STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

No. 2018AP183-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GENERAL GRANT WILSON,

Defendant-Appellant.

Appeal from the Circuit Court of Milwaukee County,
The Honorable Victor Manian, The Honorable Jeffrey A. Conen,
and The Honorable M. Joseph Donald Presiding,
Circuit Court Case No. 1993 CF 931541

REPLY BRIEF OF DEFENDANT-APPELLANT GENERAL GRANT WILSON

Anne Berleman Kearney
State Bar No. 1031085
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 332-0966

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TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HIS DEFICIENCIES DEPRIVED WILSON OF A COMPLETE DEFENSE AND THAT WAS PREJUDICIAL.

The State's rhetoric cannot diminish the strength of the evidence that supported General Grant Wilson's defense but was omitted at trial because of trial counsel's ineffectiveness. The three days of his post-conviction hearing demonstrate that Wilson was deprived of "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Wilson's presentation cannot be derogated as a "laundry list" of ineffectiveness by trial counsel, Peter Kovac, as the State would have it. Plaintiff-Respondent's Brief ("State's Brief") 12. Rather, Wilson brings to this Court a cohesive theory of why the trial process, whereby he was convicted, was unacceptably compromised in its reliability. Kovac's ineffectiveness prohibited Wilson from presenting to the jury his defense, especially a third-party-perpetrator defense under *State v. Denny,* 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), as well as crucial evidence challenging the credibility of the State's key witness, Willie Friend.

Such evidence here was fundamental to a "meaningful" defense. The State is correct in noting that "when considering

actual prejudice, this Court should look at *all* the trial evidence." *See* State's Brief 14 (emphasis added). But the State fails to appreciate what that means in this context. For a third-party-perpetrator defense, as the United States Supreme Court instructed in *Holmes v. South Carolina*, 547 U.S. 319 (2006), lower courts should focus not on the strength of the State's case but rather evaluate "the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 331; *see also State v. Pitsch*, 124 Wis. 2d 628, 645-646, 369 N.W.2d 711, 720 (1985). And here—by definition for an ineffective-assistance claim—that includes the "contrary evidence" that competent counsel would have presented.

At Wilson's trial, the court and jury considered the strength of the State's case but—because of defense counsel's prejudicially deficient representation—not the available evidence that would have established Wilson's defense. The post-conviction court, too, focused "not on the probative value . . . of admitting the defense evidence of third-party guilt," as required under *Holmes,* 547 U.S. at 329-31, but made its decision based on the strength of the State's case. App. 6-7. This was error.

A. Kovac Failed in Presenting Wilson's Third-Party-Perpetrator Defense and in Impeaching the State's Key Witness, and That Was Prejudicial.

The State dismisses Wilson's challenge to Kovac's effectiveness as "speculating about [a] different tactic." State's Brief 19. Not so. *Kovac's tactical plan* was to present a third-party defense under *Denny*. App. 1-2. Once Kovac settled on this defense, he was obligated to present it effectively. Yet Kovac failed to investigate, establish a foundation for, or present the third-party defense for Wilson, a defense that was in fact viable. This was ineffective representation. *See Strickland v. Washington*, 466 U.S. 668, 690-91 (1984).

Kovac failed to investigate adequately or present the available evidence that would have established *all* elements of Wilson's third-party *Denny* defense: motive, direct connection, and opportunity. *See* 120 Wis. 2d at 624, 357 N.W.2d at 17. Two of the elements—motive and direct connection—were satisfied by Wilson, as previously admitted by the State. R.75, ¶46. Remarkably, the State now asks this Court to forget or ignore the State's admissions on motive and direct connection. *See* State's Brief 15. This is improper. This Court and the Wisconsin Supreme Court have accepted and concluded that Wilson satisfied the

motive and direct-connection elements of the *Denny* test based on the State's admission. R.75, ¶73. The State did not attempt to withdraw its admission during the post-conviction hearing. The State's citation-less attempt, then, to reopen this conclusion in its brief in this Court is contrary to the law of the case and must be denied. *See generally Univest Corp. v. General Split Corp.*, 148 Wis. 2d 29, 38-39, 435 N.W.2d 234, 238 (1989).[1]

