STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2018AP000534

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JERRY SIMONE WILSON,

Defendant-Appellant.

On Appeal from a an Order Denying a § 974.06 Motion for Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable Mark A. Sanders Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ISSUES PRESENTED

1. Has Mr. Wilson proven, by clear and convincing evidence, that an exculpatory eyewitness statement was discovered after conviction?

   The circuit court answered no. (192:31-32); (App. 132-133).

2. Has Mr. Wilson proven, by clear and convincing evidence, that he has not been negligent in seeking this evidence?

   The circuit court answered no. (192:31-32); (App. 132-133).

3. Has Mr. Wilson proven, by clear and convincing evidence, that his newly-discovered evidence is "material?"

   The circuit court did not reach this issue.

4. Has Mr. Wilson proven, by clear and convincing evidence, that his newly-discovered evidence is not merely cumulative?

   The circuit court did not reach this issue.

5. Does the newly-discovered evidence create a reasonable probability of a different outcome?

   The circuit court did not reach this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication of this case is requested as it will help to guide litigants in future cases with similar facts.

While Mr. Wilson does not request oral argument, he welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

The information charged Mr. Wilson with first-degree reckless homicide with use of a dangerous weapon contrary to Wis. Stats. §§ 940.02(1) and 939.63(1)(b) and two counts of first-degree recklessly endangering safety with use of a dangerous weapon contrary to Wis. Stats. §§ 941.30(1) and 939.63(1)(b). (4:1-2).

Mr. Wilson was convicted of all counts following a multi-day jury trial. (106:1). Following the conclusion of an unsuccessful direct appeal, Mr. Wilson filed a § 974.06 motion seeking a new trial, which included a claim of newly-discovered evidence. (120). The circuit court denied the motion without a hearing. (121:1). This Court affirmed. ***State v. Wilson***, No. 2013AP2590-CR, unpublished slip op. (Wis. Ct. App. September 16, 2014) (per curiam). (130); (App. 142-149). However, the Wisconsin Supreme Court accepted review and remanded for an evidentiary hearing. (134).

An evidentiary hearing was held before the Honorable Mark A. Sanders. (191); (App. 102-135). The circuit court denied relief. (192; 147). Mr. Wilson timely appealed. (157).

STATEMENT OF RELEVANT FACTS

Relevant Trial Testimony[1]

R.T. testified that on May 23, 2009, he went out drinking with some friends, including his cousin, M.W. (178:106-107). Toward the end of the night, the group traveled in a "caravan" fashion back toward the 2400 block of North 44th Street, where R.T. was living. (178:106-108). When they arrived, R.T. observed "a lot of people out." (178:110). In fact, there were so many people in the street he had to slow his vehicle in order not to hit anyone. (179:18). He testified that there was an "after hours" event going on where "people go out at night and pay their little money and hang out." (178:110).

As they drove down the street, a partygoer called R.T.'s sister a "bitch." (178:110). After parking the cars, the women in the group then went to "find out who called her a bitch." (178:111). The men followed, hoping to head off trouble. (178:112). The women in the group confronted a "gang of people" about the derogatory comment. (178:112). Soon, the two groups of women began yelling at one another. (178:112). R.T. and M.W. tried to break up the fight. (178:113). Despite their efforts, the fight only escalated further. (178:113). R.T. testified that an unnamed individual "started talking crazy." (178:113). In response, R.T. started

[1] Mr. Wilson's trial lasted roughly one week and the transcripts comprise several hundred pages of testimony. For the sake of brevity—and because this case has twice been briefed to this Court—Mr. Wilson has opted to focus on the eyewitness testimony presented. Mr. Wilson reserves the right, however, to supplement this statement of facts in his reply brief.

throwing punches. (178:113). According to R.T., "Then we all just start fighting." (178:113).

Suddenly, R.T. heard gunshots. (178:114). "Everybody started running." (178:114). Both R.T. and M.W. were hit by gunfire: R.T. received a non-serious wound to his foot and M.W. was fatally wounded in the ensuing chaos. (178:114; 179:5). R.T. testified that he heard "[l]ike three or four" shots." (178:115). He also claimed to see the fire from the gun. (178:115). He did not see the shooter although he believed the shots came from around thirteen feet away. (178:115; 179:21).

R.D. was also with R.T. that evening. (179:103). He also witnessed "[a] bunch of people outside" prior to the fatal shooting. (179:105). He was also present for the initial fight, although he denied that it ever turned physical. (179:107). R.D. testified that he heard the shots and ran from the scene. (179:107). He believed there were "around six shots." (179:111). He received a graze wound in his leg and was also hit in the stomach with a bullet fragment. (179:112). In addition to R.D. and R.T., the jury also heard from yet another member of their group, Shakira King. She was also present when the fight broke out. (180:91). She told the jury that she witnessed an individual she knew as "Mone" come out of the "cut" and start shooting. (180:94). She identified Mr. Wilson as "Mone." (181:10). She was also extensively cross-examined regarding alleged inconsistencies between her original statement and her trial testimony. (*See* 181:22-23). Another participant in the fight, Aaron Lee, testified that the shots occurred as the fight was ending. (184:54). He ran from the scene. (184:55). He testified that he never saw Mr. Wilson that night. (184:55).

