STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP871-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRE L. THORNTON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH M. DONALD, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Is the Defendant-Appellant, Andre L. Thornton, entitled to a new trial based on alleged newly discovered evidence?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

INTRODUCTION

Thornton was convicted of first-degree reckless homicide as a party to a crime. One of the many witnesses for the State was a jailhouse informant named Bradley Lee. Shortly after his conviction in 2016, Thornton discovered that Lee had committed perjury in an unrelated federal case in 2005. Thornton moved the circuit court for a new trial, and, in a cursory memorandum, argued that the newly discovered evidence of Lee's 2005 perjury warranted retrial. The circuit court denied the motion without a hearing.

It was proper for the circuit court to deny Thornton's motion for a new trial because his newly discovered evidence was mere impeachment evidence. In general, newly discovered evidence that does no more than impeach a witness is not sufficient to warrant a new trial. And specifically, the newly discovered evidence in this case is cumulative impeachment evidence of a witness that was effectively impeached at trial. This Court should affirm.

SUPPLEMENTAL STATEMENT OF THE CASE

Background

The State charged Thornton with one count of first-degree reckless homicide, use of a dangerous weapon, as a party to a crime, for the death of Thomas Wilson. (R. 1:1–2.) Wilson had a daughter with Corrina Williams, who was Thornton's girlfriend at the time of Wilson's murder. (R. 1:2.) On the day of Wilson's death, Wilson went to Williams' home, wanting to see his daughter. (R. 1:2.) Thornton was there and confronted Wilson. (R. 1:2.) Later, after a series of events, Wilson crashed his bullet-ridden car into a tree and died. (R. 1:2–3.) The medical examiner determined that Wilson died from a gunshot wound. (R. 1:2.)

Multiple people witnessed different events leading to Wilson's death. (R. 1:2–3.) The relevant testimony of those witnesses and of Bradley Lee, the jailhouse informant, is summarized below.

Trial Testimony

Williams testified that she and Thornton were in a relationship and that he was at her apartment with her on the day of the shooting. (R. 109:168–71, 175.) Williams had given multiple statements to the police before trial, but she remembered very few details about what she had told police. (R. 109:183–202.)

Detective Timothy Keller testified that he had interviewed Williams, and that she relayed the following statement to him. On the day of Wilson's murder, Wilson had come by Williams' house in his car. (R. 109:214.) Thornton went outside with several of his friends to confront Wilson. (R. 109:214.) Wilson sped off, and Thornton came back inside to tell Williams that he was going to follow him. (R. 109:214.) Thornton left and returned a while later after stating that he lost track of Wilson. (R. 109:214.) Thornton

left again, and returned a short while later with a long black and brown gun. (R. 109:124.) Thornton stood watch at the window, saw Wilson, and left with the gun. (R. 109:214–15.) Williams then heard numerous gunshots outside her home. (R. 109:125.) Thornton came back into the apartment and said that he had told Wilson not to come back here, and that he thought they "got him." (R. 109:215, 222.) The prosecutor played that portion of Williams' statement for the jury. (R. 109:215–17.)

Richard James testified that he was with Thornton, Jamaul Jones, Justin Speed, and James Pate on the day of the shooting. (R. 110:41, 43.) At one point, they went to Williams' apartment complex. (R. 110:44.) While they were outside, a car pulled up and Thornton thought the driver was a man, Wilson,[1] who had been threatening him. (R. 110:45.) Thornton went to Wilson's car and talked to Wilson. (R. 110:46.) Wilson then drove away and James, Thornton, Jones, Speed, and Pate all got into James' car to follow Wilson. (R. 110:46–48.) When James caught up to Wilson a few blocks away, he heard gunshots and thought someone was shooting at his car. (R. 110:49.) James saw Wilson turn his car and drive away, and James drove back to Williams' place. (R. 110:49–50.) James dropped Thornton off there, and then took Jones, Speed, and Pate to Jones' home. (R. 110:50.) After dropping everyone off, James went to his girlfriend's home. (R. 110:50.)

Later, Thornton called James and told him that Wilson had returned to Williams' place with more people. (R. 110:50–51.) Thornton also told James that Jones, Speed, and Pate were on their way. (R. 110:51.) The prosecutor asked

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[1] James, Jones, and Speed did not use Wilson's name when testifying; rather they referred to him as "dude" or "the guy." The State is using Wilson's name for clarity.