As for the opportunity element, Wilson has shown, consistently with the State's call in its brief, "what more or better investigation *would* have revealed, not what it *might* have . . . revealed." State's Brief 19. Wilson's investigation *24 years later* for the post-conviction proceeding certainly could not uncover all evidence that had been available to Kovac, but it revealed plenty of evidence to which Kovac had access and that he should have presented at Wilson's trial in support of the *Denny* defense:

[1] Wilson's trial showing of motive and direct connection was solidified with the evidence of Friend's threats and violence. Under *Simpson v. State*, 83 Wis. 2d 494, 266 N.W.2d 270 (1978), this would meet the State's burden in a homicide case to show intent, *see id.* at 511-12, 266 N.W.2d at 277, and here it shows, at a minimum, intent under the less stringent requirements for a *Denny* defense.

- evidence that Eva Maric was a prostitute and Larnell (Jabo) Friend, along with Willie Friend, acted as her pimp, R.192(IH):16, 33; R.193(IH):24;
- evidence that Maric wanted to leave the prostitution business, a desire known to her mother and sister along with her high school friends, Mary Lee Larson and Barbara Streeter, R.192(IH):19; R.193(IH):24-29, 101; R.135(IH):Ex.27;
- evidence that Willie Friend was having none of Maric's departure from prostitution, *see id.*; and
- evidence that Maric's family and friends feared for Maric's life because of Willie Friend, *see id.*

Both Streeter and Larson provided evidence at the post-conviction hearing. Streeter put one conversation in stark terms: "They were all talking about [Eva's] prostitution. And [Eva] was saying how she didn't want to be in it. She was kind of done with it. She wanted to stop. He said, 'Well, you ain't stopping. I'm gonna keep all my bitches in check.'" R.193(IH):29. Larson testified: Friend had a gun, and, just weeks before Eva Maric's death, Friend threatened, in front of witnesses, "she [Eva] gonna do what I say or I'll pop her, and I won't think twice about it." R.192(IH):18-19.

These threats of violence by Friend, when he was in possession of a gun, were not "inadmissible," as the State claims. State's Brief 18. They were statements against interest by Friend under Wis. Stat. § 908.045(4) about his prostitution business and the violence that he used to keep Maric in check and the money coming in. These statements also were admissible under Wis. Stat. § 908.03(2) as excited utterances with a threat of deadly force.

It was established during the post-conviction hearing that trial counsel Kovac had available the testimony from family and friends of Maric who witnessed the threats and violence from Willie Friend; Friend's conviction record; the conviction records of Friend's brothers, including Jabo; evidence of the illegal nature of the after-hours club operated by Jabo Friend, the illegal activities at the after-hours house, including prostitution, and, given the presence of a metal detector, the guns expected at the after-hours house; and evidence that Friend and Maric had been inside the club for some time before Maric's death. R.192(IH):18-19; R.193(IH):95-96, 100-104; R.194(IH):12-14, 22-23, 27-28: R.102(IH):Ex. 13; R.134(IH):Ex.25; R.135(IH):Ex.27.

It was further established at the post-conviction hearing that Kovac did not investigate or present this information at trial even though it would have been useful for Wilson's defense. *See id.* Counsel's inactions resulted in actual prejudice for Wilson. The illegal after-hours club was the gathering spot for the Friends and the place for the "contacts, influence, and finances to quickly hire or engage a shooter or shooters to gun down a woman on a public street," as the Wisconsin Supreme Court found to be a necessary element of presenting a third-party defense in Wilson's case, R. 75 at ¶85. Had he been effective, Kovac would have shown, as this Court noted to be enough, evidence along the lines of Friend's involvement in the murder "in conjunction with others." R.71 at 7.

