STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP001362-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOVAN T. MULL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable J.D. Watts and the Honorable Joseph R. Wall presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. A new trial is warranted in the interest of justice.

Jovan did not receive a fair trial. When police collect evidence tending to inculpate at least three alternative suspects and that evidence is then concealed from the jury, no rational observer could claim this trial was fair, reliable, or that it ever pretended to "fully try" the "real controversy." This is before one ever considers that the trial also relied on inadmissible hearsay "confessions" elicited via Ms. Pugh. Whether this Court assesses the interest of justice inquiry under the "real controversy" or "manifest injustice" standard, the outcome is consistent: Jovan is entitled to a new trial.

The State tries to circumvent that intuitive outcome, asserting "the record" contradicts Jovan's arguments, a new trial is not warranted, and the outcome was somehow fair and reliable. These arguments are easily rebutted.

The State first attempts to defuse the bombshell evidence set forth by Jovan—for example, one of its witnesses was identified in a photo array as the killer—by baselessly alleging "[m]any of the facts Mull claims were omitted were background facts not directly relevant to the question of whether Mull shot and killed Walker." (State's Br. at 26). That is simply untrue. For example, Jovan has not merely asked this

Court to consider "how many fights happened" or "whether heterosexual and gay partygoers were getting along." (State's Br. at 26). As set forth at length in the brief, the fight(s) leading up to the shooting mattered precisely because that shooting did not occur out of the blue. It was a direct outgrowth of the interpersonal conflicts which preceded it. Thus, with respect to the fight between the gay and straight partygoers, these facts mattered because: (1) multiple witnesses agreed the fight leading up to the shooting was initiated when a straight man (Vashawn) bumped into a gay man (Davion) and the men started fighting; (2) Davion retreated into the bedroom, after battering Menjuan, one of the straight men and one of Vashawn's friends; (3) Menjuan brandished a gun and told "his friend" to shoot into the room where Davion was hiding; (4) someone saw Vashawn shoot into that room; (5) multiple partygoers formed a reasonable belief based on these facts that Vashawn had shot into the room at the gay men who had been on the other side of the fight.

Second, the State suggests reversal is not necessary because there was other trial evidence favorable to Jovan. (State's Br. at 26). However, that evidence clearly was insufficient to avoid a conviction and obviously did not include the omitted evidence at issue in this appeal. Moreover, evidence that the State's prosecution may have been shaky to begin with only strengthens Jovan's argument that either the real controversy has not been tried or that justice has miscarried.

Third, the State alleges Jovan has merely "rehashed" and "repackaged" his ineffectiveness claims and, for that reason, he is barred from obtaining a new trial in the interest of justice. (State's Br. at 26). The State's citation is not on-point. In *State v. Arredondo* 2004 WI App 7, ¶ 56, 269 Wis. 2d 369, 674 N.W.2d 647, this Court summarily rejected the defendant's claim for a new trial in the interest of justice because it had already assessed those same arguments under the rubric of ineffective assistance of counsel and found them unpersuasive. *Id.* However, the case does not mean a defendant is precluded from raising arguments under one legal theory and then incorporating some of those same concerns into his interest of justice argument. After all, the Court is required to assess whether other legal mechanisms would entitle the defendant to relief as part of its discretionary inquiry. *State v. Kucharski*, 2015 WI 64, ¶ 23, 363 Wis. 2d 658, 866 N.W.2d 697. Moreover, while some of the arguments overlap, the interest of justice claim is much broader in scope than the intentionally streamlined ineffectiveness claims presented for this Court's review.

Once these general lines of attack are ineffectually deployed, the State makes several fact-intensive arguments that do not fare much better.

