COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1598-CR **Cir. Ct. No. 1995CF510**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DANIEL G. SCHEIDELL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 REILLY, P.J. This appeal addresses the ramifications of the discovery of "newly discovered evidence" that had it been known at the time of trial would have resulted in a different legal analysis than that applied by the circuit court. On October 11, 1995, Daniel G. Scheidell was convicted following a

"he said, she said" jury trial of attempted first-degree sexual assault and armed burglary against J.D. Nineteen years later, Scheidell brought a motion for a new trial under WIS. STAT. § 974.06 (2015-16)[1] with the assistance of the Wisconsin Innocence Project (WIP). The circuit court granted Scheidell's motion for a new trial based on newly discovered third-party perpetrator DNA evidence in the first-degree sexual assault of K.C., and the State appealed. We affirm the decision of the circuit court vacating Scheidell's judgment of conviction.

BACKGROUND

¶2 On May 20, 1995, at 4:45 a.m., J.D. was asleep when she heard the sound of a window blind falling onto her bathroom floor. ***State v. Scheidell***, 227 Wis. 2d 285, 289, 595 N.W.2d 661 (1999). J.D. investigated and found that the window, which she had left ajar for air, was now open approximately one foot. ***Id.*** She shut the window and went back to sleep. ***Id.*** Some thirty minutes later, J.D. awoke to a man, wearing a black knit ski mask and a jacket over his head and hair, straddling her waist. ***Id.***

¶3 J.D. fought the knife-wielding man and "believed" she recognized the man as her upstairs neighbor, Scheidell. ***Id.*** at 289-90. A struggle continued, during which time J.D. would call out Scheidell's nickname, "Danno," which caused the man to hesitate each time she said his name. ***Id.*** J.D. managed to expose the left side of the man's face from the bottom of the eye to the top of the lip and based on the man's "distinctive body and walk," J.D. was certain the man was Scheidell. ***Id.*** at 290.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 J.D. was able to kick the man away and retrieve a pistol from her nightstand. ***Id.*** J.D. told the man that she would shoot him if he did not leave, and the man left "having never uttered a word." ***Id.***

¶5 J.D. promptly called the police. ***Id.*** Upon arrival, police found Scheidell coming down the stairs from his upper floor apartment, "and [he] appeared to have just woken up." ***Id.*** Scheidell gave a voluntary statement and allowed police to search his apartment, which turned up no evidence. ***Id.*** Police also searched the outside alley, finding no evidence. Police returned later with a search warrant and likewise found no evidence implicating Scheidell.

¶6 Scheidell was charged with one count of attempted first-degree sexual assault and one count of armed burglary, both while masked. ***Id.*** at 290. On the morning of trial, the circuit court heard arguments on Scheidell's intent to offer evidence of a similar crime that occurred five weeks after the attack on J.D. that Scheidell could not have committed as he was in jail. ***Id.*** The other crime took place approximately four blocks from J.D.'s residence and the offender was described by K.C., the victim, as a white male, thirty-five to forty, with a thin build, who had entered K.C.'s residence through a window at approximately 5:00 a.m. and was possibly wearing a mask, holding a knife, and had some type of hood on his head. ***Id.*** at 291. K.C. awoke to the man on top of her, who then sexually assaulted her. ***Id.***

¶7 Scheidell brought a ***Denny***[2] motion to the circuit court seeking admission of the similar crime that occurred to K.C., just weeks after and within

[2] ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (1984).

blocks of J.D.'s apartment, perpetrated by one who wore a mask, was hooded, utilized a knife, entered through a window in early morning hours, and was of a similar appearance to Scheidell. ***Scheidell***, 227 Wis. 2d at 291. In ***Denny***, we held that "as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible." ***State v. Denny***, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (1984). ***Denny*** established a "bright line standard" that required three factors to be present: motive, opportunity, and direct connection. ***Id.*** at 625.

¶8 The circuit court denied the ***Denny*** evidence, finding that there was no showing of any direct connection between the crimes. ***Scheidell***, 227 Wis. 2d at 291-92. Scheidell was found guilty by a jury on both charges and sentenced to twenty-five years in prison. ***Id.*** at 292.