Kovac's omissions cannot be excused because the trial court dismissed the third-party evidence as "speculative." State's Brief 18. Any such critique abides with Kovac, who did not establish the foundation necessary to bring the defense before the trial court. As the ineffectiveness court *found*, "Attorney Kovac did not file a motion before trial or investigate sufficient facts to support the admission of *Denny* evidence." App. 2.

Kovac's errors in not using accessible evidence and making the proper showings for Wilson's *Denny* defense caused actual

prejudice. Indeed, this Court envisioned this possible conclusion in its last decision:

> Based on the Wisconsin Supreme Court's decision, Kovac's failure to adequately investigate and make an adequate offer of proof prior to or at trial *resulted in* the proper exclusion of third party evidence pointing to Willie Friend or Larnell Friend. Wilson has thus alleged sufficient facts that, if true, show that he was prejudiced.

App. 13. The facts alleged are now established to be true. Kovac did not make an adequate investigation or adequate offer of proofs. Kovac so—i.e., ineffectively—proceeded because he "didn't think the [third-party defense] was going to be a problem" (R.193(IH)70) and thought that the testimony from Larson and, particularly, Streeter was "obvious" (R.193(IH):90), despite their having critical evidence establishing the third-party defense, R.193(IH)118-119, which did not go to the jury. The trial court's ruling of "speculative" resulted from Kovac's ignoring the requirements of Wis. Stat. § 901.03(1)(b) concerning offers of proof.

Not only did Kovac fail to present important third-party evidence, but he missed critical evidence for testing before the jury the credibility of Willie Friend, who even the State agrees was *the key witness* for the prosecution, *see* State's Brief 1. Kovac's ineffectiveness is shown by the physical evidence and testimony

that was available to impeach Friend but that Kovac forwent. Among other things, Kovac had, but did not pursue, autopsy evidence showing that Maric's stomach was "collapsed and contracted" or empty, just three or so hours after Maric supposedly ate chicken. R.141(IH):Ex.33 at 10; R.194(IH):112. The State's chronology twice relies on Friend's testimony that he and Maric ate chicken and, crucially, while doing so, Friend sighted Wilson such that Friend later could supposedly identify Wilson as the shooter. State's Brief 3, 24.[2] Milwaukee County's assistant medical examiner explained at the post-conviction hearing that it was as probable as not that any food eaten by Maric would still have been in her stomach at the time of the autopsy. R.194(IH)115. In other words, there was an even chance that any food eaten by Maric at the time asserted would have remained in her stomach at the time of death. The autopsy evidence showed no food in her stomach. This goes relevantly and materially to

[2] The State offers a factual chronology without "appropriate references to the record." Wis. Stat. §809.19(1)(d). Perhaps the State did "dra[w]" upon some facts from the Supreme Court as suggested, (State's Brief 2), but without quotations or even record citations, it is difficult to tell. Moreover, the whole point of the evidentiary hearing at the post-conviction stage, after the 2015 Supreme Court decision, was to establish certain facts.

establish whether Maric ate food—that is, to cast doubt on a crucial part of Friend's (the State's) story.

Kovac's failure to raise questions about the manufacturer and color of the gun also matters. The State's expert, Monty Lutz, identified the murder weapon as a .44 Sturm Ruger. R.182(Tr.):48-58; R.140(IH)Ex. 32. Wilson did not have a .44 Sturm Ruger. Wilson testified that he had had a Smith & Wesson. R.184(Tr.):56. Kovac did not do his job and question Lutz about the gun manufacturer. R.182(Tr.):78-82. Nor did Kovac challenge Friend about Friend's identification of the shooter's gun. Friend testified that he saw a "blue steel large revolver." R.180(Tr.):38. Kovac would not have relied on Wilson to raise doubts about this identification, as the State suggests, *see* State Brief 23; rather, Kovac should have brought to the jury the statement of Terry Bethly, a State witness, who saw a .44 caliber in Wilson's hands at a shooting gallery in April and identified it as "all black," R. 149 (IH):Ex.39, not the "blue steel" of Friend's testimony.

