

Wisconsin Court of Appeals
District III

State of Wisconsin
v
Kevin Wilke

Court Case # on Appeal
2020AP1068-CR

Pro Se Kevin Wilke
- Brief of Appellant -

Circuit Court case # 2019-CF-263
Honorable Judge Timothy Hinkfuss

- Pro Se Address -

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Statement of Issues

- ① Full discovery given with 911 tape night before trial no time to prep 921. 23 (1) and (7)(a) and (b)
- ② Denial of right to confront credibility and mental issues US Constitution Amendment #6
- ③ Denial of Due Process under the United States Constitution Amendments 5 and 14
- ④ Surprise - was not informed only true witness did not remember incident. and 2 new witnesses added day of trial.
- ⑤ No physical evidence I Kevin Wilke was involved at all!
- ⑥ State was allowed to bring in unsubstantiated evidence that tainted the jury.

809.19 (c)

a statement with reasons as to whether oral argument is necessary and a statement as to whether the opinion should be published and if so the reasons therefor. _____

This being Pro Se and my first Appeal if this Court finds they need more understanding and oral argument is necessary I am more than willing to oblige the Court with same.

A few of my issues regarding discovery (timing of) and unsubstantiated evidence as well as evidence as a whole I was unable to find a lot of solid rulings on in state or U.S. court so would ask this case/appeal be published.

- Statement of the Case -

This is a Domestic case centered in Brown County Green Bay WI on or about February 26-2019 between 3:15am and 3:50 Am morning of. I Kevin Wilke was found 10 to 15 minutes away asleep at my home no evidence of ever being gone
Tire tracks warm car nothing!

Charges include Count ① 940.235(1) 939.62(1)(b) Wis stats Strangulation and Suffocation Repeater, Count ② 940.19(1) 939.62(1)(a) Wis state Battery Repeater Count ③ 947.01(1) 939.62(1)(a) Wis state disorderly conduct, Repeater, Count ④ 940.44(1) 939.62(1)(a) Wis state Intimidation of a Victim Repeater, Jury trial 2 days 11-20-11-21-19
Verdicts Count ① Not Guilty Count ② Guilty Count ③ Guilty Count ④ Guilty ISSUES / Facts

Discovery Full pack and 911 tape day before trial Given, page 19 page 30 page 87 page 161-162 first day of trial and page 10-11 second day of trial, asked for dismissal or a judgment page 33-38 Denide page 87-88 Denide page 162-163 denide first day of trial. Second day after state rested 77-94 denide

- Argument -

① Full discovery given with 911 tape
Night before Trial no time to "prep"
971.23 (1) and (2m)(a)(b) (impart) —
(upon demand the district attorney shall
within a reasonable time before trial
disclose to the defendant — (a) — (h))
(2m) sanctions for failure to comply (a)
The court shall exclude any witness not
listed or evidence not presented for
inspection or copying required by this
section unless good cause is shown
for failure to comply the court may
in appropriate cases grant the opposing
party a recess or a continuance. (b)
In addition to or in lieu of sanction
specified in par (a) a court may subject
to sub (3) advise the jury of any failure
or refusal to disclose material or
information required to be disclosed
under sub (1) or (2m) or of any untimely
disclosure of material or information
required to be disclosed under sub (1) or
(2m)

⑤

System of Justice anticipates that a criminal defendant is entitled to see the prosecution's whole case before deciding on a defence and to be judged by a jury that is strongly warned to keep an open mind until —

- deliberations *U.S. v. Yakobowicz* (9th Cir 2005)

If there is a reasonable probability that the defendant could have been prejudiced by the error, it cannot be a harmless error and appellate court must reverse

- conviction *State of Colorado v. Daniel*

- *Trevizo* (2007)

"It is important to consider how disclosure could have affected defense preparation with an awareness of the difficulty of post-trial reconstruction!"

