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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP183-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GENERAL GRANT WILSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE VICTOR MANIAN (JUDGMENT) AND THE HONORABLE M. JOSEPH DONALD (ORDER), PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED FOR REVIEW

Did the postconviction motion court properly deny Wilson's claims of ineffective assistance against his trial counsel, Peter Kovac?

The motion court implicitly answered "yes."

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would add little of substance to the arguments contained in the parties' briefs.

Publication is not warranted. Resolution of this case turns on application of well-settled principles of law.

INTRODUCTION

Wilson stood trial in 1993 for shooting and killing Eva Maric, and attempting to kill Willie Friend. Friend, the State's key witness, directly identified Wilson as the shooter.

Kovac wanted to present a third-party perpetrator defense. He claimed an unknown, unidentified person or persons actually killed Maric at Friend's direction. The trial court excluded Kovac's proffered supporting evidence as too speculative. The jury convicted Wilson of both charges.

In 2015, the Wisconsin Supreme Court concluded that the 1993 third-party perpetrator evidence failed to satisfy the admissibility requirements of *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). *See State v. Wilson*, 2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52.

The case returned to the circuit court in 2017 for postconviction proceedings. Wilson challenged Kovac's effectiveness on various grounds, including his investigation and presentation of the third-party perpetrator defense. Wilson presented additional evidence at three postconviction

hearings. The postconviction motion court denied all of Wilson's claims of ineffective assistance based on lack of actual prejudice, and he appeals.

Wilson is not entitled to a new trial. His third-party perpetrator evidence is still inadmissible under *Denny*. It still does nothing more than encourage improper jury speculation and conjecture. And none of his remaining allegations of deficient performance resulted in actual prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

STATEMENT OF THE CASE

Wilson's crimes and his trial.

This portion of the State's brief draws upon the comprehensive factual summary found in *Wilson*, 362 Wis. 2d 193, ¶¶ 11–40.

Eva Maric died on April 21, 1993, in the 3200 block of North 9th Street of Milwaukee from gunshots fired by a .44 caliber gun and a .25 caliber gun. Seven bullets struck Maric—once in her chest and once in her back with the .44, and five times in the left front and side of her torso with the .25.

The shooter also targeted Friend, who escaped uninjured. Friend identified Wilson as the shooter.

Police recovered bullets, bullet fragments, and shell casings from .44 caliber and .25 caliber weapons at the scene. They later questioned Wilson and searched his work lockers, his car, and his home. They seized pictures of Maric, two boxes that formerly contained .25 caliber handguns, and two .25 cartridges.

Wilson admitted owning three .25 caliber semiautomatic pistols, but denied ever owning a .44 caliber magnum revolver. Police later questioned a friend of Wilson

and Wilson's brother. They both said Wilson had a .44 caliber revolver.

Wilson continued to deny owning or possessing such a gun. That would turn out to be a lie.

The State charged Wilson with first-degree intentional homicide and attempted first-degree intentional homicide, both while armed with a dangerous weapon. Trial began on June 28, 1993.

Friend and Maric were long-time friends who became intimate in 1992. Before the shooting, they ran errands together in Maric's car and later stopped at a tavern for drinks.

As they left the tavern, they saw a gold Lincoln parked near another tavern. Friend testified that Maric said, "[T]here go General's car." Friend saw the car had a license plate with "G-Ball" on it. Friend later identified a picture of Wilson's car as the car he saw that night.

Friend and Maric kept driving, then stopped to buy chicken. They took the chicken to Friend's mother's house at 3859 North 9th Street, parked in front, and began to eat. Wilson then pulled up in the same gold Lincoln, with an unknown passenger in the front seat. Friend saw and identified Wilson, although he had never seen him before except in a "picture photo" Maric had shown him. Wilson eyed Maric's car, drove away, and then drove by again three or four minutes later. Friend described Maric as having a "hyper-reaction" to Wilson's behavior.

While Friend and Maric sat in front of his mother's house, Maric expressed concerns about Wilson, with whom she was trying to end a relationship. Friend and Maric sat there until approximately 2:00 a.m., when Maric left in her car to return home. Friend then walked to the house of his brother, Larnell (Jabo) Friend, at 3288 North 9th Street. The house was an "after-hours place." When Friend reached the

house, Maric arrived and told Friend that Wilson had tried to run her off the road. Maric said that Wilson walked up to her car, holding a revolver, and told her if he saw her with Friend again, he—Wilson—would kill them both.

Friend and Maric stayed at Jabo's house for a while. At about 4:30 a.m., Friend walked Maric to her car, parked nearby. As they sat together, Friend saw Wilson's car approach and pull up directly across from Maric's car. Friend recognized it as Wilson's car, the same one he had seen earlier that night. Believing Wilson wanted to talk, Friend got out of Maric's car as Wilson's car approached.

No talking occurred. Wilson got out of the driver's side of his Lincoln and walked toward the driver's side of Maric's car with a large, blue-steel revolver in his hand.