James if he remembered telling a police officer that Thornton had told him that Speed was bringing an AK-47 with him. (R. 110:52.) James did not remember saying that, but he did have a conversation with Speed in the days after the shooting, in which Speed told James that he took his AK-47 to Williams' apartment and that Pate had used it to shoot at Wilson's car. (R. 110:52, 66–69.) The prosecutor also questioned James regarding a statement he made to the police that Speed had told James that Thornton was a "fool" and "aired the place out." (R. 110:70.) James did not remember saying that Speed told him that, but he did remember someone saying that "Dre is a fool." (R. 110:70.)

Jamaul Jones, Thornton's brother, testified consistent with James regarding the events leading up to the first shooting. (R. 110:77–82.) Jones also testified that he knew that Thornton had his gun with him in James' car, but he was unsure if Thornton or Wilson fired the shots. (R. 110:84.) After James dropped off Jones, Jones got a call from Thornton that Wilson had returned to Williams' place and had a gun. (R. 110:86.) Jones went back to Williams' place with Pate and Speed to pick up Thornton. (R. 110:87.) When they arrived, Pate and Speed got out of the car and Jones saw that Speed had his AK-47 with him. (R. 110:88–90.) Pate and Speed went inside and Jones stayed outside with his car. (R. 110:90–91.)

According to Jones' testimony, while outside, Jones saw Wilson's car drive by. (R. 110:91.) He called Thornton and told him that it was time to go. (R. 110:92.) That car then came back and pulled up to the building. (R. 110:92.) Jones saw someone in the car reach out of the sunroof with a gun and start shooting. (R. 110:92–93.) He then heard loud return fire, but could not see where it was coming from. (R. 110:93–94.) Wilson's car then "pulled off." (R. 110:94.) Immediately after the car left, Thornton, Speed, and Pate ran out of the apartment complex. (R. 110:94.) Jones saw

Pate hand a gun to Speed. (R. 110:94–95.) Jones heard Speed ask Pate why he shot at the car because "it wasn't [his] fight." (R. 110:118–19.)

Jones testified that Thornton stayed at Williams' place, while Pate and Speed got into Jones' car and Jones drove back to his house. (R. 110:95–96.) During that drive, Jones asked what happened, and Speed told Jones that Pate shot at the car. (R. 110:110.)

The prosecutor questioned Jones about his prior statements to the police. He asked Jones whether he told the police that Thornton came out of the apartment building with the gun and handed it to Pate, that he saw Thornton with the rifle, and that Thornton said "I got his bitch ass." (R. 110:103, 120–21.) Jones denied making any such statements. (R. 110:103, 121.) The prosecutor also questioned Jones about his prior statement that he saw Wilson pull up in a car, heard a single gunshot, saw Thornton, Speed, and Pate come out of the apartment complex, and then heard a series of gunshots. (R. 110:121.) Jones also denied making that statement. (R. 110:121.)

Justin Speed testified fairly consistently with James and Jones regarding the events leading up to the first shooting, and consistently with Jones regarding the circumstances that brought them back to Williams' residence before the second shooting. (R. 110:125–42.) He added that he, Thornton, and Pate were in Williams' home talking for about 20 to 30 minutes, and Thornton said that there would be some problems if Wilson came back. (R. 110:142, 144.) Both he and Thornton had their guns sitting out on the kitchen table. (R. 110:142–43.) Speed was getting ready to leave when Wilson came back in his car. (R. 110:143–44.) Speed saw someone reach out of the car with a gun and heard gunshots. (R. 110:145.) Thornton said that was "the same guy" and he wanted to go outside. (R. 110:146.) Thornton grabbed his gun and Pate grabbed the AK-47. (R.

110:146–47.) Speed saw Pate shoot the AK-47 out a window. (R. 110:149.)

According to Speed, Thornton then went downstairs and Pate and Speed followed. (R. 110:150.) Before Speed reached the exterior door, he heard more shots fired outside, but could not see the shooter. (R. 110:151–52.) Speed then saw Wilson's car drive away and crash into a tree. (R. 110:154.)