Antwan Smith-Currin[2] also testified for the State. (179:32). He testified that he was at his home at 2333 North 44th Street on the night of the shooting. (179:32-33). That address corresponds to the upper level of a split-level duplex. (179:33). He testified that there were parties going in both units. (179:33-34). He testified that he was familiar with an individual known as "Simone" and identified Mr. Wilson as "Simone." (179:34-35).

On the evening of the shooting, Mr. Smith-Currin testified that he heard two sets of shots. (179:36). The first volley came from a North Avenue location around 30 minutes before the brawl outside. (179:36-37). After hearing the first set of shots, Mr. Smith-Currin witnessed "people outside fighting in the front" of the house. (179:36). He went outside and "told everybody to move around" meaning that "they got to go." (179:37). However, "[w]ouldn't nobody listen." (179:37). Instead, "[e]verybody just got to fighting." (179:37). At this time, Mr. Smith-Currin was standing on the lower porch. (179:38). He witnessed the fight and, in his trial testimony, largely corroborated R.T.'s account of the fight's evolution. (179:38-39).

He then witnessed Mr. Wilson come out from between two houses. (179:42-43). According to Mr. Smith-Currin, "He just came out, got to shooting." (179:43). He gave the jury an extended, shot-by-shot description of Mr. Wilson's alleged actions. (179:43-48). Mr. Smith-Currin claimed to be standing on the lower-level porch during the entirety of the shooting. (179:50). On cross-examination, he denied drinking during the party—meaning that he was sober when he claimed to see Mr. Wilson shooting. (179:72).

[2] There are divergent spellings of the name in the record; undersigned counsel will use the spelling in the trial transcripts. (179:32).

Santanna Ross attended the party at Mr. Smith-Currin's home. (183:6-7). She corroborated Mr. Smith-Currin's account of earlier gunshots. (183:11). She testified that she left the party after the gunshots and, soon thereafter, found herself engaged in an argument with R.T. and his friends. (183:13). At one point, she claimed that Ms. King threatened her with a liquor bottle. (183:13). She "dropped to the ground" when she heard the shots. (183:32). At trial, she recanted a prior identification of Mr. Wilson as the shooter. (183:20). She stated she felt pressured to give that earlier statement while in police custody. (183:34). She also testified that she heard shots coming from the porch where the party was happening and that she saw someone with a gun on that porch. (183:35).

Kawana Robinson, another participant in the street fight, also heard gunshots coming from the location of the after-set party at "2333." (183:135). Shantell Johnson, yet another participant in the fight, also believed the shots were coming from that house, although she thought they were coming from the upstairs porch. (183:35).

Another acquaintance of Mr. Wilson, Samantha Coats, was asleep at her home when the fight started. (180:28-30). She went to the window and "seen somebody shooting." (180:30). She placed Mr. Wilson's girlfriend in the crowd at the time of the fight. (180:31). While she apparently identified Mr. Wilson as the shooter in an initial statement to law enforcement, she recanted much of her story and would only admit that the shooter fit Mr. Wilson's description in her trial testimony. (180:33).

Outcome of the Trial and Sentence

At the conclusion of the trial, Mr. Wilson was convicted of all charges. (103). He received the following sentence:

- Count One: Twenty years of initial confinement followed by eight years of extended supervision, consecutive to any other sentence;

- Count Two: Four years of initial confinement followed by two years of extended supervision, consecutive to count one;

- Count Three: Four years of initial confinement followed by two years of extended supervision, consecutive to counts one and two.

(187:38-39).

Direct Appeal Proceedings

Mr. Wilson filed a notice of intent to pursue postconviction relief. (107). He filed a Rule 809.30 postconviction motion seeking a new trial due to ineffective assistance of counsel. (110). Specifically, Mr. Wilson argued that trial counsel was ineffective for failing to investigate a possible alibi defense, for not investigating the possibility of misidentification, and for not conducting an adequate cross-examination of Mr. Smith-Currin. (110). That motion was denied in a written order. (111:1).

This Court affirmed. ***State v. Wilson***, Appeal No. 2011AP1043-CR, unpublished slip op. (Wis. Ct. App. May 15, 2012) (per curiam). (117); (App. 136-141). The Wisconsin Supreme Court denied a petition for review. (118:1).

Mr. Wilson's § 974.06 Motion

On November 4, 2013, Mr. Wilson filed a *pro se* motion for a new trial under Wis. Stat. § 974.06. (120). He raised numerous claims, only one of which is relevant to this appeal—the newly-discovered evidence claim.

Specifically, Mr. Wilson included, as an attachment to his motion, the affidavit of Ms. Lakisha Wallace. (120:19-20). According to her affidavit, Ms. Wallace was present at the duplex on the day of the party. (120:19). Before the party, she witnessed Mr. Smith-Currin "smoking weed, taking x-pills, and drinking liquor." (120:19). Later, during the party, she heard arguing outside. (120:19). She witnessed Mr. Smith-Currin ask his brother for a gun. (120:19). She then witnessed Mr. Smith-Currin standing on the lower-level porch, waving the handgun and demanding that the fighters "move the fuck from in front of" the residence. (120:19). She then witnessed Mr. Smith-Currin run into crowd and begin shooting. (120:19). Afterwards, Mr. Smith-Currin tried to enter her home. (120:19). She denied him entry. (120:19). Shortly thereafter, she witnessed him telling his brother that he just "popped that nigga." (120:19). She described Mr. Smith-Currin as wearing a black hoodie, dark jeans, with braided hair. (120:19).