¶9 Scheidell appealed the denial of the ***Denny***/other acts evidence of K.C.'s attack, and our supreme court ultimately accepted review to address the appropriate test for the admissibility of other acts evidence committed by an unknown third party when offered by a defendant to prove identity. ***Scheidell***, 227 Wis. 2d at 293. The court summarized what Scheidell was attempting to do: "Scheidell attempted to admit evidence of a similar crime that was committed by an unknown third party while he was in jail awaiting trial on the pending matter to prove mistaken identity." ***Id.*** at 294.

¶10 The court found that the ***Denny*** "legitimate tendency" test does not apply where a defendant seeks to show that some *unknown* third party committed the charged crime based on evidence of another allegedly similar crime as "it would be virtually impossible for the defendant to satisfy the motive or the

opportunity prongs of the legitimate tendency test of ***Denny***." ***Scheidell***, 227 Wis. 2d at 296. Stated succinctly, a defendant cannot meet his or her burden under the legitimate tendency test when the alleged third party is unknown. ***Id.*** at 296-97. ***Denny*** "does not apply to this type of other acts evidence." ***Id.*** at 297.

¶11 In 2010, Scheidell applied to WIP, and in 2013 WIP obtained a DNA profile on the sexual assault kit from K.C.'s assault. The DNA profile returned as a match for Joseph R. Stephen, who is currently serving a prison sentence for a 1998 sexual assault in Racine. Scheidell filed a motion for a new trial under WIS. STAT. § 974.06 based on newly discovered DNA evidence and in the interest of justice. Scheidell now seeks to present evidence that a *known* perpetrator of the sexual assault against K.C. also committed the crimes that he was convicted of against J.D.

¶12 The circuit court held an evidentiary hearing on January 21, 2015. At the hearing, Laura Davis, a law student working with WIP, testified that she interviewed Stephen after the DNA results were returned. Davis stated that Stephen was living in Racine during the time of the 1995 assaults on J.D. and K.C. Stephen did not deny committing either attack, but admitted that he was abusing a lot of drugs during that time and noted that "DNA speaks for itself."[3] According

[3] Davis presented Stephen with an affidavit summarizing their conversation, and although Stephen refused to sign the affidavit and told Davis he would invoke his Fifth Amendment right, Stephen "did not disagree with any of the content of the document." The State argued before the circuit court that Davis' statements as to what Stephen told her were hearsay and were not against his penal interest. The circuit court allowed in Stephen's statement that he did not disagree with any of the information contained in the affidavit, which coincided with Davis' testimony.

We do not reach the hearsay issue on appeal as we note that Stephen could testify at trial under subpoena. As Stephen has not invoked his Fifth Amendment right under oath before a court, we will not make any assumptions about what his testimony would entail at trial. These evidentiary issues must be determined by the circuit court.

to Davis, Stephen told her to "tell [Scheidell] I'm sorry." Dr. Nick Yackovich, an expert in sex-offender risk assessment, and Dr. Jeffrey Neuschatz, an expert on eyewitness identification, also testified. The late Judge John S. Jude issued an insightful and thorough decision and order granting Scheidell's motion for a new trial. The State appeals.

DISCUSSION

¶13 We begin with the understanding that a defendant has a constitutional right to present a defense. U.S. CONST. amend. VI; WIS. CONST. art. I, § 7; ***Chambers v. Mississippi***, 410 U.S. 284, 294, 302-03 (1973); ***Scheidell***, 227 Wis. 2d at 293-94. Furthermore, "it is unconstitutional to refuse to allow a defendant to present a defense simply because the evidence against him is overwhelming." ***State v. Wilson***, 2015 WI 48, ¶61, 362 Wis. 2d 193, 864 N.W.2d 52. We acknowledge, however, that the right to present a defense is not absolute as it is subject to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence," including whether the evidence is relevant. ***Scheidell***, 227 Wis. 2d at 294 (citation omitted). As Judge Jude so aptly quoted, our system of law has a "twofold aim … that guilt shall not escape or innocence suffer" and that "justice shall be done." ***Berger v. United States***, 295 U.S. 78, 88 (1935). The question before this court is whether the circuit court properly granted Scheidell's request for a new trial based on newly discovered evidence. We conclude that it did.

