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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 Reply Brief

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Argument

I. A prior finding of perjury under similar circumstances is just the sort of extreme case where impeachment evidence is sufficient to warrant a new trial.

The state asserts that, "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) . . . . 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." (Resp. brief p. 11)

The state's assertion is true, as far as it goes; but the state's argument stops short of examining the nature of the newly-discovered impeachment evidence in each of the cases cited. As will be set forth in more detail below, the newly discovered perjury evidence in our case is far more similar to the sort of evidence that the appellate courts have found to be sufficient to warrant a new trial.

For example, in *Simos v. State,* 53 Wis. 2d 493, 499, 192 N.W.2d 877, 880 (1972), eyewitnesses identified Simos as being one of the people leaving the scene of a burglary. In *Simos*, the newly discovered evidence was the fact that, prior to viewing the lineup, the witnesses told the police that they did

not think it was worthwhile for them to view a line-up because they did not think they would be able to identify the person they saw at the scene of the crime.

Not surprisingly, the Supreme Court did not find this impeachment evidence to be particularly compelling. Even though the eyewitnesses may have thought they would be unable to identify the burglar, it turned out they were able to do so.

The holding in *Simos* is based on a similar remark made by the court in *Greer v. State,* 40 Wis. 2d 72, 78, 161 N.W.2d 266 (1968). In *Greer,* Essie Burt, who was a state's witness, testified that she did not know the deceased; but the defendant later determined that a piece of paper was found among the deceased's belongings with the name "Essie Burt" written on it.

Again, the Supreme Court was justifiably dismissive of the defendant's claim that this was significant impeachment evidence. It certainly is something of a stretch to conclude that Essie Burt's trial testimony was false merely because she claimed not to know the deceased while the deceased possessed a scrap of paper with her name written on it.

Compare these cases, though, to the evidence in *State v. Plude*, 2008 WI 58, ¶ 36, 310 Wis. 2d 28, 51, 750 N.W.2d 42, 53, where the impeachment evidence was sufficient to warrant a new trial. In *Plude*, the defendant developed

newly-discovered evidence that a state's expert, Dr. Shaibani, had lied at trial about his qualifications.

Concerning this newly-discovered impeachment evidence, the court wrote, "We conclude that in a trial rife with conflicting and inconclusive medical expert testimony about a case the circuit court observed was based on 'circumstantial evidence,' there exists a reasonable probability that, had the jury discovered that Shaibani lied about his credentials, it would have had a reasonable doubt as to Plude's guilt." *Plude*, 2008 WI 58, ¶ 36, 310 Wis. 2d at 51, 750 N.W.2d at 53.

It is important to note that Dr. Shaibani did not perjure himself about any operative fact in the case; rather, the doctor lied about a matter bearing only on his level of expertise. Thus, the reasoning goes, if Dr. Shaibani lied about his credentials, the jury may very well infer that he also lied about his opinions.

Plude, then, does not seem to be much different than Thornton's case. Although Thornton cannot demonstrate that Bradley Lee lied about an operative fact in the case; the newly-discovered evidence allows Thornton to conclusively demonstrate that Lee lied under oath under similar circumstances. Here, then, if presented with the evidence of Lee's prior perjury, the jury certainly could infer that if Lee lied under oath under similar circumstances, then he may very well have lied in the present case.

II. It does not follow that because the jury acquitted Thornton of the "while armed" allegation, it must have disbelieved Lee's testimony.

The state argues, "The jury then convicted Thornton of first-degree reckless homicide, as a party to the 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." (Resp. brief p. 13) In order words, the newly-discovered impeachment evidence would not have made a difference because, evidently, the jury already disbelieved Lee's testimony that Thornton told him "he got" the deceased.

Under the law, though, this sort of reasoning simply does not follow. The court is not permitted to discern the reasoning of the jury based upon the verdicts returned.

In *Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932), the United States Supreme Court held that, "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." Later, in *State v. Mills*, 62 Wis.2d 186, 191, 214 N.W.2d 456 (1974), the Wisconsin Supreme Court explained that, "It has been universally held that logical consistency in the verdict as between the several counts in a criminal information is not required. The verdict will be upheld despite the fact that

the counts of which the defendant was convicted cannot be logically reconciled with the counts of which the defendant was acquitted." In another case, the court observed, "[T]he right to be inconsistent in this respect is the jury's prerogative, not [the] court's." *Nabbefeld v. State*, 83 Wis.2d 515, 529, 266 N.W.2d 292 (1978).

In other words, we cannot say that the jury must have disbelieved Lee's testimony because simply because they found Thornton not guilty of being armed. It could have just been that the jury was exercising its prerogative to acquit Thornton of that claim.

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

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Jeffrey W. Jensen