Ultimately, the circuit court conducted an evidentiary hearing on the newly-discovered evidence claim. (191). Ms. Wallace was called as a witness and testified that she was living in the lower unit of the duplex at the time of the shooting. (191:14). She knew Barbara Smith, one of the upstairs tenants, as well as Ms. Smith's son, Antwan Smith-Currin. (191:15). There was also a family connection: Ms. Wallace's sister had a child with Mr. Smith-Currin's brother and her cousin was in a relationship with Mr. Smith-Currin.

(191:16). Ms. Wallace testified that, on the day of the shooting, she witnessed the State's key witness, Mr. Smith-Currin, drinking liquor, smoking marijuana and consuming drugs on the porch outside of her home. (191:17). Based on her prior interactions with Mr. Smith-Currin, she could tell that he was obviously intoxicated. (191:20-21).

Ms. Wallace recalled the fight later that evening with vivid detail, and asserted that shortly after the brawl started, she heard Mr. Smith-Currin run up the back stairs and ask his brother "Bro', let me see your heat, let me see your heat." (191:23-25). She then witnessed Mr. Smith-Currin stand on their shared porch and wave a handgun while yelling "move the fuck away from in front of my motherfuckin' mama house with this bullshit." (120:23). According to Ms. Wallace, Mr. Smith-Currin then ran "down like a couple stairs" and began shooting. (191:24). After the shooting, he tried to enter Ms. Wallace's residence and she refused him entry. (191:24).

Later, as she tried to exit through the rear of the duplex, Ms. Wallace witnessed a verbal interaction between Mr. Smith-Currin and his brother:

> And then as I'm leaving out- we leaving out he was talkin' to his brother. . . He was like "Yeah, I popped that nigga." He was like "Shut the fuck up. I told you to stop taking these pills and shit. Look what you got yourself into." He was like stop talkin', and stuff like that, and I was on my way leaving and I left.

(191:24). Ms. Wallace testified that throughout these events, Mr. Smith-Currin was wearing a black hoodie and jeans. (191:32). Ms. Wallace also discussed Mr. Smith-Currin's decision to cooperate with the prosecution of Mr. Wilson: She stated that Mr. Smith-Currin may have witnessed his girlfriend (Ms. Wallace's cousin) "talkin'" with Mr. Wilson

and, as a result, would have had an animus against him. (191:34). She stated that she overheard a conversation between her cousin and Mr. Smith-Currin in which he discussed blaming Mr. Wilson for the shooting. (191:34).

Ms. Wallace testified that she was never interviewed by police and did not otherwise disclose her information during the initial investigation and prosecution of Mr. Wilson. (191:34). Several years after the shooting, Mr. Wilson's mother reached out to her on two occasions. (191:34). The first time, nothing happened after her disclosure to the family. (191:36). The second time, she signed the affidavit which led to the motion. (191:37). That affidavit is dated July 1, 2013. (191:38).

Mr. Wilson also testified. He testified that he knew "of" Ms. Wallace prior to the shooting. (191:90). He stated that he "had put the music in for her that night." (191:90). Mr. Wilson testified that Ms. Wallace reached out to him while he was incarcerated via letter, stating that "she had information about what happened that night." (191:91). That letter would have been received by Mr. Wilson in 2011 while Mr. Wilson was still represented by appellate counsel during his direct appeal. (191:91-92). He had his mother follow up with Ms. Wallace. (191:92). The following events occurred:

> Counsel: And what did you do with that report of her information?
>
> Mr. Wilson: I asked her we should make -- we should talk to my lawyer first which she stated yes, and supposedly she contacted my lawyer, gave her statement over the phone, and he's supposed to have been get in contact with her later on to get the -- write the affidavit up, to file it into my -- my first -- my direct appeal.

Counsel: And to your knowledge did that happen?

Mr. Wilson: No.

(191:92).

Mr. Wilson testified that he waited for his appellate lawyer to do something with the information. (191:93). His mother told him, during this time, that the lawyer continued to promise that he would move forward with Ms. Wallace's information but that he never did. (191:93). After losing his direct appeal, Mr. Wilson therefore made the choice to proceed with his *pro se* newly-discovered evidence claim. (191:95).

Following the evidentiary hearing, the circuit court ruled on the motion. (192); (App. 102-135). Regarding Ms. Wallace, the circuit court found that her testimony—with respect to the elements Mr. Wilson must prove under the newly-discovered evidence test—"was credible and worthy of belief." (192:12); (App. 113). The circuit court identified two general limitations on her credibility, however. (192:12); (App. 113). First, the circuit court noted that Ms. Wallace had "some difficulties in sequence of events." (192:13); (App. 114). It suggested, however, that this "could be attributed to the questions" or to some possible intellectual limitations. (192:13-14); (App. 114-115). The circuit court also claimed that her answers as to a series of questions about the defendant's presence at the scene of the shooting indicated further intellectual issues. (192:13-14); (App. 114-115). Essentially, the circuit court faulted Ms. Wallace for not adequately distinguishing, in her testimony, between Mr. Wilson not being present at the scene and Ms. Wallace simply not observing him at the scene. (192:13); (App. 114).