The State begins by making two superficially unreasonable assertions. First, the State claims "the fight preceding the shooting was not directly relevant to the question of whether Mull shot and killed Walker." (State's Br. at 27). The State does not say

why this is so and does not bother to explain, if such evidence was irrelevant, why it elicited copious testimony about the fight(s) leading up to the shooting at trial. As set forth above, the fight(s) and the shooting are linked and if this Court is being asked to assess the shooting without any discussion of what may have led to that event, the Court is being asked to conduct an intentionally deficient inquiry.

Second, and even more bafflingly, the State claims Jovan is incapable of showing that "evidence connecting Smyth to the shooting was relevant to the true controversy." (State's Br. at 27). In assessing a whodunit, the State believes the proper analytical approach is to omit any discussion of alternative suspects. In their Bizarro version of Clue, only one piece is ever allowed on the board. This cannot be consistent with an adequate exercise of this Court's discretionary power to reverse in the interest of justice.

Having asserted this Court should simply not consider evidence which undermines the verdict, the State falls back on a procedural defense: alleging Jovan's request for a new trial is somehow estopped by his decision to abide by his attorney's strategic choices at trial. (State's Br. at 27). It is the State's position that, because Attorney Guerin exercised his authority under the ethical rules to make certain strategic decisions—what witnesses to call or not call—and Jovan acquiesced to those decisions, he is somehow precluded from claiming now that a new trial is warranted. Setting aside the fact that Jovan had no

control over these issues of strategy—SCR 20:1.2—the State's position is unsupported by legal authority and manifestly at odds with this Court's ability to exercise its discretion on appeal in conformity with the broader interests of "justice." The trial was fair, or it was not; making that inquiry depend on whether trial counsel had the foresight to extort a liability-shielding agreement from his indigent and uneducated client before the close of evidence appears wholly incompatible with those aims.

Next, the State alleges Jovan is wrong to rely on Keshawna Wright—the woman who identified Vashawn as the murderer—in his request for a new trial in the interest of justice, because, after all, she did not testify at trial and allegedly could not be located by trial counsel. (State's Br. at 27). The State seems to suggest the real controversy *was* tried by specifically referencing aspects of that controversy which were not submitted to the jury. The relevance of this argument continues to evade detection.

The State then makes a conclusory argument that neither Tyler nor Menjuan could be potential suspects because neither were "identified" as the shooter. (State's Br. at 27). This is true. But it is also true that Vashawn told the police Tyler admitted to the crime and that Menjuan was observed holding a gun in front of the door before the shots were fired; while no one saw either man pulling the trigger, these are still compelling factual considerations.

The State then moves on to a discussion of whether Vashawn had a motive to lie to the police about Jovan being the shooter. (State's Br. at 28). The State calls these arguments "conclusory" and "without factual support." (State's Br. at 27). That assertion is frivolous. The record in this case proves Vashawn was on probation at the time he was interrogated about the shooting. (83:7; 83:33). The record also proves he was threatened with charges of being a felon in possession during that interrogation. (83:9). The criminal complaint charging him with that crime is also part of this record and discloses this charge was an outgrowth of this investigation. (84:31). Transcripts indicating this charge was dismissed prior to this trial are also a part of the record. (84:58). The record also includes materials referencing the new charge that was under review at the time Vashawn testified on behalf of the State. Specifically, the record discloses a referral was made to the Milwaukee County District Attorney's Office on April 5, 2016 and a charging decision was still being made when Vashawn testified as a witness for the State. (92:16). The record also makes clear Vashawn was acting suspicious after the shooting—"laying low." (83:34).

The State argues Jovan needed to explain, in his brief, precisely how this evidence would have been presented to the jury. (State's Br. at 28). Setting aside the fact that this would have been obvious fodder for cross-examination, no such showing is necessary for an interest of justice claim. Jovan is merely pointing out additional facts and circumstances which undermine the fairness and integrity of this trial.

Next, the State argues Jovan has not articulated any evidence as to why Jovan's participation in the fight alongside Vashawn and his friends was questionable. (State's Br. at 28). However, the brief reiterated Vashawn's assertion that he was not friends with Jovan and represented there was no evidence placing Jovan in that friend group on the night of the fight. (Brief-in-Chief at 30).

