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State of Wisconsin
Court of Appeals
District 1
Appeal No. 2018AP000871-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Andre L. Thornton,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Joseph Donald, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

Whether the circuit court erroneously exercised its discretion in denying Thornton's motion for a new trial based on newly-discovered evidence that one of the state's key witnesses had perjured himself in an earlier federal proceeding.

Answered by the circuit court: Although the evidence is newly discovered, it does not warrant a new trial because there was substantial other direct and circumstantial evidence of Thornton's guilt. As such, the newly-discovered evidence does not create a reasonable probability that the result of the trial would be different.

Summary of the Argument

The circuit court denied Thornton's postconviction motion because the court believed that there was "substantial direct and circumstantial evidence" of Thornton's guilt; and, therefore, there is not a reasonable probability that, even if the jury had

known of the witness's perjury in federal court, the result of the trial would not have been different. The only such evidence that the court identified was a remark that Thornton supposedly made after the shooting to the effect that "I got his bitch ass."

This decision is an erroneous exercise of discretion because, first of all, there is absolutely no testimony in the record that Thornton said, "I got his bitch ass." The testimony was that James Pate made that remark after using the rifle to shoot at TW's car. Secondly, the circuit court did not identify any of this supposed "substantial evidence" of Thornton's guilt because there is none. The testimony of numerous witnesses was to the effect that James Pate was the shooter.

Thus, Bradley Lee's testimony that Thornton admitted to being the shooter was critical to the state's case. The evidence of Lee's perjury in federal court is not merely a supposition that Lee might deny on cross-examination, it is a finding of fact by a district court judge in a federal court proceeding. As such, it is just the sort of strong evidence of Lee's character so as to require a new trial.

Statement of the Case

I. Procedural History

On February 1, 2016, the defendant-appellant, Andre L. Thornton (hereinafter "Thornton"), was charged, as a party to the crime, with first degree reckless homicide arising out of an incident that occurred in Milwaukee on October 31, 2015. In a nutshell, the criminal complaint alleged that Thornton was involved in the shooting death of TW. Following a confrontation with Thornton and others earlier in the evening, TW was shot as he drove past Thornton's girlfriend's home in the early morning hours. TW then crashed into a tree, and he died from gunshot wounds.

Thornton waived a preliminary hearing and he was bound over for trial. (R:101-3) He later entered a not guilty plea to the charge. (R:102-2)

Other than perfunctory motions in limine, there were no pretrial motions.

The matter proceeded to trial before a jury beginning on October 24, 2017. After approximately four days of testimony, the jury returned a verdict finding Thornton guilty as charged. (R:114-13)

Thornton did not testify. (R:111-53)

The court sentenced Thornton to 28 years in prison,

bifurcated as 18 years of initial confinement, and 10 years of extended supervision.

Thornton timely filed a notice of intent to pursue postconviction relief. (R:82)

On February 16, 2018, Thornton filed a postconviction motion seeking a new trial based upon newly-discovered evidence. (R:88) Thornton alleged that, after his trial, postconviction counsel learned that a state's witness, Bradley Lee[1], had previously perjured himself in a federal court proceeding in North Carolina. *Id.* Thornton argued that Lee, who claimed to have had a conversation with Thornton in jail in which Thornton admitted that he was involved in the shooting of TW, was a key state's witness in that it was the only testimony directly implicating Thornton in the shooting. *Id.* Thus, Thornton argued, this newly-discovered impeachment evidence was critical to Thornton's defense.

The circuit court ordered briefs on the motion. Without conducting an evidentiary hearing, on April 18, 2018, the trial court denied Thornton's motion by memorandum decision. (R:94; App. A)

Thornton now appeals.

[1] Not surprisingly, Bradley Lee is known by a number of aliases. In this matter, Lee may also be referred to as "Bradley Wallace." It is the same person.

II. Factual Background

A. The incident

On October 30-31, 2015, Thornton was at his girlfriend's apartment. His girlfriend is Corrina Williams ("Williams"). The apartment belongs to Williams' mother. (R:109-171)

Prior to that night, Thornton had had a disagreement with his brother, Jamaul Jones. Therefore, on the night in question, several of Jones' friends wanted the two brothers to iron-out their differences. (R:110-44) The men met at Williams' apartment. Eventually, the men were standing in front of Williams' apartment near 61st Street and Carmen Street in Milwaukee, when a Pontiac car slowly rolled past. (R:11-82) In the car was TW, who was the father of Williams' daughter. (R:109-164, 165) At that point, Thornton briefly confronted TW, but then TW drove away.