Pena v. State (Tex Crim App 2011)

Evidence is material if when there is a reasonable probability that had the evidence been disclosed the result of the proceeding would have been different *Care v. Bell* 556 U.S. (2009)

The test of whether evidence should have been disclosed is not whether in fact the prosecutor knows of its existence but rather, whether by the exercise of due diligence the prosecutor should have discovered it! *State v. Harris* (Wis 2008)

There are ③ different situations of prosecutorial non disclosure each with a different standard ① When the undisclosed evidence shows the prosecutors case included perjury ② When the defence made a pretrial request for specific evidence and ③ When the defendant made no request or a general request for exculpatory evidence *State v. Ruiz* Wis (1984)

When credibility of a witness was a critical issue exclusion of evidence offered under sub ① was grounds for discretionary reversal *State v. Cuyler* 110 Wis (1983)

⑤

The discovery statute requires at a minimum that the prosecutor disclose evidence that is favorable to the defence if nondisclosure of the evidence undermines confidence in the outcome of the judicial proceeding 971.23(1)(h) State v. Harris WI (1984)

Weary v. Cain a recent supreme court decision holding that the states failure to disclose impeachment information concerning 2 state witnesses violated defendants due process rights as in weary state withheld information about the credibility of there star witness Petitioner also argues that case is E. Miller to weary because other then witness there was no scientific or physical evidence linking the defendant to the crime.

Roeder v. Cain 2017

Evidence qualifies as material under Brady when there is any likelihood it could have affected the judgment of the jury

The suppression by the prosecution of evidence favorable to the accused upon request violates due Process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution 14th amendment USCA Reeder v. Cain (2017)

(Denide time to prep for trial discovery and witness list given night before trial with 9/11 tape) asked the state Ms Hardke about her witness's and availability 3 times she stated on page "87" of the First day of trial (there should be no confrontational issues) (in part) she was able to get evidence in to the court/Jury without disclosing the only witness she had to corroborate said evidence 9/11 tape and statements does not remember due to Blackouts and a history of same I had a right to suppress this evidence or at the least motion to end or have a evidentiary hearing without the Jury. The defence had a legal right to know and prep with full disclosure.

⑨

Due Process Failure upon request to produce evidence or witness's whether informant or not that may be favorable to the accused where evidence is relevant to guilt or Innocence, Violates due process 904.01 USCA Constitution Amendments 5-14 state v. Outlaw Wis(1982)

When state ~~over~~ for even exemplary purposes, elects to deny defendant access to information or testimony that is arguably exculpatory, it must forego the prosecution. State v. Outlaw Wis(1982) and Brady v. Maryland supra 373 U.S. at 86. 83 S.Ct at 1196 Outlaw. and United States v. Agurs (1976) of course where enforcement of a nondisclosure policy deprives an accused of a fair trial it must either be relaxed or the prosecution must be foregone Roviano v. United States 353 U.S. at 66-67. 77 Sct at 630-631

The prosecution Ms Hanke had responsibility and duty as I've shown via case law and statute Wis to give me full discovery and witness list with time to prep for trial and to disclose any and all evidence or testimony relevant to any evidence being introduced to trial before its introduction!

- Argument -

② Denial of right to Confront Credibility and mental issues US. Constitution Amendment #6

A finding of unavailability of a witness due to mentally illness made on the basis of a confused and stale record deprived the defendant of the right to confront the witness
State v. Zellmer Wis (1981)

A witness claimed non-recollection of a prior statement may constitute inconsistent testimony sub(4) a(1) Hearsay
State v. Lenarchick Wis 1975 3 different statements don't remember 1 N.V.
stated she did not remember giving statement until after read to her on 9/11 first day trial transcripts page 161 page 100 Judge Hinkfuss stated (so we are not bringing up four times in Bellin we are not bringing up the Patter!
the prejudicial part I agree it is prejudicial but a lot of things in law are prejudicial
page 103-104 denied right to bring up past crime of domestic Blacking out with family and admitted to Bellin

Page 165 first day transcripts (stated I know I gave the statement to officers because I did read it) page 166 N.V. stated (I don't know if he was at my house that night I know he was the previous night) page 174 denied by objection to question drinking except night in question she don't remember that night. pages 175 & 176 top of denied after objection right to ask about self harm only in night in question once again don't remember night in question! we are convinced that the district court violated lover's right of confrontation when it sustained Thomas's objection (Collins 226 F.3d at 742) Here the nature of the psychological problem in question is memory loss a condition that implicates Thomas's ability "to comprehend know and correctly relate the truth" (James 256 F.3d at 343) second we look to whether the witness suffered from the condition at the time of the event to which the witness will testify (Collins 226 F.3d at 742) Thomas's diagnosis and the events that he observed is not of sufficient duration to eclipse the relevancy of the inquiry. Accordingly we conclude that the district court violated lover's right of confrontation by limiting his cross-examination - (12)