As to Mr. Wilson, the circuit court indicated that Mr. Wilson was "not credible." (192:17); (App. 118). His testimony was "not worthy of belief." (192:17); (App. 118). The circuit court gave it "zero weight." (192:17); (App. 118). Specifically, the circuit court disbelieved his testimony regarding an exchange of letters with Ms. Wallace, who testified that she is illiterate. (192:19); (App. 120). The circuit court also cited a specific exchange on cross-examination when Mr. Wilson appeared, from the circuit court's perspective, to have "talked himself into a corner" regarding this topic. (192:22); (App. 123). The circuit court believed that the testimony about an exchange of letters with Ms. Wallace was "crafted to achieve a particular end." (192:22); (App. 123). The circuit court indicated:

> When testimony that is incredible appears to be designed to achieve a particular end and that here the end was to assist him in being successful in his motion by addressing one of the five factors, it undermines the remainder of a witness's credibility in testimony that achieves -- that seeks to achieve that same manner.
>
> When a witness's testimony is seemed to be designed to achieve a particular end rather than designed to just relay what it is that happened, that witness's testimony becomes suspect. And it's because of that suspectness [sic] or suspiciousness that I don't give Mr. Wilson's testimony much weight at all.

(192:23); (App. 124).

Moving to the five-factor test for newly-discovered evidence claims, the circuit court held that Mr. Wilson was unable to satisfy the first prong—that the evidence was discovered after conviction. (192:24); (App. 125). Specifically, the circuit court stated that "if I were to give the defendant's testimony credibility, he would have a significant

problem on this element." (192:24); (App. 125). That is because Mr. Wilson testified that he had been at the witnesses' home earlier in the day, before the shooting. (192:25); (App. 126). The circuit court indicated:

> Well, what that sequence of questions and the other question that I referenced indicates is that the defendant knew who Lakisha was, knew that he had been at her house the day of the shooting.
>
> He didn't connect those dots until a little bit later but certainly before trial and that he didn't ask anybody to go and interview her but for the general request that his lawyer go and interview people in the neighborhood.
>
> Now, what that means is the defendant's knowledge -- had knowledge that Miss Wallace was available, that he had been with Miss Wallace, that she lived at that address, and that the shooting occurred in front of her house.
>
> He did not know what her testimony would be; but, of course, he wouldn't know what her testimony would be until someone went to interview her.

(192:27-28): (App. 128-129). Thus, while "[t]he substance of her testimony wasn't known until after conviction" the circuit court held that the "potential of her testimony that there was evidence there was known by the defendant before his conviction." (192:29); (App. 130).

Moving to the second factor—whether Mr. Wilson had been negligent in discovering the evidence—the findings as to whether the testimony was discovered after conviction supported a finding of negligence. (192:29); (App. 130). "When the defendant knows that there may be a potential witness and does not ask anybody to go interview that witness

and essentially sits on his hands relative to that potential witness, that's negligence." (192:29); (App. 130).

Moreover, the circuit court held that there had been additional negligence postconviction, as there had been a delay between Ms. Wallace's first report in 2011 and his filing of the motion in 2013. (192:30-31); (App. 131-132).

The circuit court did not determine whether Mr. Wilson had carried his burden with respect to the remaining prongs. (192:32); (App. 133). It denied Mr. Wilson's motion. (192:32); (App. 133).

This appeal follows. (157).

SUMMARY OF ARGUMENT

Mr. Wilson carried his burden of proof with respect to the first four prongs of the newly-discovered evidence test and, because Ms. Wallace's exculpatory information undermines the State's trial narrative, that evidence creates a reasonable probability of a different outcome. Accordingly, the circuit court erroneously exercised its discretion in denying Mr. Wilson relief. He is entitled to a new trial.

ARGUMENT

I. The circuit court erroneously exercised its discretion in denying the § 974.06 motion for a new trial.

A. Legal principles and standard of review.

A defendant who alleges newly-discovered evidence must meet four initial requirements:

1) The evidence was discovered after conviction;

2) The defendant was not negligent in seeking the evidence;

3) The evidence is material to an issue in the case;

4) The evidence is not merely cumulative.

State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42. The defendant must establish these first four factors "by clear and convincing evidence." ***State v. Edmunds***, 2008 WI App 33, ¶ 13, 308 Wis. 2d 374, 746 N.W.2d 590.

The circuit court's determination of whether these first four factors have been sufficiently proven is a discretionary determination for the circuit court; as such, this Court "review[s] whether the circuit court properly exercised its discretion in finding that the first four factors had been met by clear and convincing evidence." ***Edmunds***, 2008 WI App 33, ¶ 14.