Speed testified that Jones then drove up in his car, and Speed, Pate, and Thornton got in. (R. 110:154–55.) Jones drove them around the block to see what happened to Wilson's car and then drove back to Williams' place to drop off Thornton. (R. 110:155.) Jones, Speed, and Pate stayed in Jones' car and Jones took them back to his place. (R. 110:155.)

The prosecutor questioned Speed about his prior statements to the police. Specifically, he asked Speed whether he told the police that Thornton grabbed both guns from the kitchen table, and then went to the hallway window and shot out of the window with the AK-47. (R. 110:163–64.) Speed did not remember making that statement. (R. 110:163–64.) The prosecutor also asked Speed about his other multiple statements to police that Thornton was the one shooting at Wilson's car with the AK-47. (R. 110:164–68.) Speed also did not remember making those statements. (R. 110:164–68.)

Bradley Lee testified that he met Thornton when they were housed in the same jail pod. (R. 112:17–19.) Lee said that he talked to Thornton "pretty much everyday" (R. 112:19) and gave a very detailed account of what Thornton told him about Wilson's murder.

Thornton told Lee that he was hanging out at his girlfriend's place with James, Jones, Pate, and Speed,[2] when Wilson, the father of his girlfriend's child, showed up at 1:00 a.m. and demanded to see the baby. (R. 112:22–25.) Thornton disclosed that he and his girlfriend had "previous issues" with Wilson and that Wilson was not welcome there. (R. 112:25.) Thornton said he told Wilson to leave and they got into an argument. (R. 112:25–26.) Wilson left, but circled back around the block, so Thornton went inside of the apartment and grabbed his gun. (R. 112:26–27.) When Thornton came back outside, he told his "peers" that he was going to shoot Wilson if he came back. (R. 112:27.)

Thornton told Lee that Wilson circled the block again and yelled at them from his car. (R. 112:27.) At that point, Thornton and his "peoples" got into James' car and gave chase. (R. 112:27–28.) Thornton told Lee that he shot at Wilson's car and the car sped off. (R. 112:28.) Afterwards, Thornton was dropped off at home and everyone else left. (R. 112:28.) Around a half hour later, Wilson came back and had another man with him. (R. 112:28.) Wilson had a gun, waved it in the air, and fired a shot. (R. 112:28–29.) Thornton said he called his brother (Jones), and his brother told him he was on his way over. (R. 112:29.)

Thornton also told Lee that Jones brought Speed with him and Speed brought an AK-47 that was all black with a brown handle. (R. 112:29.) Thornton did not say that Pate was with Jones and Speed. (R. 112:29.) Thornton said that he, Jones, and Speed made a plan that if Wilson returned, they would "post up" in the upper window and Speed would shoot at the car from there. (R. 112:30.)

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[2] With the exception of Speed, Lee did not know the witnesses' last names or Wilson's name. (R. 112:23, 41–42, 44–46, 51). The State is using the last names for clarity.

Lee testified that according to Thornton, Wilson did come back, and Thornton initially told Lee that Speed shot at the car. (R. 112:43.) Later, however, Thornton changed his story and told Lee that Speed did not shoot, so Thornton grabbed the gun from him, ran downstairs, and shot up the driver's side of Wilson's car. (R. 112:30, 43.)

Lee testified that he took notes on what Thornton was telling him and provided that information to investigators. (R. 112:34–35.) He hoped that providing the information and testifying at trial would result in reduced charges or leniency in his case, but neither the police department nor the district attorney's office made that promise. (R. 112:36–37, 48.) Lee also testified that he had ten criminal convictions, and was currently facing three counts of forgery with a possible 66-month prison term. (R. 112:32, 39, 50.)

Jury Verdict and Sentencing

The court instructed the jury on party-to-a-crime liability. (R. 112:66–67.) During deliberations, the jury submitted a question regarding the provided verdict forms. (R. 114:2.) As relayed by the judge, the jury asked:

> "If we come back with a verdict of guilty but say 'no' to the use or possession of a dangerous weapon, in parentheses 990, does that automatically infer that the defendant is then a party to the crime by aiding and abetting?" Question mark. Then in parenthetical phrase it indicates, "because it does not reference this on the verdict form."

(R. 114:2.)

After discussion with the parties, the court decided to provide a new verdict form to the jury that separated out the

first-degree reckless homicide charge as a party to a crime, and the dangerous weapon enhancer.[3] (R. 114:2–3.)