Standard of Review

¶14 A judgment of conviction is properly set aside and a new trial granted based on newly discovered evidence where the evidence is "sufficient to establish that the defendant's conviction resulted in a 'manifest injustice.'" ***State***

v. Avery, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (citing ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42). The defendant must establish by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***Plude***, 310 Wis. 2d 28, ¶32 (citation omitted); ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Whether to grant a motion for a new trial under the newly discovered evidence standard is a discretionary decision for the circuit court.[4] ***Plude***, 310 Wis. 2d 28, ¶31. "A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly-discovered evidence." ***Id.***

¶15 If a defendant is able to prove all four criteria, then the court must also determine "whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Id.***, ¶32. "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (alteration in original; citation omitted). This determination is a

[4] We acknowledge that the State suggests that we should apply a de novo standard of review, citing ***State v. Herfel***, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971), for the proposition that when the judge who presided at trial and the judge who decided the postconviction motion are not the same, we "start[] from scratch and examine[] the record de novo." *But see* ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60 (applying erroneous exercise of discretion standard where trial judge and postconviction judge were not the same); *see also* ***State v. Vollbrecht***, 2012 WI App 90, ¶18, 344 Wis. 2d 69, 820 N.W.2d 443 (applying the same standard of review we utilize where the judge presiding at trial and at postconviction were different). We note that neither party suggests that disputed issues of fact are before this court, and as such we shall not delve deeper into the State's argument.

question of law that we review de novo. ***Plude***, 310 Wis. 2d 28, ¶33; ***State v. Vollbrecht***, 2012 WI App 90, ¶18, 344 Wis. 2d 69, 820 N.W.2d 443. If these five criteria are met, the defendant has established the existence of a manifest injustice. ***Plude***, 310 Wis. 2d 28, ¶33.

Arguments

¶16 The State challenges the circuit court's finding of newly discovered evidence on two grounds: (1) materiality and (2) reasonable probability. The State argues that Scheidell failed to satisfy the third prong of the newly discovered evidence test—the evidence is material to an issue in the case—as our supreme court had previously determined that the two assaults were dissimilar enough that the evidence would be inadmissible under ***Denny***.[5] The State also claims that based on the strength of the State's case, evidence of K.C.'s assault and Stephen's identity "would not have disturbed that foundation or the verdict in Scheidell's trial." Alternatively, Scheidell argues that the circuit court properly exercised its discretion in concluding that the newly discovered evidence is admissible under ***Denny***, is material to the issue of identity, and there is a reasonable probability that a jury would have a reasonable doubt about Scheidell's guilt.

[5] The State also argues in the alternative that Scheidell's claims are barred under the doctrine of issue or claim preclusion. The State's claim is made in a footnote, which we find to be undeveloped, general statements that are void of legal analysis. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

Newly Discovered Evidence Test

¶17 The parties agree that only one criterion of the newly discovered evidence test is at issue on appeal: materiality.[6] Whether the newly discovered evidence of the identity of K.C.'s attacker is material to an issue of the case—here, the identity of J.D.'s attacker—hinges on whether the evidence is admissible. We know, given our supreme court's decision in ***Scheidell***, 227 Wis. 2d at 310, that evidence of an unknown perpetrator of the K.C. assault is not admissible as proper other acts evidence under ***Sullivan***.[7] We conclude, however, that the newly discovered identity of K.C.'s attacker should be reviewed under the test articulated in ***Denny*** for admissibility of known third-party perpetrator evidence. *See* ***Vollbrecht***, 344 Wis. 2d 69, ¶24. "If evidence of third-party culpability would not be admissible at trial under ***Denny***, then it could not be material to the issue of guilt or innocence." ***Vollbrecht***, 344 Wis. 2d 69, ¶25.