"The term 'discretion' contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards." ***State v. Delgado***, 223 Wis. 2d 270, 280–81, 588 N.W.2d 1 (1999). "The record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case." ***Id***. An appropriate exercise of discretion must also be based on more than the arbitrary judgments of the circuit court. ***Edwards v. Edwards***, 97 Wis. 2d 111, 117, 293 N.W.2d 160 (1980). While appellate review of discretionary determinations is deferential, the standard is not without meaning and requires that the ruling at issue be, among other descriptors, consistent with "the essential demands of fairness." ***State v. Koch***, 144 Wis. 2d 838, 847,

426 N.W.2d 586 (1988); *see also* ***Martindale v. Ripp***, 2001 WI 113, ¶ 45, 246 Wis. 2d 67, 97, 629 N.W.2d 698 (discussing legal standard).

B. Mr. Wilson has proven, by clear and convincing evidence, that the evidence was discovered after conviction.

Here, the circuit court held that Ms. Wallace testified credibly. (192:12); (App. 113). Her testimony, which was not contradicted, is that she did not disclose her information to the police after the shooting. (191:34); (App. 135). The circuit court made a finding of fact that Ms. Wallace did not reach out to Mr. Wilson's family until 2011 or 2012. (192:19); (App. 120). Further, her affidavit is dated July 1, 2013. (120:20); (App. 121). Mr. Wilson was found guilty after a jury trial on August 24, 2010. (186). Undersigned counsel averred in his postconviction brief that there are no statements from Ms. Wallace in the police reports, an assertion that has never been contradicted by the State.[3] (142:10).

Based on these facts, Mr. Wilson has carried his burden with respect to the first prong. The circuit court's finding to the contrary is an erroneous exercise of discretion as it is "against the great weight and clear preponderance of the evidence." ***State v. Arias***, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748.

The circuit court's ruling is also internally inconsistent. After all, the circuit court established that Ms. Wallace was "[g]enerally […] credible and worthy and belief." (192:12); (App. 113). The circuit court also made a

[3] In fact, the State openly disregarded the circuit court's briefing order and never filed a brief in response to Mr. Wilson's.

finding of fact that the evidence was not provided to Mr. Wilson's family until after his conviction. (192:19); (App. 120). Thus, the circuit court's finding with respect to the first prong—which is inconsistent with that credible testimony—is clearly erroneous. At the same time, the circuit court's ruling is also in tension with its credibility finding as to Mr. Wilson. (192:24); (App. 125). Specifically, the circuit court held that Mr. Wilson "would have a significant problem on this element"—*if* it found Mr. Wilson credible, which it did not. (192:24); (App. 125). These puzzling, contradictory, and inconsistent rulings are not compatible with an appropriate exercise of discretion.

The circuit court's conclusion also appears to be premised on faulty legal reasoning. In finding against Mr. Wilson, the circuit court conflated the first two prongs of the newly-discovered evidence test, incorporating the negligence analysis of prong two into its analysis of prong one. (192:29); (App. 130). ("This actually is where there's a little bit of an overlap of the second element as well.") While the circuit court held that "the substance of [Ms. Wallace's] testimony wasn't known until after conviction," it nevertheless denied relief because "[t]he potential of her testimony […] was known by the defendant before his conviction." (192:29); (App. 130). In reaching that legal conclusion, the circuit court relied on ***State v. Boyce***, 75 Wis. 2d 452, 249 N.W.2d 758 (1977) and ***Sheehan v. State***, 65 Wis. 2d 757, 223 N.W.2d 600. Those cases are distinguishable.

In ***Sheehan***, the allegedly "new" evidence was the testimony of a codefendant who, after being separately tried, was subsequently acquitted on two of three charges. ***Sheehan***, 65 Wis. 2d at 768. The Wisconsin Supreme Court denied relief, holding that the codefendant's testimony was not truly "new." "[A]lthough the defendant did not know

exactly what [the codefendant]'s testimony was going to be, he did know that [the codefendant] was involved and that [the codefendant] had knowledge of the facts of the case." ***Id***.

In ***Boyce***, the Wisconsin Supreme Court applied ***Sheehan*** to an analogous set of facts. ***Boyd***, 75 Wis. 2d at 458. In that case, the defendant claimed that the testimony of a document examiner was "newly discovered evidence" impacting the integrity of his fraud conviction. ***Id***. While that examiner was able to put forth new opinions helpful to the defense postconviction, he had actually been named as a defense witness at the original trial. ***Id***. at 455-456. Thus, while the exact results of his potential examination were unknown prior to trial, "[t]he fact that [the witness] would make an examination and would testify was known to the defendant before the trial." ***Id***. at 458. Accordingly, his proffered testimony was not truly "new." ***Id***.

In this case, the circuit court asserted that Mr. Wilson's newly-discovered evidence claim was controlled by these authorities. (192:32). In its view, Ms. Wallace's testimony was not "new" because Mr. Wilson was aware, prior to trial, that Ms. Wallace had been at the party near the fatal shooting. (192:29). However, this situation is not at all analogous to ***Sheehan*** or ***Boyce***, both of which deal with witnesses who were identified as such prior to trial. Ms. Wallace, however, has credibly testified that she deliberately withheld her information and it does not appear that she was in any way a contemplated witness during the prior trial.

Moreover, her dramatic and exculpatory testimony constitutes an unexpected, radical shift in the narrative of this shooting. For the first time, there is not only a credible alternate suspect but also reason to doubt the State's main witness, Mr. Smith-Currin. Requiring Mr. Wilson to be

omniscient about information possessed by an acquaintance who happened to be in the vicinity of the homicide is unreasonable and, under these circumstances untenable.