Friend's credibility was highly suspect, and the State's case, which was otherwise circumstantial, rode on it. Kovac's failure to strongly attack Friend's credibility was prejudicial. Contrary to the State's assertion, the testimony of Carol Kidd Edwards did not

support Friend's version of events. *See* State's Brief 27. Edwards heard loud gunshots. After they stopped, Edwards looked up and saw Friend at Maric's car. *See* State's Brief 5. Friend then ran away from the car. *See id.* According to Edwards's testimony, when Friend was running away, no shots were fired at him. The loud gunshots were over. The smaller gunshots were, according to Edwards, fired into the car that Friend had already left. *See id.* Edwards's testimony, then, is contrary to Friend's testimony, as he said that bullets were firing around him. R.180(Tr.):40-41. Further, Edwards gave a description of the shooter that did not match a description of Wilson, R.193(IH):43-44; R.180(Tr.):122-123, and her description of the license plate of the shooter's car was a normal plate, not the specialty plate of Wilson's car, R.180(Tr.)129; R.193(IH):44. Edwards's testimony did not connect Wilson to the shooting.

Friend was the only one to link Wilson to the shooting. In *State v. Thiel*, 2003 WI 111, ¶¶ 4, 46, 264 Wis. 2d 571, 581, 598, 665 N.W.2d 305, 311, 319, the Wisconsin Supreme Court explained that where "the credibility of the complaining witness was paramount to this case," the "fail[ure] to use a great deal of available evidence to impeach the State's chief witness because of

inadequate trial preparation [was] deficient [and] the cumulative effect of the deficiencies prejudiced [the] defense."

B. Kovac Failed to Keep "Pretty Damning" Hearsay Evidence from the Jury—and, Instead, Ensured That the Jury Heard the Evidence Multiple Times.

Not only did the jury hear the State's case without contrary defense evidence, but Kovac *ensured* that the State's account included especially prejudicial hearsay testimony by Friend. This was a supposed statement by Maric to Friend that Wilson had tried to run her off the road and told her that he would kill her if she did not stop seeing Friend. R.178(Tr.):237. Kovac objected—and then inexplicably withdrew the objection. R.178(Tr.):238, 250. The post-conviction court concluded that "Kovac's performance was deficient in withdrawing the objection." App. 5.

The State now argues in "hindsight" no harm and no foul because the statement would have come into evidence. *See* State's Brief 24. But it overlooks an important point: the trial court *upheld* the objection upon concluding the statement to be hearsay, and excluded the statement, before the objection's withdrawal. R.178(Tr.):242-243. No "excited utterance" argument (the explanation offered then and also now) persuaded the trial court of admission. R.178(Tr.):238, 242. This, too, should be noted: The

record contains no corroborating evidence for Friend's convenient contention that Maric was "upset," for any "upset" being attributable to Wilson, or, in fact, for the hearsay statement's ever having been uttered by Maric.[3]

Kovac allowed the hearsay statement to go to the jury in full, even underscoring it on cross-examination. He forfeited the adversarial imperative that the State make its case to overcome the hearsay and the prejudice. Kovac's deficiencies as counsel had the jury hearing evidence even more "prejudicial" than "most evidence presented by the State," State's Brief 25, because it was offered by the State's key witness and went to ultimate issues.

The post-conviction court was correct that "Attorney Kovac's performance was deficient in various respects." App. 5. Its mistake was to find a lack of prejudice. *See id.* The jury did not hear Wilson's complete defense because Kovac did not investigate or present it. Sure, the jury knew that Friend had eight convictions. *See* State's Brief 27. But there was so much more—of more direct importance—that the jury did not know because of

[3] To the contrary, the evidence in the record, such as answering machine messages, demonstrated Maric's lack of fear of Wilson and Maric's attempts to continue the relationship. R.184(Tr.):67-71. Mary Larson confirmed this at trial, R.185(Tr.): 13, and at the post-conviction hearing offered her own positive view of Wilson, R.192(IH):21.