Wilson started shooting. Friend ducked down beside Maric's car, with the open passenger door between himself and Wilson. Friend then ran. A bullet passed through the door, and other bullets hit the concrete around Friend, causing dirt to fly up and hit him. A police detective later corroborated the existence of bullets and scattered dirt in this area.

Friend ran to and through a passageway between two houses and around a house. He heard three or four additional gunshots in rapid succession from a smaller gun before hearing a car door slam and the fast acceleration of an engine.

Friend returned to Maric's car. Wilson's car was gone. Maric, badly wounded, was lying across the car seat sideways facing the passenger side. Friend went back to Jabo's house to tell him Maric had been shot. A neighbor called for medical assistance.

Friend identified Wilson as the shooter to police at the crime scene, and later identified Wilson in a photo lineup as the person who shot at him.

Carol Kidd-Edwards witnessed some of the shooting from her home at 3291 North 9th Street. As she dressed at approximately 5:00 a.m. to take her husband to work, she heard about five very loud, consecutive gunshots. She dove to the floor. After the shots stopped, she went to her window and saw a man who she later identified as Friend running away from Maric's car parked on the corner across the street from her house. She saw Friend hide between houses across the street from her home. She saw nothing in Friend's hand.

From her vantage point, Kidd-Edwards could see to the corner across the street from her house, but had an obstructed view of the street and sidewalk on her side of the street. Familiar with Lincoln automobiles, she saw a "gold toned Continental, a mark version of the Continental" near the corner on her side of the street. To her, a picture of Wilson's car looked like the car she saw.

As Friend ran from Maric's car, a man walked from the passenger side of the Lincoln out of a blind spot from her window. She could not get a good view of the man's face, but described him as a brown-toned black man, roughly six feet tall, with a top fade hairstyle. She did not remember whether he wore glasses.

The man walked toward the driver's side of Maric's car, top-loaded his gun and pulled back the top. He then fired five to seven shots into her car. The shots were not as loud as the previous shots, suggesting the man used a smaller gun. He then walked back toward the Lincoln, into Kidd-Edwards' blind spot. She did not see the man get into the car, but she heard the door shut and then saw the car quickly pull off and drive past her house. While she could not see whether the man got into the passenger side of Wilson's car, she could see the driver's side. She did not see anyone get into that side of the car.

Kidd-Edwards did not see anyone other than the man firing the shots and Friend. After the Continental drove away, Friend pounded on Kidd-Edwards' door, yelling to her to call 911.

Kidd-Edwards saw Maric at the scene; she appeared pregnant. Kidd-Edwards later asked Friend if Maric was pregnant; Friend said yes. Maric's autopsy later revealed she was not pregnant.

Wilson testified in his defense. He had known Maric since 1988, and maintained a relationship with her until her death. Wilson claimed he spent time with a woman named Rosanne Potrikus throughout the evening until he returned to his home between 3:30 a.m. and 4:00 a.m. He claimed he was home when the murder occurred.

Wilson also admitted owning a .44 Smith & Wesson magnum revolver. Maric's murderer used a .44 Sturm-Ruger revolver. Wilson lied to police when they questioned him about owning a .44 revolver because he no longer had it in his possession at the time. Neither weapon used in the murder was ever recovered.

The defense also tried to present third-party perpetrator evidence. Mary Lee Larson testified that she knew Maric, Wilson, and Friend. When asked whether she noticed Maric act in any way that indicated she feared Wilson, Larson answered "[n]o, not recently." When Wilson's trial counsel, Kovac, tried to ask Larson whether Maric feared Friend, the State objected and the trial court sustained the objection.

In an offer of proof, Kovac asked Larson whether she heard Friend threaten Maric during the two weeks before her death. Larson said that one time, when Friend and Maric were at her house in her kitchen, Friend told Larson "he had to keep Eva in check," and "if she wouldn't be in check, he'd kill her, and she knew it." Maric responded that

"yes, he would." And when Kovac asked Larson whether she ever saw any physical contact between Maric and Friend, Larson said she saw Friend slap Maric at a motel room.

Kovac told the trial court the defense believed Friend was responsible for killing Maric. The court sustained the State's objection, concluding that allowing Larson to testify would cause the jury to speculate. The court also excluded Barbara Lange's proffered testimony about Friend and Maric's relationship and the threat Friend made to Maric in Larson's kitchen.

In closing arguments, Kovac argued that Friend and other unknown, unidentified third-party perpetrators killed Maric: "Willie Friend should be a suspect."

Kovac continued: "Now, I'll tell you, right from the beginning . . . Willie did not fire the shots. There were two people who came by in that car, at least two people. There was somebody in the driver's area seat. There was somebody in the passenger seat. Those two people shot and killed Eva. I don't know who those people are. . . . But I think when you look at what's going on here, it's reasonable to me that Willie was involved. Willie had her there at this location knowing that these guys were going to come by."

To support his theory, Kovac suggested Friend thought Maric was pregnant with his child and he wanted to avoid another child support case. Kovac also suggested the shots fired at Friend could have been for show, to make it look as though Friend was in harm's way when he really was not.

The jury convicted Wilson of both charges. He received a life sentence with parole eligibility after 30 years for the homicide, and a maximum 20-year sentence, consecutive to his homicide sentence, for the attempted homicide.

