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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Wilson was not negligent in seeking Ms. Wallace's evidence.[1]

The State claims that "Wilson had sufficient information before his trial that Wallace was a potential witness to the shootings." (State's Br. at 22). Accordingly, they argue that the "blame thus falls squarely on him for not obtaining her testimony sooner." (State's Br. at 22). The State makes a series of factual claims to support that legal conclusion. First, they assert that "Wilson and Wallace knew each other from the neighborhood before the shooting." (State's Br. at 23). Second, "Wilson knew that Wallace had a party at her house the night of the shooting." (State's Br. at 23). Third, "Wilson knew that the party at Wallace's address was a central event in the allegations against him." (State's Br. at 23).

Mr. Wilson disagrees with the State's analysis. As Mr. Wilson pointed out in his opening brief, Ms. Wallace was never identified as a witness by the Milwaukee Police Department, who conducted an otherwise exhaustive and rigorous investigation of this shooting. (Opening Br. at 22). Moreover, the

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[1] The State appears to concede that Mr. Wilson has satisfied three of the prongs of the newly discovered evidence test in footnote six of its brief. (State's Br. at 22).

record is also clear that this was a chaotic scene involving at least two wild parties, with enough partiers in the street to actually impede traffic. (178:106-108). Thus, just looking at the surrounding facts, Ms. Wallace does not appear to have been a self-evidently important witness that Mr. Wilson could or should have known about. Importantly, their mutual acquaintanceship does not change that analysis.

Mr. Wilson testified that he "knew of" Ms. Wallace "in the community." (191:90). Similarly, Ms. Wallace testified that Mr. Wilson was a neighborhood acquaintance and nothing more. (191:33). Neither witness' testimony establishes that these individuals were anything more than mere acquaintances whose only interaction on the day in question involved Mr. Wilson helping to set up the music at Ms. Wallace's home earlier that day. (191:90). That fleeting interaction does not make it sufficiently reasonable to assume that Ms. Wallace would have been a witness to the shooting which occurred outside her home much later in the evening. This is therefore clearly not a situation where Mr. Wilson was aware of Ms. Wallace's information. The circuit court acknowledged as much, but still faulted Mr. Wilson for not uncovering Ms. Wallace's potential testimony. (192:29). However, the record demonstrates that this "potential" evidence was insufficiently foreseeable and, thus, that Mr. Wilson cannot be faulted for discovering credible evidence which would have exonerated him at his trial.

In support of their contrary position, the State makes several arguments. First, the State suggests that relief is foreclosed by *State v. Albright*, 98 Wis. 2d 663, 674, 298 N.W.2d 196 (1980). (State's Br. at 24). In that case, the defendant deliberately withheld his psychiatric history from his attorney and then, on appeal, claimed that this information constituted newly-discovered evidence. *Id.* Mr. Wilson's case is easily distinguished. Here, Mr. Wilson did not know that Ms. Wallace possessed evidence which radically undermines the State's theory of guilt. Unlike the defendant in *Albright*, Mr. Wilson did not "know" about any evidence—at best, he knew that Ms. Wallace *may* have been one of at least a hundred people who *may* have been in the general vicinity of an otherwise random street shooting.[2] Under these facts and circumstances, Mr. Wilson stands by his assertions in the opening brief that the circuit court has imposed an onerous pretrial discovery burden on him.

The State also argues that Mr. Wilson's citation of *State v. Vollbrecht*, 2012 WI App 90, ¶ 22, 344 Wis. 2d 69, 820 N.W.2d 443 was not on point. (State's Br. at 24). The State misconstrues Mr. Wilson's argument. Here, the circuit court claimed that Mr. Wilson was negligent because of the additional delay between Ms. Wallace's first contact with Mr. Wilson's

[2] In fact, cross-examination of Mr. Wilson revealed that he was not aware Ms. Wallace had been at the party when the shots occurred. (191:102).

family and the drafting of the affidavit that appeared in the motion. (192:30). The State does not seriously develop an argument that postconviction delays should be considered in assessing whether Mr. Wilson was negligent under the newly-discovered evidence test. Instead, they circle back to the argument already addressed above in order to incorrectly claim that the case law has been misapplied. (State's Br. at 24). Accordingly, it appears that the State has implicitly conceded Mr. Wilson's point and he will not further discuss it here.

Finally, the State argues that arguments about the discoverability of Ms. Wallace's information are not relevant; rather, this Court must consider "what Wilson could have done." (State's Br. at 24). However, this Court does not assess Mr. Wilson's alleged negligence in a vacuum; the objective discoverability of a fact is intimately connected to the consideration of whether a given actor was negligent in not uncovering said fact. If the State, with all of their investigative powers, was unable to uncover Ms. Wallace's testimony, why is Mr. Wilson being forced to best those efforts? This is an unjust and inequitable standard. Accordingly, this Court should find that Mr. Wilson's efforts were sufficient and that he was not negligent in seeking this information.