¶18 Our supreme court recently reaffirmed that the ***Denny*** "legitimate tendency" test "is the correct and constitutionally proper test for circuit courts to apply when determining the admissibility of [known] third-party perpetrator evidence." ***Wilson***, 362 Wis. 2d 193, ¶52. ***Denny*** created a "bright line standard" for admissibility of evidence requiring a defendant to make a sufficient showing of

[6] We note that Scheidell argues that the State conceded below that Scheidell satisfied the materiality prong of the newly discovered evidence test, and the circuit court's decision suggests support for Scheidell's claim as the court stated that the first four factors of the test "are not contested." We disagree with Scheidell that the State "clearly failed to raise this issue with sufficient prominence before the post-conviction court" as the State's brief in opposition to Scheidell's motion for a new trial clearly questioned whether the evidence was material to an issue in the case. Thus, we refuse Scheidell's request that we decline to entertain the State's materiality argument.

[7] ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

a legitimate tendency that an alleged third-party perpetrator committed the crime. ***Scheidell***, 227 Wis. 2d at 295-96 (citing ***Denny***, 120 Wis. 2d at 623-25). A legitimate tendency is demonstrated where the defendant can establish "(1) the motive and (2) the opportunity to commit the charged crime, and (3) can provide some evidence to directly connect the third person to the crime charged which is not remote in time, place or circumstance." ***Scheidell***, 227 Wis. 2d at 296 (citing ***Denny***, 120 Wis. 2d at 623-24). Strong evidence implicating the third-party perpetrator on one prong may impact the evaluation of the other prongs, but "the ***Denny*** test is a three-prong test; it never becomes a one- or two-prong test." ***Wilson***, 362 Wis. 2d 193, ¶64. We review a circuit court's decision to admit evidence under an erroneous exercise of discretion standard. ***Id.***, ¶47.

1. Motive

¶19 The ***Wilson*** court determined that under the motive prong the court must ask: "[D]id the alleged third-party perpetrator have a plausible reason to commit the crime?" ***Id.***, ¶57. Motive, explained the court, "refers to a person's reason for doing something." ***Id.***, ¶62 (citing WIS JI—CRIMINAL 175). The defendant is never required to prove motive with "substantial certainty"; instead, "relevant evidence of motive is generally admissible." ***Wilson***, 362 Wis. 2d 193, ¶63. The circuit court determined that Stephen had motive to commit this crime against J.D. based on his prior assault on K.C. and on the sexual assault he committed in 1998 in Racine that led to his incarceration. The circuit court accepted Yankovich's testimony that "[s]exual assault perpetrators tend to exhibit a pattern of such behavior," and the court was swayed that K.C.'s attack and the 1998 victim's assault demonstrated a sufficient pattern to establish Stephen's motive. We defer to the circuit court's discretionary decision and agree that

Stephen's prior criminal history provides a "plausible reason" for Stephen to have attacked J.D.

2. Opportunity

¶20 The second prong of the ***Denny*** test asks: "[C]ould the alleged third-party perpetrator have committed the crime, directly or indirectly? In other words, does the evidence create a practical possibility that the third party committed the crime?" ***Wilson***, 362 Wis. 2d 193, ¶58. Evidence of opportunity will "often, but not always, amount[] to a showing that the defendant was at the crime scene or known to be in the vicinity when the crime was committed." ***Id.***, ¶65. Importantly, "[t]he defense theory of a third party's involvement will guide the relevance analysis of opportunity evidence in a ***Denny*** case." ***Wilson***, 362 Wis. 2d 193, ¶68. The circuit court found that Stephen was in Racine at the time of the assault on J.D. and that he was not in custody. The court acknowledged that while this implied that Stephen had opportunity, "so did hundreds, if not thousands, of other men who were in the Racine area." The circuit court, relying heavily on our supreme court's decision in ***Wilson***, explained that "the opportunity prong must be weighed in conjunction with all factors" of the ***Denny*** test and that the strength of the other prongs in this case, namely the direct connection prong, impacted the court's evaluation of the opportunity prong. Upon review of the record, we cannot conclude that the circuit court erroneously exercised its discretion on this issue.