The supreme court's 2015 decision in *Wilson*.

The supreme court concluded that the 1993 third-party perpetrator evidence did not demonstrate a legitimate tendency "that Friend committed the crime for which Wilson was convicted by hiring one or more persons to kill Maric." *Wilson*, 362 Wis. 2d 193, ¶ 83. In both 1993 and 2015, Wilson "failed to proffer any evidence that would elevate the theory of Friend's involvement in an assassination conspiracy from a mere possibility to a legitimate tendency." *Id*.

The supreme court's detailed analysis warrants quotation in full:

> Wilson has proffered no *evidence* demonstrating that Friend had the *opportunity* to arrange a hit on Maric during the relatively short time they were in Maric's car—no evidence that Friend had the contacts, influence, and finances to quickly hire or engage a shooter or shooters to gun down a woman on a public street. He has not shown that Friend or his alleged unnamed associates had access to a gold Lincoln Continental similar to Wilson's. He has not proffered any telephone records from Friend or Friend's brother's house that could have set up the time and place of the hit on short notice. He has not proffered any evidence of the ownership by Friend or his family of .44 and .25 caliber weapons. He has not identified any individuals as being the shooter or shooters possibly employed by Friend. In short, he has not offered any evidence whatsoever indicating that Friend had the means or access or ability to hire assassins to kill Maric at a particular place within a relatively short time frame.

Id. ¶ 85. The supreme court also found that any 1993 evidence related to Jabo also failed to satisfy *Denny*. *Id*. ¶ 86 n.15.

The 2017 postconviction proceedings giving rise to this appeal.

Wilson asserted many claims of ineffective assistance of trial counsel. (R. 84; 86; 155.) After the postconviction motion hearings, he settled on four. (R. 155.)

First, Kovac should have done a better job of establishing and presenting the third-party perpetrator defense. (*Id*. at 2.)

Second, Kovac should have used certain laboratory and medical evidence to impeach Friend's credibility. In particular, he should have used the statement in the autopsy protocol that Maric's stomach was "collapsed and contracted" to argue that Friend lied about the two eating chicken together before the murder. (*Id*. at 2–3.)

Third, Kovac should have emphasized the differences between the revolver used in the murder (a blue steel, Sturm Ruger .44) and the revolver Wilson claimed to have owned (an all-black, Smith & Wesson .44 revolver.) (*Id*. at 3.)

And fourth, Kovac should not have withdrawn his original hearsay objection to testimony from Friend that, shortly before her murder, Wilson had walked up to Maric's car holding a revolver, and told her if he saw her with Friend again, he would kill them both. (R. 155:3.)

The postconviction motion court held three separate hearings. (R. 192; 193; 194.)

Kovac testified at two of the three hearings. (R. 193; 194.) His case files were unavailable. (R. 193:114.)

He considered Friend the State's most important witness. He reiterated his efforts to offer proof that third-party perpetrators actually murdered Maric at Friend's behest, but the trial court rejected the proffered evidence as too speculative. (R. 193:41, 67–94, 100, 118–120.)

Kovac said he considered the significance of the collapsed and contracted condition of Maric's stomach in light of Friend's testimony that he and Maric ate chicken together before the murder. (R. 194:61.) He did not see it as a significant issue, but conceded it could have been helpful to discredit Friend's testimony. (*Id*. at 61, 69.) As to this claim, a pathologist also testified that the description "collapsed and contracted" provided no definitive proof as to whether Maric ate or drank in the hours before her murder. (*Id*. at 105–06, 114–15.)

Kovac could not fully explain why he did not focus the jury's attention on discrepancies between the color and manufacturer of the murder weapon and the gun Wilson claimed to have owned. (R. 193:55–56; 194:74–75.) And he could not fully explain why he withdrew his hearsay objections to Friend's testimony regarding Maric's out-of-court statement that Wilson threatened her and Friend (R. 193:52–53, 57.)

Regarding possible third-party perpetrators, Wilson presented testimony that (1) before the murder, Maric had welts on her back that she attributed to Friend; (2) at the time of the murder, Maric worked as a prostitute for Friend, Jabo, or both; (3) at the time of the murder, Maric no longer wanted to work as a prostitute; and (4) the names Willie, Jabo, and Marshall Friend all appeared in Wisconsin Department of Justice records available in 1993. (R. 192:17–21, 26–29, 33–34, 44–47; 193:25.)

The postconviction motion court found no ineffective assistance. (R. 167.) The court concluded that, while Kovac performed deficiently in various respects, Wilson suffered no actual prejudice as a result. (*Id*. at 5.)

Regarding possible third-party perpetrators, the court concluded that the postconviction testimony failed to satisfy the admissibility requirements of *Denny*. It raised only the

mere possibility of third-party involvement, invited jury speculation, and constituted hearsay. (*Id.* at 1–3.)

The court found that, even if Kovac should have tried to prove Maric had sex before her murder, and even if he should have tried to use the condition of Maric's stomach at autopsy to impeach Friend's testimony, no reasonable probability existed that taking this action would have altered the outcome at trial. (*Id.* at 3.)