We held that a trial court's decision to limit cross-examination violates the Confrontation Clause, a determination must be made to whether "the error" was harmless in the 986 context of the trial as a whole." The Supreme Court has held that the - Harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence... and promote respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error" *Van Arsdall* 475 U.S. at 681, 106 Sct 1431 (internal citation omitted) in assessing whether the error was harmless, we consider multiple factors - including the importance of the (witness's) testimony to the overall case against (the defendant); whether it was cumulative the presence of corroboration or contradicting evidence the extent of cross-examination otherwise permitted and the overall strength of the government's case *Caldwell* 88 F.3d at 525 *U.S. v. Loue* (2003)

Considering these factors it is impossible for us to conclude that the error in limiting the cross-examination of Thomas was "harmless beyond a reasonable doubt" Van Arsdall 475 U.S. at 684, 106 S.Ct 1431. First in relation to importance of the witness's testimony to the overall case against defendant, we note that Thomas was the sole witness to see Love with a firearm in his possession. Second because Thomas was the only witness to observe Love with a firearm it cannot be said that his testimony was cumulative (Third) the record is void of any other examination regarding Thomas's recall capacity - it was neither permitted nor attempted. The final factor - the overall strength of the government's case is fatal for ~~the~~ the government's contention that any error was harmless.

Thus if the testimony of Thomas was disregarded then the government is left with less than overwhelming evidence of Love's Guilt, and we are unable to say that the court's error was harmless beyond a reasonable doubt. Caldwell 88 F3d at 525
U.S. v. Love 329 F3d 981 (2003)

In conclusion, only one witness - Thomas - stated that he actually observed Love possess a firearm. Love was barred from pursuing a line of questioning into this critical witness's impaired memory. This limitation denied Love his constitutionally-guaranteed right to effectively cross-examine Thomas and we cannot definitively state that this denial did not contribute to the verdict obtained. *U.S. v. Love*, 329 F.3d 981 (2003)

I Kevin Wilke was denied the right to confront witness N.V. She does not remember the day and for the most part drinking self harm post domestic patterns of same as well as documented blackouts via Bellin. I should have been able to question outside day in question to present my defence as statutes Constitutional law and case law to prove my conviction was not harmless error, due to the facts above and throughout this argument.

(15)

- Argument -

③ Denial of Due Process under
The United States Constitution
Amendments 5 and 14

Defendants Right to Due Process
Prosecuting attorneys have a duty
to see that the accused is given
a fair trial and must observe the
requirements of Due Process of law
throughout the trial process
State v. Swarts Iowa (1995)

There was no physical evidence of
me involved in this incident at all
and all relevant evidence was
denied that may have proved my
innocence no due process to confront,
no due process to prep for any of
the witness's or trial as a whole.
under US Constitution Section 8 (import)
No person may be held to answer
for a criminal offence without
due process of the law. Due process
requires that evidence reasonably
support a finding of guilt beyond a
reasonable doubt ~ State v. Stawicki (1979)
A man has to have the evidence against
him and the ability to present a
defence to show doubt!

- Argument -

④ Surprise - was not informed only true witness did not remember incident and 2 New witness's added day of trial. The test of whether evidence should have been discovered is not whether in fact the prosecutor knows of its existence but rather whether by the exercise of due diligence the prosecutor should have discovered it! State v. Harris WI (2008) - If a phase of the case takes counsel for a party by surprise and counsel contends that they did not come to trial prepared to meet such phase counsel may move for a new trial Mulhall v. Keenan U.S. (1973) page 87 First day transcripts I Kevin stated the state seems to be acting like there holding back witness's or discovery in there coments to the Jury, state said (There should be no confrontational issues) first day trial page 125 I stated again if witness are testifying I'm okay with Jury instruction #70 otherwise No! first day trial 151 I stated (I'm okay with 911 tape as long as there testifying otherwise its hearsay) page 161 Nicole V stated she did not remember flight in question page 162 I objected page 163 stated I was not ready to deal with this witness evidence was brought into Jury already surprised. (17)