The circuit court also made no findings as to whether Ms. Wallace would have been discoverable pretrial—which is problematic because the Milwaukee Police Department also failed to interview her. The circuit court has also made a large leap by assuming that Mr. Wilson should have known Ms. Wallace was present at the time of the shooting and would have been in a position to witness it. After all, the only thing established by Mr. Wilson's testimony—which the circuit court appears to have totally rejected—is that he was there earlier in the day and helped set up the music for the party. (192:25). This does not necessarily mean that she would have still been in the area when the shooting occurred, that she would have been a position to see it, or that she was even awake and aware of what was going on.

In imposing this onerous burden of pretrial discovery on Mr. Wilson—in context of the first prong of the newly-discovered evidence test—the circuit court erroneously exercised its discretion. Because the credible evidence supports a conclusion that Ms. Wilson's information did not surface until after his conviction, he has carried his burden on the first factor of the newly-discovered evidence test.

C. Mr. Wilson proved, by clear and convincing evidence, that he was not negligent in seeking this evidence.

The circuit court claimed that Mr. Wilson had been negligent in at least two respects. First, Mr. Wilson had been negligent pretrial:

> When the defendant knows that there may be a potential witness and does not ask anybody to go interview that witness and essentially sits on his hands relative to that potential witness, that's negligence.
>
> Or when the request is made to go interview people in the neighborhood but there isn't a specific reference to that particular person, that's negligence as well.
>
> It's not intentional conduct on the part of the defendant. But it's negligent conduct.

(192:29-30); (App. 130-131). In this excerpt, the circuit court is again referring to its earlier findings—namely, that Mr. Wilson should somehow have uncovered Ms. Wallace's statement before he proceeded to trial as a result of his acquaintanceship and knowledge that she may have present at an indoor party near the fatal outdoor shooting.

Second, the circuit court also found that Mr. Wilson had not been diligent in presenting his newly-discovered evidence claim to the circuit court, as there was a delay between Ms. Wallace's initial disclosure in 2011 and the drafting of the affidavit in 2013. (192:30-31); (App. 131-132).

As to the second consideration—the delay between the witness's disclosure and the drafting of the affidavit (and the filing of that affidavit with the court)—the circuit court imposed a nonexistent legal duty on Mr. Wilson. In ***State v. Vollbrecht***, 2012 WI App 90, ¶ 22, 344 Wis. 2d 69, 820 N.W.2d 443, this Court expressly declined to "to impose a duty to act promptly after discovery of new evidence." In that case, there was a lengthy postconviction investigation, ultimately spearheaded by the Wisconsin Innocence Project, in which exculpatory evidence was slowly gathered over a period of several years. Rather than imposing an affirmative duty that a litigant must promptly act on new information, the

Wisconsin Court of Appeals asserted that "any delay in raising newly discovered evidence can be adequately explored at trial and weighed by the fact finder in determining the credibility of any explanations provided, as well as the evidence itself." ***Id***.[4]

Thus, the exact circumstances which led to the generation of the 2013 affidavit, the precise logistics underlying Ms. Wallace's decision to cooperate with Mr. Wilson's family, and Mr. Wilson's claim that his postconviction attorney had this information and failed to act on it—are all matters for cross-examination at trial. They are not adequate reasons to deny his claim under this prong of the newly-discovered evidence test. Reliance on such considerations is contrary to ***Vollbrecht*** and therefore an erroneous exercise of discretion.

Thus, Mr. Wilson's case hinges on the circuit court's other basis for denying relief—whether Mr. Wilson should have discovered Ms. Wallace's testimony prior to trial. It is Mr. Wilson's position, as articulated above, that the circuit court placed an unreasonable burden on Mr. Wilson. Ms. Wallace's testimony, found credible by the circuit court, is that she did not disclose this information at the time of the shooting. Under these circumstances, a reasonable person could be forgiven for not suspecting that Ms. Wallace—who was never interviewed by police and who did not bring her claims to the attention of the defense—was actually in possession of extremely relevant and exculpatory evidence. Her statement—which not only exculpates Mr. Wilson but

[4] And such a position also makes good procedural sense, as it encourages litigants to thoroughly investigate and present comprehensive motions raising fully ripened claims of newly-discovered evidence, thereby encouraging efficiency and finality in litigation.

suggests a cover-up by the real killer, Mr. Smith-Currin—is evidence which Mr. Wilson could not have reasonably foreseen. More to the point, it is also information which the State's zealous investigation failed to shake loose. In this sense, the circuit court has therefore required that Mr. Wilson best the combined investigative efforts of the Milwaukee Police Department, who failed to speak with Ms. Wallace and uncover her statement pretrial.

After all, a reasonable person might expect that someone like Ms. Wallace *would* come forward. Moreover, it should also be remembered that the shooting occurred in connection with a chaotic street brawl, which grew out of a larger party that had spilled out onto the city streets. There were likely countless people who *could have* witnessed something. Expecting Mr. Wilson to have proactively interviewed each and every one of these individuals—even those like Ms. Wallace who were never interviewed by police and may not have been willing to come forward with information at the time—is plainly unreasonable.