The court reached the same conclusion regarding evidence of the differences between the .44 caliber murder weapon and Wilson's .44 revolver. Neither gun had ever been found, and the jury knew Wilson had already been caught in a lie about having owned the gun in the first place: "[T]here is not a reasonable probability the jury would have believed his assertion that his .44 caliber revolver was not the same brand as the murder weapon." (*Id.* at 3–4.)

As to the withdrawn hearsay objection, the court concluded Wilson failed to prove actual prejudice because Maric's out-of-court statement regarding Wilson's threat still qualified for admission as an excited utterance. (*Id.* at 5.)

The absence of actual prejudice figured prominently in the court's decision. No prejudice resulted from Kovac's handling of the third-party perpetrator defense because no evidence existed that satisfied *Denny*. (*Id.* at 5–6.)

And Carol Kidd-Edwards's trial testimony corroborated Friend's testimony: "Carol Kidd-Edwards' testimony fully supported Willie Friend's testimony as to what transpired. It stretches the limits of credibility that Friend was involved in a conspiracy given the close proximity of the shots being fired at him, his hollering for someone to call 911, and then going back to the scene to wait for police to arrive." (*Id.* at 7.)

Recognizing the many claims presented by Wilson, the court also said that that if it did not expressly address a

factual issue raised by Wilson, "it was not significant enough to amount to ineffective assistance of counsel or reasonably probable to alter the outcome of the trial." (*Id*. at 5 n.4.)

STANDARD OF REVIEW

Ineffective assistance claims present mixed questions of fact and law. Findings of fact receive appellate deference unless clearly erroneous. Determination of deficient performance and actual prejudice receive de novo review. *Strickland*, 466 U.S. at 698; *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

ARGUMENT

The postconviction motion court properly denied Wilson's claims of ineffective assistance.

"[A] convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial." *State v. Thiel*, 2003 WI 111, ¶ 61, 264 Wis. 2d 571, 665 N.W.2d 305.

But that is exactly what Wilson has done. (Wilson's Br. 24–45.) Some of his allegations in this Court are short, underdeveloped, and declaratory. They do not merit this Court's attention. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992); *State v. Waste Mgmt. of Wis., Inc.,* 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

As noted, Wilson asked the postconviction motion court to consider four claims. (R. 155.) The State will address those claims. None of them justify a new trial.

A. The law governing claims of ineffective assistance.

Wilson must prove Kovac performed deficiently, resulting in actual prejudice. *Strickland,* 466 U.S. at 687;

State v. Erickson, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999).

1. Deficient performance.

Strickland requires reasonably effective assistance under prevailing professional norms, based on the facts of the case and viewed at the time of trial counsel's conduct. *Strickland,* 466 U.S. at 687, 690. This Court presumes effective assistance and exercise of reasonable professional judgment. It shuns postconviction criticism based on hindsight. *Id*. at 689–90; *State v. Jenkins*, 2014 WI 59, ¶ 36, 355 Wis. 2d 180, 848 N.W.2d 786; *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam).

The performance standard is reasonably effective assistance, not what an ideal attorney might have done in a perfect world, or what an average attorney might have done on an average day. *See Atkins v. Singletary,* 965 F.2d 952, 958 (11th Cir. 1992); *Thiel*, 264 Wis. 2d 571, ¶ 19.

Trial counsel cannot declare his own performance deficient. "Assessing deficient performance means determining whether counsel's performance was objectively reasonable." *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719. His own opinion does not decide the matter. *State v. Kimbrough,* 2001 WI App 138, ¶ 35, 246 Wis. 2d 648, 630 N.W.2d 752.

2. Actual prejudice.

Deficient performance results in actual prejudice if a reasonable probability exists that, but for the deficient performance, the result of the proceeding would have been different. A reasonable probability undermines confidence in the outcome. *Strickland*, 466 U.S. at 694. When "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id*. at 697.

Speculation about possible prejudice does not satisfy *Strickland*. *State v. Koller*, 2001 WI App 253, ¶ 9, 248 Wis. 2d 259, 635 N.W.2d 838; *Erickson*, 227 Wis. 2d at 773–74. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter,* 562 U.S. 86, 112 (2011).

The key is the overall reliability of the trial process. "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (citation omitted). And when considering actual prejudice, this Court should look at all the trial evidence. *Strickland*, 466 U.S. at 695. *See also Buehl v. Vaughn*, 166 F.3d 163, 172 (3rd Cir. 1999) ("It is firmly established that a court must consider the strength of the evidence in deciding whether the *Strickland* prejudice prong has been satisfied.")

And with particular importance here, counsel's failure to take action that would have provided only "some assistance" to witness impeachment does not establish actual prejudice. *Thiel,* 264 Wis. 2d 571, ¶ 73.

B. The law governing third-party perpetrator defenses.

Proper admission of third-party perpetrator evidence requires a showing that (1) the third party had a motive to commit the crime; (2) the third party had an opportunity to commit the crime; and (3) the third party had a direct connection to the crime. *Denny*, 120 Wis. 2d at 624; *Wilson,* 362 Wis. 2d 193, ¶¶ 56–72.