Thornton and his friends then got into a car and pursued TW. They caught up to him at about Silver Spring Drive. Some words were exchanged, and Thornton fired some shots at TW's car. (R:110-49) No one was hit by the shots.

Following this incident, Thornton was dropped off at Williams' apartment. (R:110-50)

Some time later, TW drove past Williams' home again, and this time he had more men with him in the car. Consequently, Thornton called his friends to come back.

(R:110-52) One man, Justin Speed, brought an AK-47 style rifle with him. (R:110-67; R:110-88, 89; R:110-138) The men waited in the kitchen. Approximately thirty minutes later, TW drove by again.

At this point, although the stories differ, there was testimony that one of Thornton's friends, James Pate, took the gun off the kitchen table, and went outside and fired shots at the car. (R:110-66; R:110-93, 94) TW was hit, and he crashed the car into a tree. He died from gunshot wounds. (R:109-153)

Jones testified that, immediately after the shooting, Pate said, "I got his bitch ass." (R:110-102)

Milwaukee Police investigated the incident. The police found Thornton inside the apartment. (R:109-123; 131) They also interviewed Williams, who at the time told them that she saw Thornton with the AK rifle that night. (R:109-213) According to Williams' statement to police, Thornton went outside with it, and then she heard shots. *Ibid.* p. 214

At trial, though, Williams testified that, at the time of the shooting, Thornton was asleep with her in bed. (R:109-177)

Speed also testified at trial, and he claimed that it was Pate who had the gun, and fired the shots. However, a Milwaukee Police detective, Jason Enk, said that when he first interviewed Speed, Speed said it was Thornton who fired the rife at TW. (R:111-25)

The police identified Speed's fingerprints on the rifle.

(R:111-54)

Significantly, the state called Bradley Lee at trial. Lee testified that, prior to Thornton's trial, he was in the same jail pod as Thornton. Lee claimed that Thornton made admissions to him about his involvement in this case. (R:112-19) According to Lee, Thornton told him that he (Thornton) had been involved in an altercation with TW. Thornton was in his home when the "other guy" circled around the block driving a car. When the car came around again, "Dre (Thornton) snatched the gun from him[2], ran downstairs and begin to shoot up the driver's side of the car with the assault rifle . . ." (R:112-19)

B. Thornton's postconviction motion

Thornton's postconviction motion alleged that on March 8, 2017, Asst. District Attorney Grant Huebner turned over to postconviction counsel a series of documents relating to Bradley Lee[3]. These materials establish that, in federal court in North Carolina in 2005, in the context of Lee's sentencing hearing, a United States District Court judge made a factual determination that Lee had committed perjury while testifying in a co-defendant's trial. (R:88; App. B)

The motion further alleged that these materials had never been disclosed to Thornton's trial counsel, Robert Webb. *Id.*

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[2] Apparently meaning "Pate"

[3] This was part of an unrelated case in which postconviction counsel coincidentally happened to be representing another person against whom Lee had agreed to testify. The other case is *State v. Oshay Randolph.*

Finally, the motion alleged that, "Lee is, apparently, a professional jail snitch. In addition to agreeing to testify in the Oshay Randolph matter, Lee wrote letters to ADA Laura Crivello on June 2, 2016 and July 7, 2015; and to ADA Dennis Stingl on April 27, 2017". *Id.*

The state conceded that the evidence was newly-discovered; however, the state argued that it is merely impeachment evidence, and it does not establish a reasonable probability that the result of the trial would be different even if the evidence were presented to the jury.