3. Direct Connection

¶21 The third, and final, prong of the ***Denny*** test asks whether there is "evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly?" ***Wilson***, 362 Wis. 2d 193, ¶59. "The 'legitimate tendency'

test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." ***Denny***, 120 Wis. 2d at 624 (citation omitted). "[C]ircuit courts must assess the proffered evidence in conjunction with all other evidence to determine whether, under the totality of the circumstances, the evidence suggests that a third-party perpetrator *actually committed* the crime."[8] ***Wilson***, 362 Wis. 2d 193, ¶71 (alteration in original). "Logically, direct connection evidence should firm up the defendant's theory of the crime and take it beyond mere speculation." ***Id.***, ¶59. Courts should not look for simply a connection between the third party and the crime but must "look for some direct connection between the third party and the *perpetration of* the crime." ***Id.***, ¶71 (alteration in original).

¶22 The circuit court found this direct connection by looking at the "points of similarity" between the two crimes. In ***Scheidell***, our supreme court outlined the similarities, as alleged by Scheidell, between J.D.'s and K.C.'s attacks: (1) the assaults occurred within four blocks of each other; (2) the assaults took place five weeks apart; (3) the assaults occurred between 5:00-5:30 a.m.; (4) the perpetrator gained access through a window; (5) each victim awoke to a man armed with a knife straddling her body; (6) the assailant wore a mask and used a jacket to cover his head; (7) both victims reported that their attacker was about 5'10", white, and slender; (8) the assailant attempted or completed first-degree sexual assault; and (9) the victimology was similar: the women were both single,

[8] The State argues in its brief in chief that ***Denny***'s direct connection prong requires both that the defendant establish a direct connection "between the other-act and the charged crime" as well as "that the other act is similar to the charged crime under the ***Sullivan*** analysis." *See* ***Vollbrecht***, 344 Wis. 2d 69, ¶¶28-31; *but see* ***State v. Wilson***, 2015 WI 48, ¶¶71-72, 362 Wis. 2d 193, 864 N.W.2d 52 (making no mention of the ***Sullivan*** analysis within the "direct connection" prong of the ***Denny*** test). We apply the direct connection analysis as stated in ***Denny***/***Wilson***.

young, and white. ***Scheidell***, 227 Wis. 2d at 308. Our supreme court, while acknowledging "some similarities," did "not agree that the two incidents are so distinctively similar as to support the inference that some *unknown* third party, and not Scheidell, committed the charged crime" under the standard set forth in ***Sullivan***. ***Scheidell***, 227 Wis. 2d at 308 (emphasis added). The court noted that K.C.'s attack was one incident, not a series of incidents; that "the factual details of the two incidents were not particularly complex or unusual"; and that the incidents were dissimilar in that J.D.'s attacker never spoke, he struck J.D., and he may have entered and exited using the door instead of the window. ***Id.*** at 308-10.

¶23 Considering Stephen's identity as K.C.'s attacker under the ***Denny*** admissibility standard, the circuit court determined that "the points of similarity are sufficient such that a jury can make a connection between Stephen and the perpetration of the J.D. assault." The court accepted Yackovich's testimony regarding sex offender risk assessment and profiling that "a home intruder rape by someone with a mask and a knife is a very small percent of the overall rapes that at least we are aware of." The court gave further credence to Yackovich's testimony that "both attacks had a ritualistic element" and that they were "more than just coincidence."

¶24 The State argues that "all that the DNA testing revealed was yet another point of dissimilarity between the attacks" as Stephen was "markedly dissimilar" in age, race, height, and weight from Scheidell. The State explained that in 1997, Scheidell, a white male, was forty-six, 5'11" tall, and weighed 161 pounds, while Stephen, a black male, was twenty-seven, 5'9" tall, and weighed 145 pounds. J.D. also denied at the postconviction hearing that Stephen was her attacker and that she had ever seen Stephen before. We do not agree that these facts destroy a finding of a direct connection as the State suggests. After the

assault, K.C. described her attacker as a slender, *white* male who was approximately 5'10" tall and between the ages of thirty-five to forty. *See* ***Scheidell***, 227 Wis. 2d at 291, 308. J.D. described her attacker the same. *See* ***id.*** at 308. We now know at least one of these identifications was mistaken as Stephen is black—according to the booking sheet—and was only twenty-four or twenty-five when K.C.'s assault took place.