Denny does not favor admissibility. Its "objective is to blunt speculation that someone other than the defendant committed the crime." 7 Daniel D. Blinka, *Wis. Prac., Wis. Evidence,* § 404.719 at 253 (4th ed. 2017).

The evidence must prove the third party had a *motive*—a plausible reason—to commit the charged crimes. *Wilson*, 362 Wis. 2d 193, ¶¶ 57, 62–63. But proof of motive is not enough: "[T]he *Denny* test is a three-prong test; it never becomes a one-or two-prong test." *Id.* ¶ 64.

The evidence must also prove the third party had the *opportunity* to commit the charged crimes. *Id.* ¶ 58. Mere third party presence at the crime scene will not normally suffice. *See id.* ¶¶ 60, 65, 68, 75. A court may ask whether the defendant has proved that a third party had the practical skills, capacity, or ability to carry out the crimes. *Id.* ¶ 67. A court's determination of opportunity depends on the defendant's theory of third party involvement. *Id.* ¶ 68. Here, Wilson's theory was that Friend arranged for unknown, unidentified third-party perpetrators to actually commit Maric's murder.

Finally, the evidence must *directly connect* third-party perpetrators with the actual commission of the charged crimes. *Id.* ¶ 71. The evidence must have an "inherent tendency" to make that connection. *Id.* The evidence should "firm up the defendant's theory of the crime and take it beyond mere speculation." *Id.* ¶ 59.

In 2015, the State conceded that the 1993 third-party perpetrator evidence satisfied the motive and direct connection prongs of *Denny*. *Id.* ¶ 73. That concession no longer applies because the legal and factual landscape has changed. *Wilson* now informs *Denny* decisions, and the postconviction motion hearings created a new factual record.

C. Kovac did not perform ineffectively in investigating and presenting a third-party perpetrator defense.

In *Wilson*, the supreme court held that the 1993 third-party perpetrator evidence was inadmissible under *Denny*. *Wilson,* 362 Wis. 2d 193, ¶ 83. That means Wilson can only

obtain a new trial on this claim if other evidence existed in 1993, if Kovac performed deficiently in failing to find and offer it, and if his deficient performance resulted in actual prejudice.

He cannot discharge these burdens.

After the postconviction motion hearings, the evidentiary picture arguably established that in 1993, (1) Friend physically abused, emotionally abused, and threatened Maric; (2) Maric worked as a prostitute for Friend or Jabo, but wanted out of the business; (3) the Friend brothers had criminal records; (4) Maric was murdered outside Jabo's "after-hours club," and (5) such clubs can be hotbeds of criminal activity.

None of this evidence is admissible under *Denny* as proof of third-party liability. It does not establish Wilson's theory that Friend arranged for unknown, unidentified third-party perpetrators to actually commit Maric's murder. It only encourages speculation and conjecture. It only hints at the possibility that someone other than Wilson killed Maric.

Even if Kovac should have found all this evidence in 1993 and offered it then, he would not have been constitutionally ineffective. Counsel does not perform ineffectively for failing to discover and present inadmissible evidence. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

If put before a jury, this evidence would have opened up speculation and conjecture the moment deliberations began. Who, exactly, were the unknown, unidentified third-party perpetrators who actually killed Maric? What was their motive? Which circumstances provided them with the opportunity to murder her? Did they have the opportunity to act? And where is the direct connection between these

unidentified, unknown people and the actual commission of the charged crime?

Kovac could not answer those questions in 1993 with the evidence he had. And Wilson could not answer them in 2017 with the evidence in existence. Without answers to those questions, the only way a jury could assess Wilson's theory of third-party perpetrators would be to openly engage in speculation and conjecture of the type foreclosed by *Denny* and *Wilson*.

Wilson cannot satisfactorily prove that any third-party perpetrators exist. And "[t]rial counsel cannot be ineffective for failing to present evidence that did not exist at the time of trial." *Clark v. State*, 35 So.3d 880, 888 (Fla. 2010).

The same flaws in the evidence that the *Wilson* court found in 2015 regarding opportunity exist today.

The evidence still fails to show that Friend actually had the contacts, influences, and finances to arrange Maric's open-air assassination by a third party or parties on a public street. It fails to show that Friend had a realistic, demonstrable ability to engineer such a scenario.

It still fails to show that Jabo—or anyone associated with his after-hours club, in any capacity—actually played a role in Maric's murder. It fails to show that Friend actually used the club to find and recruit third-party perpetrators, or actually persuaded someone to commit the murder.

It still fails to show that, at the time of Maric's murder, Friend or any of the unidentified, unnamed third-party perpetrators had access to a gold Lincoln Continental similar to Wilson's.

It still fails to show the existence of any planning or coordination of Maric's open-air assassination by Friend or any potential third-party perpetrators. There is no evidence

of communications between Friend and third-party perpetrators at or near the time of the crime.