Moving to uncalled witnesses, the State demands an evidentiary showing from Jovan as to why he "agreed" not to call any witnesses. (State's Br. at 28). Once again, this is not required and any attempt to hold Jovan to a quasi-stipulation should fail for the reasons already addressed.

As to the clothing worn by the shooter, the State claims Jovan failed to identify what was left out of trial. (State's Br. at 28). As set forth in the brief, there is reason to suspect the shooter may have been wearing a red Wisconsin Badgers sweatshirt. At least, that is what the State elicited at trial. (135:98). Both Menjuan and Tyler can be connected to a piece of clothing matching that description. (83:32; 83:19). Charles Cantrell, for example, claimed the shooter had been wearing a sweater like this during the party, but had taken it off by the time of the shots being fired. (82:50). That is consistent with Menjuan's account that the sweatshirt was pulled off during the fight. (83:29). The State's witness also told police the shooter's pants were "Rock Revival" brand—the same pants worn by Vashawn. (83:43; 83:32).

The State then attacks one of Jovan's arguments about the "problematic" photo array procedures. (State's Br. at 28). The State tries to assert a waiver or forfeiture defense, that no pretrial motion on the admissibility of the photographic identifications has been litigated. (State's Br. at 28). The State also points out, correctly, there was ample cross-examination on these points. (State's Br. at 28). The State implies a claim about the photo identification procedures cannot support a new trial. (State's Br. at 28). Jovan did not ask this Court to grant a new trial *because* photo array procedures were problematic; rather, he highlighted the problems in the identifications based on trial evidence to show how the State's case is shaky and how further evidence favoring Jovan would have changed the factual picture.

Finally, the State alleges Jovan has not satisfactorily established prejudice. (State's Br. at 28). However, no finding of prejudice is required to grant a new trial in the interest of justice based on a conclusion that the real controversy has not been fully tried. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). While a grant of a new trial under the alternative standard—that justice has miscarried—requires a finding of prejudice, *see id.*, Jovan's case amply satisfies that burden. As set forth in the brief, a new trial is warranted under either legal theory. Here, there was ample evidence which was not presented to the trier of fact, evidence which was crucial to the real controversy. Omission of this evidence also creates a miscarriage of justice (as does the reliance on Cheyenne Pugh's hearsay) and, had the jury been

properly apprised of all relevant facts and not informed about highly prejudicial hearsay testimony, a different result is not only a possibility, but highly likely, perhaps inevitable.

Accordingly, this Court should exercise its discretion and grant a new trial in the interest of justice.

II. Trial counsel's ineffectiveness entitles Jovan to a new trial.

A. Failure to present a third-party defense.

The State argues trial counsel could not have been deficient for not pursuing a third-party perpetrator defense because there was no "available direct evidence" Vashawn, Tyler, or Menjuan committed the crime. (State's Br. at 15). The State is mistaken.

With respect to Vashawn, the State alleges his guilt could only be established via Keshawna Wright's testimony. (State's Br. at 15). But-for Keshawna's testimony, the State argues counsel would have been unable to satisfy any of the legal requirements for third-party guilt. (State's Br. at 15). As set forth in the brief-in-chief, however, motive and opportunity could both be established by Vashawn's own statements, including statements made during his trial testimony. (Brief-in-Chief at 36). And, while Keshawna's testimony would have been the most compelling way to present evidence of a direct connection, Jovan has outlined alternative means of presenting her

information. (Brief-in-Chief at 37-38). The State does not address those legal arguments, nor does it address Jovan's arguments that trial counsel did not make reasonable efforts to procure Keshawna for the trial.

