than requiring him to prove a probability of a different result on retrial. That is a burden he does not bear. *State v. D'Acquisto*, 124 Wis.2d 758, 763, 370 N.W.2d 781 (1985).

B. There Has Been a Miscarriage of Justice

Mr. Malone agrees that a miscarriage of justice occurs when there is a "substantial probability" that a new trial would produce a different result. (Malone's Br. 26).

The State contends the omitted clip would not have more effectively demonstrated the second suspect was white because the jury saw a small portion of the second suspect's face that was not masked. (State's Br. 34-35). However, the omitted clip showed the robber's entire bare hand completely unobscured. At trial, Detective Feyen testified that he was unable to determine race based on the image displayed when Exhibit 11 was paused (91:110). The majority of the robber's face and head were covered. The same was not true of the suspect's hand in the omitted clip. An unobscured view of the suspect's skin provides a far better basis for determining race. Simply because the jury found Mr. Malone guilty because it could not determine race based on the small portion of the robber's exposed face does not mean that it would have done the same had it viewed his entire exposed hand.

The State's own witness testified that he could not tell the race of the suspect based on the exposed portion of the face. The fact that the skin tone of the robber's hand matches the skin tone of the exposed portion of his face would have shown the jury that the robber was actually white. It was not a glare or reflection from a store display or any other external factor making the small portion of the face appear white. In the omitted clip, the

robber takes his hand out of his pocket, lifts it to his face, and then puts it back in his pocket. The color of his skin does not change when the hand moves. The jury was not given the opportunity to view this evidence. Considering that the jurors requested the opportunity to view the video from up close it is clear that they had questions about the identity of the suspect. Those questions would have been answered by viewing the video of the suspect's hand.

The State argues that this is not a truly exceptional case (State's Br. 36). Mr. Malone disagrees. One would hope that a case of this type is the exception rather than the rule. If a case in which a detective omits exculpatory footage from an exhibit and then falsely testifies that he did not edit out any activity is unexceptional then our system is truly broken. Mr. Malone asks the Court to order a new trial in the interest of justice.

IV. The State Denied Mr. Malone His Due Process Right to a Fair Trial

The State does not dispute that the video was edited or that Detective Feyen testified falsely when he claimed he did not edit any activity out of the video. Nevertheless, the State argues that Mr. Malone forfeited his due process right to a fair trial by failing to object to its denial. (State's Br. 36-37).

Although Mr. Malone did not object at trial, the issue was raised before the trial court in Mr. Malone's post-conviction motion. The trial court had an opportunity to rule on the issue but failed to do so. Even if this Court finds that the issue was not timely raised, it may still address it because it is in the interest of justice and there are no factual issues in dispute. *Bradley v. State*, 36 Wis.2d 345, 359-59a, 153 N.W.2d 38 (1967).

A constitutional violation having a direct bearing on guilt or innocence is an exceptional circumstance affecting the justice of the trial. See *United States v. Atkinson*, 297 U.S. 157, 160 (1936); *Maclin v. State*, 92 Wis. 2d 323, 329-30; *State v. Lambert*, 68 Wis.2d 523, 533, 229 N.W.2d 622 (1975). The identity of the second suspect was the only issue at trial and the omitted video clip has a direct bearing on guilt or innocence. The interest of justice prong of the *Bradley* rule therefore applies. *Id.*

Additionally, there are no factual disputes regarding this issue. The State does not deny that Detective Feyen omitted the footage of the video showing the bare hand of the robber from the video used as Exhibit 11 at trial. Nor does it deny that Detective Feyen falsely testified that he did not omit any activity. There is no question that this

occurred, and the trial court specifically found that the clip was not included in the exhibit (82:31-32).

Deciding whether the State denied Mr. Malone his due process right to a fair trial is in the interest of justice. The issue goes directly to the question of guilt or innocence and seriously affects the fairness, integrity, and reputation of the proceedings. Because there is also no factual dispute over what occurred this Court should decide the issue on the merits.

V. Conclusion

For the reasons stated above, this Court should reverse the decisions of the circuit court, vacate Mr. Malone's conviction, and order a new trial.

Dated this 27th day of October, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in secs. 809.19(8)(b) and (c) Stats. for a Brief produced with a monospaced font and consists of 13 pages. I also certify that the text of the electronic copy of this brief is identical to the text of the paper copy.

October 27, 2017

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