And the evidence still fails to show that Friend or any potential third-party perpetrators owned or had immediate access to .44 caliber and/or .25 caliber firearms of the type used in the actual commission of the crimes.[1]

Today, the evidence proves no more than it did in 1993. It still invites only speculation about the mere possibility of third-party perpetrators. And it still includes out-of-court statements made by nontestifying declarants. It is inadmissible hearsay. (R. 167:1–3.) *See* Wis. Stat. §§ (Rule) 908.01 and 908.02.

Similarly, the evidentiary picture today fails to establish a direct connection between Friend, any third-party perpetrators, and the actual commission of Maric's murder. It has no inherent tendency to connect Friend and third-party perpetrators—identified or unidentified—with the actual commission of Maric's murder. *Wilson*, 362 Wis. 2d 193, ¶ 71. None of the evidence firms up the theory that third-party perpetrators actually fired the shots that killed Maric. On the contrary. It simply provides an open invitation for a jury to speculate.

Kovac did what he could for his client in 1993. Discovering a motive for Wilson's chief accuser to kill Maric, Kovac asked the trial court to admit the evidence he had to point the finger at Friend for arranging Maric's murder by a person or persons unknown. The trial court found the evidence speculative and excluded it. Kovac still argued that

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[1] Mary Larson testified in postconviction proceedings that she saw Friend with a gun close in time before Maric's death. (R. 192:18–19.) She provided no details regarding the type, caliber, or manufacturer of the gun—"I just saw like the handle of the gun." (*Id.* at 28.)

possibility to the jury. He was unsuccessful. But that does not make him ineffective.

Wilson's corresponding appellate argument does not support a different conclusion (Wilson's Br. 26–33, 37–43, 46–49.) It falters for at least two reasons.

First, Wilson's evidence does not satisfy *Denny*.

Second, Wilson engages in both hindsight and speculation. They have no place in ineffective assistance analysis. *Strickland*, 466 U.S. at 689; *Erickson*, 227 Wis. 2d at 773–74.

Wilson suggests that additional investigation by Kovac in 1993 might have revealed stronger evidence in support of a third-party perpetrator defense. (Wilson's Br. 26–29.) That is speculation. A defendant who alleges deficient investigation must show what more or better investigation *would* have revealed, not what it *might* have or *could* have revealed or accomplished. *State v. Flynn,* 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). That requirement reflects the presumption of effective assistance, and the need to prove actual prejudice. When, as here, the best the defendant can do is speculate about what a different tactic might have accomplished, and how it might have altered the outcome, there is no showing of actual prejudice. *Erickson*, 227 Wis. 2d at 773–74.

Wilson also asserts that out-of-court statements made by Maric to friends and family—that she was a prostitute associated with Friend and Jabo, and wanted out of the business—somehow bolstered the showing of opportunity. (Wilson's Br. 29–32, 37–43.) That evidence may suggest motive. But it says nothing about the opportunity for third-party perpetrators to actually murder Maric, and it does not establish a direct connection between those alleged perpetrators and the actual commission of Maric's murder. And even a strong showing of motive, standing alone, will

not satisfy *Denny*. "[T]he *Denny* test is a three-prong test; it never becomes a one-or two-prong test." *Wilson*, 362 Wis. 2d 193, ¶ 64.

There is also no reason for this Court to conclude that Maric's out-of-court statements would have survived hearsay objections. While excited utterances are exceptions to the hearsay rule, there are predicates to admission Wilson has failed to satisfy. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Wis. Stat § (Rule) 908.03(2). Spontaneity and stress are the circumstances which endow excited utterances with sufficient trustworthiness to render them admissible. *State v. Huntington*, 216 Wis. 2d 671, 681–82, 575 N.W.2d 268 (1998). Wilson has not proven that Maric was under the stress of excitement when she made her statements.

Wilson also asserts that evidence of Friend's maltreatment and threatening of Maric—offered through testimony from her friends and family—would have been admissible under *Simpson v. State*, 83 Wis. 2d 494, 266 N.W.2d 270 (1978) or as an excited utterance. (Wilson's Br. 31–33.) Again, Wilson failed to prove the predicate for admission as an excited utterance. And *Simpson* held "threats *by an accused* against the victim are competent admissible evidence in a homicide prosecution." *Simpson,* 83 Wis. 2d at 511 (emphasis added). Friend was not the accused; Wilson was. Wilson cites no cases supporting the applicability of this theory in a third-party perpetrator case involving a claim of ineffective assistance.

No basis exists to grant Wilson a new trial on this claim.

D. Kovac did not perform ineffectively by failing to use certain laboratory and medical evidence to impeach Friend's credibility.

The postconviction motion court found that Kovac did not perform ineffectively by (1) not seeking out evidence to show whether Maric had sex before her death, and (2) not arguing to the jury that Maric's collapsed-and-contracted stomach at autopsy impeached Friend's testimony that the two ate chicken together hours before Maric was murdered. The court found no reasonable probability that Kovac's failure to take these actions affected the outcome of the trial. (R. 167:3.) That is a manifestly reasonable conclusion.