As to Menjuan, the State concedes—as it must—that Menjuan can be placed in front of the door with a gun talking about shooting into the door shortly before someone shot through the door. (State's Br. at 15). The State argues, however, that this excludes Menjuan from consideration as a suspect; the fact that he was observed talking about shooting into the door *must* mean that someone else shot through the door. These two propositions are not logically linked; a fair inference is that Menjuan could have chosen to follow up his statement about shooting into the door by shooting into the door with the gun he was already brandishing. Aside from this conclusory point, the State does not respond to any of the other arguments in the brief, thereby conceding them in Jovan's favor.

Moving to Tyler, the State does not address Jovan's arguments in any fashion. By completely failing to respond to the specific arguments about Tyler Harris, the State has conceded those arguments in Jovan's favor.

Setting aside its specific criticisms of the third-party defense, the State then moves to a holistic defense of trial counsel, asserting he reasonably chose to pursue a different defense and this strategic decision is entitled to deference on appeal. (State's Br.

at 16). It supports its argument of reasonableness by making a series of debatable factual assertions.

First, the State alleges the "jury knew about Smyth, Tyler Harris, and Bankhead." (State's Br. at 16). The State is correct that Tyler and Menjuan were obliquely referenced, in a few intermittent moments during this multi-day trial. But the jury was never squarely presented with evidence of Vashawn, Tyler, or Menjuan's guilt, nor were they asked to evaluate them as alternate suspects.

Next, the State makes speculative arguments that because the State's case was apparently "weak," counsel reasonably chose not to "impress the jury unfavorably" by presenting evidence that someone other than Jovan committed the crime. (State's Br. at 16). The argument is not rational and certainly not supported by counsel's testimony at the postconviction motion hearing.

The State then alleges trial counsel adequately cast doubt on Vashawn's credibility by "confirming that he had been arrested for the shooting" and "questioning whether Smyth was not also armed at the party when he had told police he often carried a gun." (State's Br. at 16). The State is correct that counsel asked a single conclusory question about Vashawn being arrested. (135:74). But the jury was also personally assured by the prosecutor Vashawn was "not the shooter" and this assertion was never seriously questioned. (134:27). Trial counsel also asked whether Vashawn had a gun at the party; he

denied it. (135:76). There was never any serious attempt to suggest that answer was untruthful or that his possession of the gun was in any way suspicious.

The State also writes, "The jury knew that Smyth was present at the party, participated in the fight, and was identified as the shooter by one witness." (State's Br. at 16). The first two assertions are true, even if, as Jovan has argued in his interest of justice claim, more facts which directly connected him to the shooting were omitted.[1] But there is no basis in the record for the third claim—that the jury knew he had been "identified" as the shooter. In support, the State has cited Jovan's postconviction motion instead of the trial transcript. Here, there was no evidence presented at trial that Vashawn was "identified" as the shooter. The entire thrust of Jovan's argument is that Keshawna's identification *was not* elicited; the State's misleading and false factual citation should doom their attempt to rebut that argument here.

As to Tyler, the State is correct that the jury heard Tyler had his gun at the party. (135:78). Yet, the jury was never told that, in addition to this relevant fact, he also admitted to shooting the gun. In isolation, the reference to Tyler was meaningless and could not

[1] Likewise, the jury also heard generic references to Vashawn fighting and being implicated in text messages (text messages which, in all fairness, should have also been inadmissible) by anonymous members of the community. But none of this evidence was ever presented to suggest Vashawn was the killer; that through line was totally omitted from this trial.

have clued the jury into his possible participation in the homicide. And, while the State writes there is "no evidence" he was the shooter, it is apparently excluding the statement made by Vashawn implicating Tyler in that crime.

With respect to Menjuan, the State suggests the jury could "infer" he was a suspect. (State's Br. at 17). The brief references to Menjuan in the trial transcript do not convey such an immediate inferential link; more to the point, it is unclear why, if the State believes trial counsel was not deficient for not presenting a third-party defense, it defends his actions by trying to claim he *did*.