Finally, the circuit court's conclusion ignores evidence in this record which indicates Mr. Wilson did urge his trial attorney to conduct an investigation of the "100 people" present at the party. (120:4). The circuit court acknowledged that Mr. Wilson had made a general request that his trial counsel interview people in the neighborhood, but faulted him for not specifically requesting that his lawyer to interview Ms. Wallace. (192:27); (App. 128). That finding is erroneous because it presupposes that Mr. Wilson knew which of the more than 100 people present would have exculpatory information. After all, the circuit court's sole reason for finding Mr. Wilson negligent is because he did not interview a person—Ms. Wallace—who may have been present when the shooting occurred. But that same reasoning would

seemingly apply to each and every person present—at least 100, if not more, potential witnesses. Like Ms. Wallace, these other 100 witnesses may also have had "potential testimony." However, it is plainly unreasonable to hold Mr. Wilson responsible for not interviewing each and every one in order to fortuitously discover Ms. Wallace's information—information which she may not have been willing to disclose anyway. In essence, the circuit court has imposed an onerous and unreasonable burden of pretrial investigation on Mr. Wilson.

Accordingly, Mr. Wilson carried his burden with respect to the second prong of the newly-discovered evidence test. The circuit court's finding to the contrary is an erroneous exercise of discretion.

D. Mr. Wilson's claim satisfies the remaining requirements of the newly-discovered evidence test.[5]

1. Ms. Wallace's statement is material to an issue in the case.

Here, the evidence is plainly material to a determination of Mr. Wilson's guilt or innocence as it goes to the central disputed issue: the identity of the shooter. It is also material because it suggests a source of bias for Mr. Smith-Currin. "Inquiry into a witness's bias is always material and relevant." ***State v. Yang***, 2006 WI App 48, ¶ 11, 290 Wis. 2d 235, 712 N.W.2d 400. In addition, the evidence bears on Mr.

[5] The circuit court did not resolve the remaining aspects of the newly-discovered evidence test. Mr. Wilson believes the record is sufficient for this Court to do so. Should this Court disagree, it should remand to the circuit court for a further hearing.

Smith-Currin's credibility, as it shows that he may have been untruthful about being under the influence of intoxicants when he claimed to witness Mr. Wilson shoot into the crowd, which is also a "material" issue. *See* ***State v. Harris***, 2004 WI 64, ¶ 31, 272 Wis. 2d 80, 680 N.W.2d 737 (impeachment evidence is material); ***Plude***, 2008 WI 58, ¶ 47.

Further, Ms. Wallace's testimony raises the distinct possibility that Mr. Smith-Currin's entire trial testimony may have been falsified, and the Wisconsin Supreme Court has observed that a new trial is required if there exists a reasonable likelihood that the false testimony of a witness affected the judgment of the jury. ***Plude***, 2008 WI 58, ¶ 40. Finally, the evidence is "material" because it supports a viable third-party perpetrator defense. *See* ***Vollbrecht***, 2012 WI App 90, ¶ 25. Ms. Wallace's testimony establishes that Mr. Smith-Currin had an opportunity, a motive, and a direct connection to the shooting. ***Id.***; ***State v. Denny***, 120 Wis. 2d 614, 622-624, 357 N.W.2d 12 (Ct. App. 1984).

2. The evidence is not merely cumulative.

In addition, Ms. Wallace's statement is not merely cumulative. Evidence can only be cumulative when offered to support an established fact. ***State v. Thiel***, 2003 WI 111, ¶ 78, 264 Wis. 2d 571, 665 N.W.2d 305. None of the evidence offered by Ms. Wallace has ever been heard by a jury. Accordingly, it cannot be "merely cumulative." To the contrary, it offers a radically different narrative which contradicts the State's theory of guilt. The Seventh Circuit has held that "having independent witnesses corroborate a defendant's story may be essential and the testimony of additional witnesses cannot automatically be categorized as cumulative." ***Crisp v. Duckworth***, 743 F.2d 580, 585 (7th Cir.1984).

Here, Mr. Wilson has consistently denied being the shooter. At trial, the jury was given a panoply of conflicting accounts from an array of citizen witnesses, many of whom admitted their involvement in the unsavory street brawl. Their accounts are at times inconsistent, and in some cases, possibly self-interested. In many ways, this was a case which could only be resolved by careful juror scrutiny of each witness's credibility. Rather than simply adding one more conflicting account to the mix, Ms. Wallace's testimony offers a complete and unbiased account of the shooting which dramatically undercuts the testimony of the State's main witness—Mr. Smith-Currin. As such, it cannot be cumulative.

3. Ms. Wallace's testimony creates a reasonable probability of a different outcome.

If this Court is satisfied that Mr. Wilson has carried his burden with respect to the first four requirements, it must then consider "whether a reasonable probability exists that a different result would be reached in a trial." ***State v. McCallum,*** 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof." ***Edmunds***, 2008 WI App 33, ¶ 13; *see also* ***State v. Armstrong***, 2005 WI 119, ¶ 161, 283 Wis. 2d 639, 700 N.W.2d 98. (A reasonable probability determination need not be made by clear and convincing evidence: there is either a reasonable probability that a different result would have been reached, or there is not.) The question of whether the new evidence would have a sufficient impact on the other evidence, such that a jury would have a reasonable doubt about the defendant's guilt, is a question of law reviewed de novo. ***Plude***, 2008 WI 58, ¶ 31-33.