It is hard to understand precisely why nonexistent evidence of Maric's sexual conduct before she was murdered is relevant to an issue in controversy in the case; it has no tendency to make the existence of a consequential fact more or less probable. *See* Wis. Stat. § (Rule) 904.01.

And there is no reasonable probability that, but for Kovac's failure to stress the condition of Maric's stomach at autopsy, the result of the proceeding would have been different. A pathologist testified in postconviction proceedings that the description "collapsed and contracted" provided no definitive proof as to whether Maric ate or drank in the hours before her murder. (R. 194:105–06, 114–15.) That evidence, presented by the State in rebuttal, would have effectively countered any argument made by Kovac. Indeed, a simple statement by the prosecutor to the jury—"People eat different amounts of food, and digest that food at different rates"—would have accomplished the same thing. Had Kovac tried to impeach Friend in this manner, the most he would have achieved would have been to provide "some assistance" to the process. That is not enough to establish actual prejudice. *Thiel*, 264 Wis. 2d 571, ¶¶ 44, 71, 73.

Again, Wilson says nothing on appeal to bring the correctness of the motion court's conclusions into doubt. (Wilson's Br. 34–37, 50–51.)

Wilson begins by offering an additional claim in his brief—that Kovac performed ineffectively by failing to prove that Maric was not pregnant at the time of her murder. (*Id.* at 35.) He fails to fully explain why this evidence is relevant. And he virtually concedes lack of actual prejudice by arguing that "[i]f Kovac had demonstrated this, it would have dispelled highly charged emotions at trial." (*Id.*) We are left to guess what those highly charged emotions were, why this evidence would have dispelled them, and why a reasonable probability exists that, having heard such evidence, the jury would have had a reasonable doubt respecting guilt.

As to whether Maric had sex before her murder, Wilson states that "[n]o vaginal swab results (which *might have raised questions* about Friend's narrative) ever were received." (Wilson's Br. 35 (emphasis added).) *Strickland* requires proof of actual prejudice, not speculation. *See Erickson*, 227 Wis. 2d at 773–74.

E. Kovac did not perform ineffectively by failing to emphasize the differences in color and manufacturer between the .44 caliber revolver used in the murder and the .44 caliber revolver Wilson claimed to have owned.

Again, Wilson employs postconviction hindsight and speculation. He believes Kovac should have stressed the differences in color and manufacturer between the .44 caliber revolver the State argued was used in the crimes (a blue-steel .44 Sturm-Ruger, determined by ballistic evidence), and the .44 caliber revolver Wilson claimed to have owned (an all-black, .44 caliber Smith & Wesson). (R. 155:3.) Actual, physical comparison of the revolvers was not

possible. Police never recovered the murder weapon, and Wilson never produced the weapon he finally admitted owning.

The postconviction motion court found that Wilson suffered no actual prejudice because his testimony regarding the gun was dubious at best: "The gun was never found, and it was only the defendant's word that his .44 caliber revolver was a Smith & Wesson. Given that he admitted on the stand that he had lied to police that he ever owned a .44 caliber revolver, there is not a reasonable probability the jury would have believed his assertion that his .44 caliber revolver was not the same brand as the murder weapon." (R. 167:4.)

The motion court reached a reasonable conclusion. There is no reasonable probability that, but for Kovac's failure to stress the differences between the weapons, the result of the proceeding would have been different. Had Kovac stressed the point, it is virtually certain the prosecutor would have pointed out that (1) Wilson lied about not owning a .44 caliber revolver in the first place—thus lacking credibility when he described the color and manufacturer of the gun; (2) Wilson never produced his revolver to confirm the alleged differences; and (3) nothing prevented Wilson from using a different gun to murder Maric.

Wilson's corresponding appellate argument is again borne of hindsight and speculation. (Wilson's Br. 34, 37, 50, 57.) He calls the differences in color between the two weapons a "critical difference" and "significant." (*Id.* at 34, 27.) No one can say whether or not it was a *critical difference* or *significant*—neither weapon appeared in evidence. And the actual distinction in color between blue-steel revolvers and black revolvers is not self-evident, as a visit to a firearms dealership would quickly reveal.

F. Kovac did not perform ineffectively by withdrawing his hearsay objection to testimony from Friend that Maric told him, shortly before her murder, that Wilson had threatened to kill Maric and Friend if he saw the two together again.

Recall the factual context of this claim, as described by the supreme court in *Wilson*, 362 Wis. 2d 193, ¶¶ 22–23. Friend testified that, as he and Maric sat in Maric's car eating chicken, Wilson drove up to them in his own car, with an unknown passenger. Wilson eyed Maric's car, drove away, and then drove by again three or four minutes later. Friend described Maric as having a "hyper-reaction" to Wilson's behavior. She expressed concerns about Wilson, with whom she was trying to end a relationship. Friend and Maric sat there until approximately 2:00 a.m., when Maric left in her car to return home. Friend then walked to the house of his brother, Jabo, at 3288 North 9th Street. When Friend reached the house, Maric arrived. Maric said Wilson had tried to run her off the road. Maric said that Wilson walked up to her car, holding a revolver, and told her if he saw her with Friend again, he—Wilson—would kill them both.