The jury found Thornton guilty of first-degree reckless homicide, as a party to a crime, but acquitted him of the dangerous weapon enhancer. (R. 114:13.)

The court sentenced Thornton to 28 years of imprisonment. (R. 115:21.)

The Postconviction Challenge and Decision

Thornton moved for a new trial on the ground that he had newly discovered evidence that Lee, under the name of Bradley Wallace, had committed perjury in federal court ten years before testifying at Thornton's trial. (R. 88.) Thornton's argument in support of his motion was three paragraphs and alleged that a new trial was warranted because Lee was the only witness to testify that Thornton shot Wilson. (R. 88:4–5.)

In response, the State conceded that Lee's prior perjury was newly discovered, but argued that it did not warrant a new trial. (R. 92:3.) The State argued that Thornton did not establish that the new evidence was admissible evidence, that the new evidence was merely impeachment evidence, and that there was no reasonable probability of a different outcome at a new trial because Lee's testimony was not critical to the conviction. (R. 92:3–7.)

The circuit court denied the motion without a hearing. (R. 94.) The court concluded that "Lee's perjured testimony in an unrelated federal trial *occurring more than ten years before Lee testified at the trial in this case* . . . is at most

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[3] Defense counsel did object to this (R. 114:4–9, 12), but that is not at issue in this case.

impeaching only in character, which is generally insufficient for a new trial." (R. 94:3.) The court also determined that even if the evidence were presented at a new trial, there was no reasonable probability of a different outcome. (R. 94:3.) The court noted that defense counsel effectively impeached Lee, given that the jury acquitted Thornton on the dangerous weapon enhancer and thus, by necessity, rejected Lee's testimony that Thornton was the one who shot Wilson. (R. 94:3.)

Thornton appeals.

STANDARD OF REVIEW

This Court reviews a circuit court's ruling on the first four prongs of the newly discovered evidence test for an erroneous exercise of discretion. *State v. Vollbrecht*, 2012 WI App 90, ¶ 18, 344 Wis. 2d 69, 820 N.W.2d 443. This Court independently reviews the fifth prong: whether there is a reasonable probability that the new evidence would have affected the result of the trial. *Id.*

ARGUMENT

The circuit court properly denied Thornton's motion for a new trial.

A. To warrant a new trial, newly discovered evidence must be more than cumulative impeachment of character evidence.

"Motions for a new trial based on newly discovered evidence are entertained with great caution." *State v. Morse*, 2005 WI App 223, ¶ 14, 287 Wis. 2d 369, 706 N.W.2d 152 (citation omitted). Where a defendant seeks a new trial based on newly discovered evidence, the defendant must show, "by clear and convincing evidence, that (1) the evidence was discovered after conviction, (2) the defendant was not negligent in seeking to discover it, (3) the evidence is

material to an issue in the case, and (4) the evidence is not merely cumulative." *Vollbrecht*, 344 Wis. 2d 69, ¶ 18.

"Newly discovered evidence is cumulative where it tends to address 'a fact established by existing evidence.'" *State v. McAlister*, 2018 WI 34, ¶ 37, 380 Wis. 2d 684, 911 N.W.2d 77, *reconsideration denied*, 2018 WI 90, 383 Wis. 2d 146. "Where the credibility of a prosecution witness was tested at trial, evidence that again attacks the credibility of that witness is cumulative." *Id.* ¶ 39 (citation omitted).

If the defendant satisfies the first four criteria, "then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" *State v. Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). "A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." *Id.* (citation omitted). "If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial." *State v. Eckert*, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).

In general, Wisconsin courts will not grant a new trial on the basis of newly discovered evidence that does no more than impeach a witness. *See Simos v. State*, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972); *see also State v. Debs*, 217 Wis. 164, 258 N.W. 173 (1935) (collecting cases). Rather, newly discovered impeachment evidence may warrant a new trial in extreme cases like "*where it is shown that the verdict is based on perjured evidence*." *State v. Plude*, 2008 WI 58, ¶ 47, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted).