¶25 Our courts have recognized that "eyewitness testimony is often 'hopelessly unreliable'" and that "eyewitness misidentification is now the single greatest source of wrongful convictions in the United States." ***State v. Dubose***, 2005 WI 126, ¶30, 285 Wis. 2d 143, 699 N.W.2d 582 (citation omitted). The State is correct to identify the differences between Scheidell and Stephen, but these are considerations that should be left to the judgment of the jury. We, therefore, do not agree with the State that the physical differences between Scheidell and Stephen impact the admissibility of the evidence.

¶26 We agree with the circuit court's discretionary decision, and we see no evidence in the record suggesting that its discretion was exercised erroneously. Scheidell now presents DNA evidence that K.C.'s attacker was Stephen, an individual we venture to describe as a serial rapist based on K.C.'s assault and the 1998 assault for which Stephen is incarcerated. Although the circumstances surrounding the 1998 assault are not in the record and, therefore, we are unaware whether there are any similarities between K.C.'s and the 1998 victim's attacks, we suggest that the evidence now demonstrates a "series of incidents" of sexual assaults in Racine in the mid-to-late 1990s perpetrated by the same individual. Stephen admitted that he was living in Racine during this period, he did not deny committing either attack on K.C. or J.D., and he asked Davis to apologize to Scheidell. *See* ***Wilson***, 362 Wis. 2d 193, ¶72 ("[A] third party's self-incriminating

statement may be used to establish direct connection."). When coupled with the abundant similarities between K.C.'s and J.D.'s attacks, we find no error in the circuit court's decision finding the evidence of the identity of K.C.'s attacker admissible under ***Denny*** and, therefore, material to the issue of the identity of J.D.'s attacker.

Reasonable Probability

¶27 As we agree with the circuit court that Scheidell has established the first four criteria under the newly discovered evidence test, the final question is whether a reasonable probability exists that the jury would have reached a different result at trial. ***Plude***, 310 Wis. 2d 28, ¶32. "A court reviewing newly-discovered evidence should consider whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt." ***Id.***, ¶33 (citing ***State v. McCallum***, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997)). The court must consider both the evidence presented at trial in conjunction with the newly discovered evidence in determining a reasonable probability of a different outcome. ***Avery***, 345 Wis. 2d 407, ¶25 (citing ***McCallum***, 208 Wis. 2d at 474-75).

¶28 For example, in ***Plude***, the issue was whether Plude drowned his wife by forcing her head in the toilet, which involved conflicting testimony from several experts. ***Plude***, 310 Wis. 2d 28, ¶45. It was revealed later that one of the experts, who testified that Plude's wife could not have inhaled toilet water on her own, had falsified his credentials. The ***Plude*** court found that "in a trial rife with conflicting and inconclusive medical expert testimony … there exists a reasonable probability that, had the jury discovered that [the expert] lied about his credentials, it would have had a reasonable doubt as to Plude's guilt." ***Id.***, ¶36; *see also*

McCallum, 208 Wis. 2d at 480 (remanding the matter to the circuit court for reasonable probability determination where circuit court erroneously considered only the credibility of victim's accusation versus her recantation); ***State v. Edmunds***, 2008 WI App 33, ¶23, 308 Wis. 2d 374, 746 N.W.2d 590 (finding it improper to weigh State's new evidence in shaken baby case against defendant's new evidence and instead concluding that considering both old and new evidence jury would have reasonable doubt as to guilt).