Kovac objected to Maric's out-of-court statement on hearsay grounds, but then withdrew that objection. (R. 193:52–53, 57.) That does not establish ineffective assistance if the evidence was, in fact, admissible. "A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." *Strickland*, 466 U.S. at 695. The postconviction motion court correctly concluded that Maric's statement to Friend was admissible as an excited utterance under section 908.03(2). (R. 167:5.) Counsel does not perform ineffectively by failing to make a meritless objection. *See State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110.

An excited utterance is a "statement relating to a startling event ... made while the declarant was under the stress of excitement caused by the event . . . ." Wis. Stat. (Rule) § 908.03(2). A statement qualifies as an excited utterance if it meets three requirements. *Huntington*, 216 Wis. 2d at 682. "First, there must be a 'startling event or condition.'" *Id*. (citation omitted). Next, the out-of-court statement must relate to the startling event or condition. *Id*. Finally, the "statement must be made while the declarant is still 'under the stress of excitement caused by the event or condition.'" *Id*. (citation omitted); see also Wis. Stat. § (Rule) 908.03(2).

All three conditions were met here. Being forced off the road and explicitly threatened with death is undoubtedly a startling event or condition. Maric's statement related directly to what Wilson did. And Maric was plainly under the stress of having been run off the road and threatened with death when she made her statement to Friend. She made her statement shortly after Wilson threatened her. (R. 180:31–33.) And Friend described Maric as "really upset," "real scared," and "shaken" when she told Friend about Wilson's threat. (*Id*. at 56.) The evidence was admissible as an excited utterance.

Wilson's corresponding appellate argument focuses on the fact that Kovac withdrew a potentially successful objection. (Wilson's Br. 43–45, 52–54.) But Wilson assumes he is entitled to an erroneous trial court decision. *Strickland* holds otherwise. *Strickland,* 466 U.S. at 695.

Wilson also asserts that the evidence was unfairly prejudicial, and subject to exclusion on that ground. (Wilson's Br. at 44, 53–54.) But most evidence presented by the State in a criminal trial is prejudicial toward the defendant, or should be, since the State's goal is to secure a conviction. *See Bailey v. State*, 65 Wis. 2d 331, 351–52, 222 N.W.2d 871 (1974). Furthermore, this court has previously

acknowledged that, "as the probative value of relevant evidence increases, so will the fairness of its prejudicial effect. Thus, the standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by 'improper means.'" *State v. Johnson*, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994) (citation omitted). Wilson believes the evidence influenced the outcome by improper means because it was inadmissible hearsay. As shown above, Wilson is wrong. Maric's statement was admissible as an excited utterance, entitled to the weight the jury chose to give it.

G. This Court may have confidence in the jury's verdicts.

The State acknowledges the tenacity shown by Wilson in recent years to overturn his conviction and receive a new trial. But tenacity does not translate into a successful ineffective assistance of trial counsel claim. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

This Court may have confidence in the jury's verdicts.

This trial turned on a single issue—who murdered Eva Maric and tried to murder Willie Friend? The State proved it was Wilson.

Set against the State's evidence—presented at the beginning of this brief, and taken from the supreme court's 2015 assessment in *Wilson*—is the unlikely and implausible version of events preferred by Wilson: Friend somehow arranged for unidentified, unknown third-party perpetrators to perform an open-air assassination of Maric, and to shoot

at—but intentionally miss—Friend, so as to divert attention from him.

Wilson cannot point to any admissible evidence supporting this answer. At best, the evidence supports only speculation and conjecture—the mere possibility that the charged crimes could have happened as he suggests.

In sharp contrast, the postconviction motion court considered the evidence from its nonpartisan perspective and declared itself confident in the jury's determinations of guilt. (R. 167:6–8.)

Friend testified that Wilson killed Maric and shot at him. (R. 180:35–50.) The jury knew that Friend himself had eight criminal convictions, and knew it could discount his version of events for that reason. (R. 180:19; 187:24.) It chose not to do so.

And Carol Kidd-Edwards' testimony supported Friend's version of events. (R. 167:6–7.) She testified to hearing multiple gunshots, to seeing Friend run from the scene, to seeing another man firing more shots into Kovac's car, and to seeing him drive away in a gold-toned Lincoln Continental. (*Id.*) "It stretches the limits of credibility that Friend was involved in a conspiracy given the close proximity of the shots being fired at him, his hollering for someone to call 911, and then going back to the scene to wait for police to arrive." (*Id.* at 7.) The court also noted Wilson's weak credibility—having lied to police about his gun ownership—and how Wilson referred to the victim of the shooting as female before knowing Maric's actual identity. (*Id.*)

CONCLUSION

This Court should affirm Wilson's judgment of conviction and the order denying his motion for postconviction relief.

Dated at Madison, Wisconsin, this 26th day of July, 2018.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,599 words.

Dated at Madison, Wisconsin, this 26th day of July, 2018.

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

I hereby certify that:

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

I further certify that:

This electronic brief is identical 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 at Madison, Wisconsin, this 26th day of July, 2018.

_____
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