The circuit court agreed. The court wrote:

> Even if the defendant's proffered impeachment evidence were presented at a new trial, the court finds that there is not a reasonable probability that the jury would reach a different verdict in this case. The State presented substantial direct and circumstantial evidence of the defendant's guilt, including evidence that the defendant stated to witnesses after the shooting, "I got his bitch ass." The defendant attaches too much significance to Lee's testimony, because he was not the State's only witness, and he was not the only witness to implicate the defendant in the shooting. Indeed, as the State points out in its response brief, the prosecutor made no reference to Lee's testimony during his closing argument in 16 pages of transcript, perhaps because of Lee's credibility issues, which indicates that his testimony was not as critical to the State's case as the defendant would have the court believe. Too, the record reflects that trial counsel effectively impeached Lee's credibility by attacking him with evidence of his ten prior convictions and suggesting a motivation to lie in order to better his own circumstances at his upcoming sentencing hearing

> in North Carolina on three counts of forgery. The jury did not accept the whole of Lee's testimony, because it acquitted the defendant of the weapons enhancer, despite Lee's testimony that the defendant told him that he fired the shots at the vehicle. Given all of the other evidence the State presented of the 3 defendant's involvement in this offense, the court is not persuaded that there is a reasonable probability that a jury would reject the entirety of the State's evidence in this case and acquit the defendant of the underlying homicide ifit were presented with the additional impeachment evidence at a new trial. Consequently, the court finds that the defendant is not entitled to a new trial based on the proffered newly-discovered evidence.

(R:94)

Argument

I. The circuit court erroneously exercised its discretion in denying Thornton's postconviction motion. The court's decision was based on an inaccurate and incomplete view of the evidence presented at trial.

The circuit court denied Thornton's postconviction motion because the court believed that there was "substantial direct and circumstantial evidence" of Thornton's guilt; and, therefore, there is not a reasonable probability that, even if the jury had known of Lee's perjury in federal court, the result of the trial would not have been different. The only such evidence that the court identified was a remark that Thornton supposedly made after the shooting to the effect that "I got his bitch ass."

This decision is an erroneous exercise of discretion because, first of all, there is absolutely no testimony in the record that *Thornton* said, "I got his bitch ass." The testimony was that James Pate made that remark after using the rifle to shoot at TW's car. Secondly, the circuit court did not identify any of this supposed "substantial evidence" of Thornton's guilt because there is none. The testimony of numerous witnesses was to the effect that James Pate was the shooter.

Thus, Bradley Lee's testimony that Thornton admitted to being the shooter was critical to the state's case. The evidence of Lee's perjury in federal court is not merely a supposition that Lee might deny on cross-examination, it is a finding of fact by a district court judge in a federal court proceeding that Lee cannot deny. As such, it is just the sort of strong evidence of Lee's character so as to require a new trial.

A. Standard of appellate review

"The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion. [internal citation omitted] (The appellate court) review(s) the circuit court's determination for an erroneous exercise of discretion." *State v. Avery*, 2013 WI 13, ¶ 22, 345 Wis. 2d 407, 423, 826 N.W.2d 60, 68

"Failing to apply the proper legal standard is an erroneous exercise of discretion." *State v. Plude*, 2008 WI 58, ¶ 49, 310

Wis. 2d 28, 56, 750 N.W.2d 42, 56

B. Newly discovered evidence

As mentioned above, whether to grant a new trial on grounds of newly discovered evidence is normally a discretionary decision of the trial court. *State v. Boyce*, 75 Wis. 2d 452, 457, 249 N.W.2d 758, 760 (1977). For a movant to be successful in a motion for a new trial, the evidence must meet the following conditions:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

State v. Kimpel, 153 Wis. 2d 697, 701-02, 451 N.W.2d 790, 792 (Ct. App. 1989).

Significantly, "Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial. [internal citation omitted] In commenting on the discovery that a trial witness could read and write English after he testified to the contrary, we stated: 'It may well be that newly discovered evidence impeaching in character might be produced so strong as to constitute ground for a new trial; *as for example where it is shown that the verdict is based on perjured evidence.*'" *State v. Plude*, 2008 WI 58, ¶ 47, 310 Wis. 2d 28, 55, 750 N.W.2d 42,

C. The circuit court erroneously exercised its discretion because, in fact, there is no evidence that Thornton said, "I got his bitch ass", nor does the court account for the fact that eyewitnesses testified that Pate was the shooter.