Finally, while the State is correct that trial counsel had some successful moments during this trial, it cannot ignore the basic reality that the chosen defense was unsuccessful, not capable of rebutting the other evidence, and transparently weak when compared to actual evidence that some other person murdered Ericka.

Moving on to prejudice, the State is content to label Jovan's arguments as "speculative" and "conclusory." (State's Br. at 18-19). Although the State defends trial counsel's conduct on the deficient performance prong by arguing that its case was weak, the State then reverses its position and argues the overall evidence was overwhelming and not capable of being rebutted, even by direct evidence that someone other than Jovan was responsible. (State's Br. at 18). Here, it cannot be denied that if a reasonable juror

were to be told there was compelling proof Vashawn, Menjuan, or Tyler killed Ericka, they would have a reasonable doubt.

B. Failure to call other witnesses.

The State first attempts to shift the focus of this Court's inquiry, alleging that because there was a colloquy during which Jovan agreed with his lawyer's decision not to call witnesses, this Court must ask whether trial counsel unreasonably failed to consult with his client about that decision. (State's Br. at 20). At the end of the day, however, the strategic decision of what witnesses to call falls on trial counsel. The obvious shortcomings of the procedure utilized here—where the client is forced to make an on-the-record agreement during the trial and waive any future challenge to his attorney's conduct—is self-evidently problematic; it also ignores the important constitutional dimensions of the right to the effective assistance of counsel. Holding that a defendant's "agreement" waives a later constitutional challenge is unsupported by any legal authority.

The State has also not meaningfully responded to either Jovan's claim that his attorney's efforts to find these witnesses were unreasonable or to his claim that their testimony would have been admissible through other means. As to the former, the State rests on efforts made by the State (rather than proof of what trial counsel did or did not do) even when the record demonstrates, as it concedes, that one of the witnesses was not subpoenaed by the State, either. (State's Br.

at 21). As to alternative means of admission, the State inserts a single line response labeling the arguments "conclusory." (State's Br. at 21). There is no further explication.

As to prejudice, the State claims no prejudice resulted because the jury already heard evidence Vashawn, Tyler, or Menjuan could have been the shooter. (State's Br. at 21). That is patently false based on this record; moreover, it also belies the State's allegation, elsewhere in the brief, that evidence of this nature was not in existence. Other than this problematic aside, the State proffers no meaningful rebuttal of the prejudice arguments made in the brief.

C. Statement of Cheyenne Pugh.

As to deficient performance, the State makes the analytically flawed argument that because (a) trial counsel had already successfully impeached Pugh's credibility (b) moving to strike her statement about Jovan would have undermined that impeachment, as it would have suggested he believed her to be telling the truth. (State's Br. at 23). This is nonsense. Counsel's cross-examination does not reflect the unmitigated success claimed by the State; it certainly does not overpower the damaging impact of having a witness tell the jury your client bragged about killing the victim and that he believed her to be merely a disposable "stud bitch."

As to prejudice, the State wraps the failure to ask for a mistrial and the general prejudice inquiry together, asserting this statement was not so

prejudicial that it undermined the proceeding as a whole. (State's Br. at 24). Jovan, however, was on trial for murder; but-for the inadmissible statement of Ms. Pugh, the State did not have a confession. Thanks to trial counsel's ineffectiveness, the State was supplied with that confession, with the added bonus that it could now demonstrate Jovan was a cold, callous killer. The State does not dispute that the statement was inadmissible; meaning the only question now is its impact. Here, the impact is obvious and intuitive. Reasonably competent counsel should have moved to strike and for a mistrial; failure to do so prejudiced Jovan.

CONCLUSION

Jovan respectfully requests that, for the reasons outlined in his briefs, this Court reverse the circuit court and grant the relief requested herein.

Dated this 24th day of March, 2021.

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 3,820 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 24th day of March, 2021.

Signed:

Electronically signed by Christopher P. August
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