- Argument -

⑤ No physical Evidence I Kevin Wilke was involved at all! Only witness dont remember Night, History of this, "Blockouts" page 161-162 First day of trial Nicole VanTulle's Testimony page 215 first day trial Wyatt Veseth stated it would take 10-15 minutes to drive from her house to mine. page 217 I asked did you ask Grand-mother that day or next? (NO!) page 224 I asked Wyatt Veseth did you go in the basement? (Crime Scene) NO! (now NO sign of struggle or nat) page 230 Wyatt I asked was it snowing - answer might have been didnt remember tracks. page 48 second day trial asked Garth Russell what time did you arrive between 336 and 338 he was in front of my home. 10 to 15 minutes away from victims home. I was said to leave Nicales home 327 and 22 seconds per 911 dispatches report, take off 1 to 2 minutes, because either direction on my road is straight would see someone pull in within a mile either way that time of night not physically possible to make it there in 7 to 8 minutes

page 54 second day trial asked Ganth
~~Russell~~ Russell did the car look like it had
just pulled in? I didnt check fuel hood
to see or nat. and dont remember
if it was snowing. page 69 second
day trial asked Kendal Herwald
was it snowing (dont recall)
had the car been running? (cant say
or nat) "Botched investigation"
did not ask a true potential witness
did not look for fresh tire tracks in
"February" did not check or take
pictures of crime scene (if one) did
not see if car was running at all in
February (should have been steaming)
Those are/were all (Smoking Guns)
to go either way Guilty or not Guilty
I cant go back to fix it. I was convicted
of hearsay evidence let in to Jury by state
that knew witness didnt remember and did
not disclose that before evidence was admitted
before her testimony. There was not even
sercomstancial evidence I was asleep in
my bed! was Constitution Sec(7) in part
(to demand the nature and cause of the
accasations against him.) I had nothing I
could defend no witness and Botched
investigation.

- Argument -

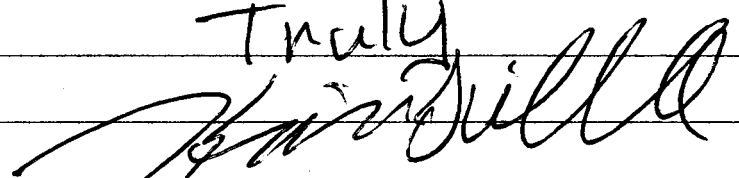
⑥ State was allowed to bring in unsubstantiated evidence that tainted Jury Page 128 first day trial I motioned that Ms Hardke has no legal right to tell the jury that there is a continued relationship with me and Nicole No proof or charges it could take 2 days to sort out and it taints the Jury (Nicole had not even testified yet) I demanded it stop! page 130-131 (motion denied) (This is a chargeable Bail Jumping not proved) U.S. v. Norick "extrinsic evidence to prove the commission of a crime other than that with which accused is charged is inadmissible and the cross-examiner is bound by the witness's denial except where there is a conviction of record" If there is a reasonable probability that the defendant could have been prejudiced by the error it cannot be harmless error and Appellate court must reverse conviction State of Colorado v. Daniel Trevizo (2007) The state bring in 11th hour evidence not previously referred to to establish a case. Roeske v. Diefenbach 75 W. (1977)

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Conclusion

I Feel I Shown This Court I was Denied Due-Process With late discovery no time to prep, unable to confront the only state witness past the day in question that (She dont remember) Surprise from non recollection and evidence already exposed to the Jury. No physical or Circumstantial evidence what so ever against me! I would under Wisconsin and United States Constitutional Law, as well as statutes and case law. I would demand this case be Thrown Out never to be tried again to waste this states time or money! At the very least be given a new trial where I may find Justice from a Jury of my Peers with out error!

Thank you for your time and consideration

Truly

Kevin Wilke

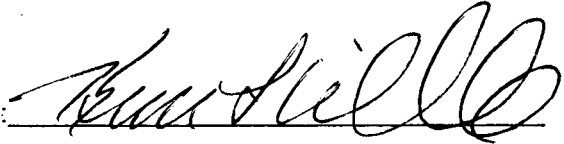
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The length of this brief is 20 pages [if a monospaced font is used] or _____ words [if a proportional serif font is used].

Date: 12-3-20

Signature: _____

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