In denying Thornton's motion, the circuit court wrote, "The State presented substantial direct and circumstantial evidence of the defendant's guilt, including evidence that the defendant stated to witnesses after the shooting, 'I got his bitch ass.' The defendant attaches too much significance to Lee's testimony, because he was not the State's only witness, and he was not the only witness to implicate the defendant in the shooting. " (R:94)

The trial court, though, does not describe any of this supposed "substantial direct and circumstantial evidence" of Thornton's guilt, except to claim that, after the shooting, Thornton said, "I got his bitch ass." There is no citation to the record for this statement which is attributed to Thornton.

Evidently, the circuit court gleaned the "evidence" from the state's response to the postconviction motion. In their response, the state claims that Jamaul Jones testified that Thornton made that remark. (R:92) The state cites to the record: "Trial Tr. 10-26-16 at 77". *Id.*

However, there is no such testimony from Jones at that

page number, nor at any other page number in the transcript.

Rather, here is what Jones said:

> Q Did you hear Dre make any comments after the shots were fired or after they approached your car?
>
> A It wasn't Dre. It was James.
>
> Q Did you tell Detective Butz and Detective Gadzalinski that Dre had said, "I got his bitch ass."?
>
> A James said that.

(R:110-102).

Thus, for this reason alone, the decision of the circuit court denying Thornton's postconviction motion represents an erroneous exercise of discretion. It is based on a mistaken view of the evidence.

But there is more.

Besides Lee's dubious testimony, there is, in fact, no other direct testimony that Thornton was the shooter. Rather, the direct testimony was that Thornton *was not the shooter*. For example:

- Corrina Williams' trial testimony was that Thornton was in bed with her at the time of the shooting. (R:109-177)
- Richard James testified that James Pate took out an AK-47 and fired at the vehicle. (R:110-66)
- Jamaul Jones testified that he saw James Pate run out of the house with the gun, and then, after the shooting, he saw Pate holding the gun. (R:110-93, 94)
- Justin Speed testified that after he heard the shots, he

went outside and saw Pate holding the gun. (R:119-153)

Now, the state did impeach the testimony of some of these witnesses with prior inconsistent statements that were made to the police during the investigation, but these prior inconsistent statements hardly rise to level of being "substantial direct evidence" of Thornton's guilt. Prior inconsistent statements, though they may be taken as substantive evidence, they are hardly substantial and direct evidence. They are, by definition, indirect evidence.

For this additional reason, the decision of the circuit court represents an erroneous exercise of discretion.

Thus, Bradley Lee's testimony that Thornton admitted to him that he was the shooter is, in fact, the only direct evidence of Thornton's guilt. Contrary to what the circuit court found, *Lee is the state's critical witness.*

Here, the newly-discovered evidence does not merely impeach some small detail of Lee's testimony. Rather, it demonstrates that he is willing *to lie under oath in a federal court proceeding*. It is not merely a supposition, it is a finding of fact made by the district court judge that Lee cannot deny.

Had Thornton known of this evidence at the time of his trial, it would have been used to thoroughly destroy Lee's credibility. Defense counsel would have inquired into it on cross-examination of Lee. Lee would have been forced to admit it because, if he did not, such a false denial is, in and of

itself, perjury. The prosecutor would have known that Lee's false denial was perjury. A criminal conviction cannot be based on material perjured testimony. So the state, at that point, would be forced to correct the record. *See, e.g., Tucker v. State*, 84 Wis. 2d 630, 642, 267 N.W.2d 630, 636–37 (1978)

Plainly, the newly discovered evidence here is just the sort of evidence impeaching Lee's character that is so strong as to constitute grounds for a new trial.

Conclusion

For these reasons, it is respectfully requested that the court reverse the order of the circuit court denying Thornton's postconviction motion for a new trial; and remand the matter to the circuit court with directions to grant Thornton a new trial.

Dated at Milwaukee, Wisconsin, this _____ day of July, 2018.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3751 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of July, 2018:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2018AP000871-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Andre L. Thornton,

Defendant-Appellant.

Defendant-Appellant's Brief and Appendix

A. Memorandum decision denying postconviction motion
B. Thornton's postconviction motion

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 first names and last initials instead of full names of persons, specifically including 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 ____ day of July, 2018.

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Jeffrey W. Jensen