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

Here, the circuit court has found Ms. Wallace to be "credible and worthy of belief." (192:12). The State cannot seriously undermine that deferentially reviewed credibility finding, so instead it tries to argue that the testimony does not create a reasonable probability of a different outcome because it is not specific enough. (State's Br. at 25). It argues that, unless Ms. Wallace was able to give detailed, quasi-forensic testimony as to the direction of the shots fired by Mr. Smith-Currin, Mr. Wilson is not entitled to a new trial. (State's Br. at 25). Importantly, it also appears to suggest that Mr. Smith-Currin may have fired a gun, just not the gun that resulted in the injuries and fatalities on the night in question. ("This is particularly true given that several witnesses testified that they heard other gunshots that night.") (State's Br. at 25).

Respectfully, this is a distorted reading of the reasonable probability standard. Ms. Wallace should not be required to explain the precise path of the fired bullets in order for her otherwise credible testimony to create doubt in the mind of a reasonable juror. Moreover, the State's claim that the physical evidence contradicts her claim is overbroad. (State's Br. at 26). Here, Ms. Wallace testified that Mr. Smith-Currin ran out into the street and fired his gun. (191:23-24). The State acknowledges that fact. (State's Br. at 25). Yet, they still insist that the claim

must fail because "the idea that Smith-Currin could have shot the victims from the porch is inconsistent with the physical evidence." (State's Br. at 26). Their hyper-specific focus on the porch—and their decision to ignore that Mr. Smith-Currin was also observed going into the crowd to shoot—is therefore inconsistent with their concession a few sentences earlier.

The State also tries to focus on the type of bullets fired—information which, on the basis of this record, is plainly irrelevant. The ballistics evidence shows that two types of shells were recovered—and can tell us nothing about whether Mr. Wilson or Mr. Smith-Currin was the fatal shooter. At the same time, the State's arguments are unduly speculative given the acknowledged lack of record evidence to support its claim that the location of the recovered bullets proves its argument. (State's Br. at 26). ("While the record does not establish exactly how far away these locations were from the porch, common sense dictates they were more than five or seven feet.")

And, while the State is correct that some witness accounts support its theory, (State's Br. at 26), others do not. As Mr. Wilson argued, Ms. Wallace's testimony is consistent with other defense witnesses. While the State tries to quibble over minor details, it cannot seriously deny that multiple witnesses reported that the shots came from the vicinity of the party house—consistent with Ms. Wallace's testimony. (*See* State's Br. at 28). The State

also brings up several other similar arguments intended to chip away at Ms. Wallace's account—that other witnesses identified Mr. Wilson, that Mr. Smith-Currin gave a slightly different account of when he yelled at the crowd, and that Ms. Wallace's accurate identification of the shooter's clothing is overcome by other evidence in the record supporting other identifications. (State's Br. at 28). This Court should not be distracted by these evidentiary quibbles.

This is because, at the end of the day, the State cannot seriously dispute that Ms. Wallace has given a credible account of someone else directly committing the offense. This is extremely strong, persuasive evidence supporting reasonable doubt at a trial. Here, it is worth revisiting the applicable legal standard. "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). Credible testimony from a witness inculpating a third-party clearly satisfies this standard.

That is, while the State points out several evidentiary issues around the margins, it remains a compelling fact that a jury which agreed with the

circuit court—that Ms. Wallace was credible and believable—*would* have a strong possibility of acquitting Mr. Wilson, notwithstanding the minor factual disputes raised by the State. After all, it is up to the jury to weigh the various witness accounts and to decide, in the face of competing and sometimes contradictory evidence, whom to believe. Because a reasonable juror could believe Ms. Wallace—just as the circuit court appeared to—Mr. Wilson is entitled to a new trial.

Finally, Mr. Wilson will briefly address the State's remaining arguments. First, the State—despite conceding that the evidence is material—attacks some of the arguments made in that section of Mr. Wilson's brief. (State's Br. at 30). As the State has conceded this issue, it is unclear why it focuses on the point. Second, the State attacks Mr. Wilson's reliance on "hearsay statements" in the opening brief. (State's Br. at 30-31). However, the State ignores that all of these statements—statements made while Mr. Smith-Currin was agitated and excited—may have been admissible as excited utterances. In any case, the question of hearsay is tangential to the much more crucial evidence at issue—the witness' direct observation of Mr. Smith-Currin with a gun, running into the crowd and shooting. (191:24).

In light of that evidence, this Court should reverse and remand for a new trial.

CONCLUSION

Mr. Wilson therefore respectfully requests that this Court reverse the ruling of the circuit court and to remand for a new trial.

Dated this 8th day of October, 2018.

Respectfully submitted,

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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 1,867 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 8th day of October, 2018.

Signed:

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Christopher P. August
Assistant State Public Defender