Kovac's deficiencies. The jury did not know that the illegal after-hours club run by Friend and his brothers, who also had a host of convictions, was a "house of prostitution," with a revolving door of unsavory people, and that guns had been present along with illegal activities. R.193(IH):96-97; R.194(IH):22-23; R.134(IH):Ex.25; R.135(IH):Ex.27. The jury did not know that Maric, a prostitute, was being kept "in check" by Willie Friend with violence (welts on her back, R.192(IH):25), threats of violence, and "it [a gun] sticking out of [Willie Friend's] pants," R.192(IH):26-27, because Maric was one of his "bitches" or prostitutes. This is evidence of "contacts, influence, and finances," and "of means or access or ability to hire assassins to kill Maric," R.75, ¶ 85, not just "tenacity," as the State suggests, State's Brief 26. And it satisfies Wilson's burden (lesser than that required of the State) under *Denny*. *See* 120 Wis. 2d at 623, 357 N.W.2d at 17.

Had he provided effective representation, Kovac would have presented Wilson's *complete* third-party defense and *complete* impeachment of Friend, thus showing the jury reasonable doubt in the State's case. Kovac did not. The jury entered a guilty verdict, but only after having reached an impasse and being assured by the court that "[y]ou have all the information you need to reach a

verdict." R.187(Tr.):155-156. But the jury did not have all the information. For there had been a breakdown in the adversarial process. *See, e.g., Pitsch*, 124 Wis. 2d at 645, 369 N.W.2d at 720. There thus cannot be adequate confidence in the verdict against Wilson, whom the law entitles to a new trial—a fair one with effective assistance of counsel.

CONCLUSION

For these reasons and those stated in the opening brief, the order denying General Grant Wilson's motion for a new trial should be reversed. His judgment of conviction and sentence should be vacated and the matter remanded for a new trial.

Respectfully submitted,

s/ Anne Berleman Kearney

Anne Berleman Kearney
State Bar No. 1031085
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 332-0966

Counsel for Defendant-Appellant General Grant Wilson

FORM AND LENGTH CERTIFICATION

I hereby certify that this Reply Brief of Defendant-Appellant General Grant Wilson conforms to the rules contained in s. 809.19(8) for a brief produced with a proportional serif font. The length of this brief is 2996 words.

s/ Anne Berleman Kearney

_____

Anne Berleman Kearney (WBN 1031085)
Appellate Consulting Group
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966

Attorney for Defendant-Appellant General Grant Wilson

CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this Reply Brief of Defendant-Appellant General Grant Wilson, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

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.

s/ Anne Berleman Kearney

_____

Anne Berleman Kearney
(WBN 1031085)
Appellate Consulting Group
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966

Attorney for Defendant-Appellant
General Grant Wilson

MAILING CERTIFICATION

I, Anne Berleman Kearney, do hereby certify that the Reply Brief of Defendant-Appellant General Grant Wilson was hand-delivered to a third-party carrier (Federal Express) on August 10, 2018 for delivery to

Ms. Sheila Reiff
Clerk of Court
Wisconsin Court of Appeals
110 E. Main Street, Suite 215
Madison, Wisconsin 53703

I further certify that on August 10, 2018 three copies of the Reply Brief of Defendant-Appellant General Grant Wilson were mailed via the United States Postal Service, postage prepaid, addressed to the following counsel:

Karen A. Loebel
Office of the District Attorney for Milwaukee County
821 W. State Street
Milwaukee, Wisconsin 53233

Office of the Attorney General
Department of Justice
Gregory M. Weber
P.O. Box 7857
Madison, Wisconsin 53707-857

s/ Anne Berleman Kearney

_____

Anne Berleman Kearney (WBN 1031085)
Appellate Consulting Group
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966
Attorney for Defendant-Appellant General Grant Wilson