B. Lee's perjury in 2005 is cumulative impeachment evidence that does not warrant a new trial.

The State assumes for the purpose of argument that Thornton's postconviction motion was sufficient to establish that the evidence of Lee's 2005 perjury was discovered after Thornton's conviction, that Thornton was not negligent in seeking to discover it, and that the evidence was material to the jury's assessment of Lee's credibility. By so assuming, the State does not concede that the newly discovered evidence is admissible evidence.[4] Rather, the State is asking this Court to resolve this case on the narrowest possible grounds.[5] In doing so, this Court should conclude that the circuit court properly denied Thornton's motion because the newly discovered evidence was merely cumulative impeachment evidence that had no reasonable probability of affecting the outcome of trial.[6]

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[4] The circuit court made a similar assumption, but noted that it agreed with the State "that the evidence would not be admissible as impeachment evidence of prior convictions under section 906.09(1), Stats., or impeachment by evidence of specific instances of conduct under section 906.08(2), Stats. Nor is it clear that the evidence would be admissible as 'other acts' evidence under section 904.04(2), Stats." (R. 94:2 n.2.)

[5] *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (stating that appellate courts should decide a case on the narrowest possible rounds).

[6] It is Thornton's burden to establish by clear and convincing evidence that the newly discovered evidence warrants a new trial. Thornton does not offer a theory of admissibility for this new impeachment evidence. This "court's role in a conventional appeal is limited to addressing the issues briefed by appellate counsel." *State v. Tillman*, 2005 WI App 71, ¶ 18, 281 Wis. 2d 157, 696 N.W.2d 574. Since this issue was not briefed by Thornton's counsel and it is not necessary for this Court to reach the issue to dispose of this appeal, the State does not address it.

To start, evidence that Lee committed perjury in 2005, to the extent it could have been admitted, is as impeachment evidence. Again, Wisconsin courts will not grant a new trial on the basis of newly discovered impeachment evidence that does no more than impeach a witness. *See Simos*, 53 Wis. 2d at 499. And Thornton cannot show that the verdict in his case "*is based on perjured evidence*." *Plude*, 310 Wis. 2d 28, ¶ 47 (citation omitted).

Rather, it is clear from the facts that the guilty verdict was not based on Lee's testimony that only Thornton shot at Wilson's car with the AK-47 during the second shooting. In addition to hearing Lee's testimony implicating Thornton as the shooter, the jury heard ample evidence impeaching Lee's credibility. That evidence included: Lee was previously convicted on 10 separate occasions, he was facing a lengthy prison sentencing for three counts of forgery, and he was testifying against Thornton in hopes that his cooperation would result in reduced charges or leniency in his case. (R. 112:23, 36–37, 39, 48, 50.) The jury then convicted Thornton of first-degree reckless homicide, as a party to a crime, and acquitted him on the dangerous weapon enhancer. To reach that result, the jury must have rejected Lee's testimony that Thornton was the shooter. Thus, an additional piece of evidence impeaching Lee would not have changed the outcome of trial.

On appeal, Thornton ignores that he was convicted as a party to a crime and acquitted of the dangerous weapon enhancer. His entire argument for why he is entitled to a new trial centers on his assertion that Lee's testimony was

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However, if this Court believes that it must reach the issue of admissibility, the State asks for leave to file a supplemental brief. *See Tillman*, 281 Wis. 2d 157, ¶ 13 n.4. (stating approval of this procedure in that case).

critical to the State's case because Lee was the only witness to directly testify that Thornton shot the AK-47 during the second shooting. (Thornton's Br. 14–16.)

While the State's theory was that Thornton shot and killed Wilson, the jury did not have to reach that conclusion to find Thornton guilty. Rather, the jury was permitted to find Thornton guilty if it concluded, beyond a reasonable doubt, that Thornton intentionally aided and abetted the commission of the crime. The jury did not have to believe Lee's testimony to reach that conclusion; it only had to believe any of the other witnesses who testified to Thornton's participation within the group of men who shot Wilson. Thus, Lee's testimony that Thornton shot the AK-47 was not critical to the conviction. A jury today would reach the same conclusion regarding Thornton's guilt even if they had heard Thornton's cumulative impeachment evidence that Lee committed perjury in 2005. The circuit court properly denied Thornton's motion without a hearing.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of conviction.

Dated this 2nd day of October, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,959 words.

Dated this 2nd day of October, 2018.

_____
TIFFANY M. WINTER
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of October, 2018.

_____
TIFFANY M. WINTER
Assistant Attorney General