"A reasonable probability of a different results exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***State v. Love***, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 700 N.W.2d 62. The defendant is not required to prove that acquittal is more likely than not, or that the evidence is legally insufficient but for the identified errors. ***Kyles v. Whitley***, 514 U.S. 419, 434-35 (1995).

Here, Ms. Wallace's affidavit and sworn testimony at the evidentiary hearing directly contradict the testimony of the State's key witness, Mr. Smith-Currin, whose narrative drove the State's case. As a result, the State has already conceded that, if true, Ms. Wallace's testimony would create a reasonable probability of a different outcome. *See* Wisconsin Supreme Court Order dated February 15, 2017 at 2. ("The State further concedes that if the allegation at issue is accepted as true, there is a reasonable probability that a jury, looking at the old evidence and the new evidence, would have a reasonable doubt as to Mr. Wilson's guilt.") (134).

For the record, this is plainly apparent: Ms. Wallace not only points the finger at a compelling alternate suspect, but she also identifies that alternate suspect as the prosecution's key witness. The other evidence in this case, on its own, does not undermine that conclusion. The only other consistent identification that was not recanted at trial comes from Shakira King. However, Ms. King testified inconsistently about being a member of the street brawl, despite a prior statement to law enforcement and the testimony of other witnesses. (181:19). She also had a prior inconsistent statement regarding the mechanics of how she claimed to see Mr. Wilson shooting. (181:22). She was also inconsistent about the shooter's hairstyle. (181:23).

Moreover, reviewing all of the testimony, it is clear that this was a chaotic, confusing scene. Ms. Wallace's perspective, however, was from the vantage point of the house and not from within the street brawl—like many of the other witnesses.

In addition, Ms. Wallace's testimony is consistent with other details in this case. Three witnesses testified that they believed that shots were fired from Mr. Smith-Currin's location: Santanna Ross (183:35); Kawana Robinson (183:135); and Shantell Johnson (184:35) (although she believed the shots were coming from the upper rather than the lower porch). While it was not presented as evidence at the trial, Mr. Smith-Currin testified at the preliminary hearing in this matter that he was aware witnesses were claiming that he was the shooter. (162:23). And, Ms. Wallace's description of Mr. Smith-Currin yelling at partygoers is also corroborated by Mr. Smith-Currin's own testimony. (179:37). Finally, her depiction of Mr. Smith-Currin's clothing is consistent with descriptions of what the shooter was wearing—a black hoodie. (179:83; 180:34).

In this regard, this case is analogous to ***State v. Jenkins***, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786, in which the State's case rested almost entirely on the testimony of one witness and there was no physical evidence directly tying the defendant to the shooting. The Court explained that contradictory eyewitness testimony supporting the defendant's position would have exposed vulnerabilities at the center of the State's case. ***Id***., ¶ 52. The Court found that the inclusion of an eyewitness who had contradictory testimony to the prosecution's central eyewitness testimony would have contributed strongly to doubts regarding the State's case. ***Id***. at ¶ 53 (citing ***United States ex rel. Hampton v. Leibach***, 347 F.3d 219 (7th Cir. 2003)).

As to Ms. Wallace's credibility, since the evidence here is not incredible as a matter of law, it is for the jury to resolve any credibility disputes, not this Court. ***Rohl v. State***, 65 Wis. 2d 683, 695, 223 N.W.2d 567 (1974). Further, the Wisconsin Supreme Court in ***Jenkins*** determined that failure to call a witness can be "prejudicial" in the ineffectiveness context regardless of potential credibility problems with the postconviction witness. ***Jenkins***, 2014 WI 59 at ¶ 54. The Court cannot reject the testimony of new witnesses merely because it may choose to disbelieve them or because it may find the witnesses at the trial more believable. ***Jenkins***, 2014 WI 59 at ¶ 50-65.

In other words, it is not this Court's task to establish whether it believes Ms. Wallace. Rather, this Court's obligation is to ask whether witness testimony creating a reasonable probability of a different result could be credited by a reasonable jury sufficient to create a reasonable doubt. Considering the holding in ***Jenkins***, and the evidence presented, there is a reasonable probability that a different result would have been reached if the jury had heard Ms. Wallace's testimony. Both her narrative and affidavit are clear as to what she witnessed on May 23, 2009. While Mr. Wilson is not required to prove that an acquittal was more likely than not, it appears that an acquittal would be the natural consequence of a jury that positively evaluated Ms. Wallace's credibility.

In sum, putting all of the pieces together, Mr. Wilson has not only satisfied the first four prongs of the newly discovered evidence test by clear and convincing evidence, but he has also presented witness testimony that creates a reasonable probability of a different outcome.

CONCLUSION

Mr. Wilson therefore respectfully requests that this Court grant him a new trial as a result of his newly-discovered evidence, or in the alternative, that it remand for further proceedings in Milwaukee County Circuit Court.

Dated this 18th day of June, 2018.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,343 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 18th day of June, 2018.

Signed:

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO APPENDIX

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

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

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

Dated this 18th day of June, 2018.

Signed:

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page