¶29 The newly discovered evidence must also go the heart of the controversy. In ***Avery***, Avery was convicted by a jury of two counts of robbery. ***Avery***, 345 Wis. 2d 407, ¶2. Twelve years later, Avery filed a postconviction motion claiming that an expert's analysis of the video of one of the robberies using digital photogrammetry was newly discovered evidence that entitled him to a new trial. ***Id.*** Our supreme court disagreed, noting the strength of the State's case, including witness identifications, Avery's detailed confession, his apology letter, his knowledge of the names of the other robbers, and the fact that the video of the robbery was not used at trial to identify Avery. ***Id.***, ¶34. The court noted that in ***McCallum***, ***Edmunds***, and ***Plude***, "the newly discovered evidence struck at the heart of the State's evidence at trial," which the photogrammetry evidence did not do in ***Avery***. ***Id.***, ¶36.

¶30 Upon our independent review, we conclude that in a trial based almost entirely on J.D.'s identification of Scheidell as her attacker, if the jury heard evidence that a strikingly similar crime was perpetrated in the same area within five weeks of J.D.'s attack by a known serial rapist, the jury would have a reasonable doubt as to Scheidell's guilt. Evidence calling into question the identity of J.D.'s attacker goes directly to the heart of the State's case as J.D.'s identification of Scheidell was "the sole evidence to support the verdict against

Scheidell." As the circuit court explained, Scheidell "now has the opportunity to present a known individual as a possible perpetrator" and he "can construct an alternative theory to explain to the jury that someone else committed the crime." *See also* ***Vollbrecht***, 344 Wis. 2d 69, ¶36 (finding a reasonable probability where "newly discovered evidence would now present the jury with a viable alternative suspect: an individual who had expressed a desire to commit such a crime, who had confessed to committing a similar crime").

¶31 In considering the strength of the State's case in conjunction with the new evidence, we recognize that J.D. remains steadfast in her unwavering belief in Scheidell's identity as her attacker. We do note, however, some weaknesses in J.D.'s identification of Scheidell. J.D. never saw her attacker's face or hair, and never heard his voice. J.D. only saw his eyes and a part of his cheek. Further, the attack occurred in the dark, and J.D. did not have her eyeglasses on. Other facts cast doubt on J.D.'s identification of Scheidell as her attacker. For example, J.D. thought her attacker was drunk or "on something" and she claimed to have fought off her attacker; however, when police spoke with Scheidell "shortly after the police arrived on the scene," Scheidell "did not appear to be under the influence of drugs or alcohol," appeared to have just woken up, and was not "flushed or out of breath." Police also searched Scheidell's apartment and the area around his apartment and found no evidence.

¶32 The newly discovered evidence presented to the circuit court includes, most importantly, Stephen's identity as K.C.'s attacker—an assault that was akin to J.D.'s attack. Further, the circuit court accepted as credible the testimony of Neuschatz as to the nuances of eyewitness identification and victim memory, who noted that several factors could contribute to a victim's "flawed yet sincere eyewitness identification," including stress, a weapon, poor lighting

conditions, and covering of the assailant's face. The research relied on by Neuschatz was documented over the last two decades. The court also heard and gave credence to Yackovich's testimony as to the "significant developments in the field of sex offender profiling which have occurred over the past 20 years." According to Yackovich, Scheidell was unlikely to have perpetrated the assault against J.D., "a person who would commit an assault like the one against [J.D.] was likely to have committed other offenses," and it was "less likely" that two separate individuals committed both the K.C. and the J.D. assaults. We find it relevant, therefore, that Scheidell had no criminal record before his conviction in this case.

¶33 We conclude that the discovery of the identity of K.C.'s attacker is newly discovered evidence, which when supported by the testimonies of Yackovich and Neuschatz, affords a reasonable probability that if the jury had heard the evidence regarding K.C.'s assault and her attacker, the jury would have a reasonable doubt as to Scheidell's guilt. The circuit court properly granted Scheidell's motion for a new trial based on newly discovered evidence.[9]

Interest of Justice

¶34 The circuit court also granted Scheidell's motion for a new trial in the interest of justice as it found that "the issue of identity was not fully tried." Where a circuit court grants a new trial in the interest of justice, we review that decision for an erroneous exercise of discretion. ***State v. Hurley***, 2015 WI 35, ¶30, 361 Wis. 2d 529, 861 N.W.2d 174. Upon review of the record, we cannot

[9] We acknowledge that our finding based on newly discovered evidence is not binding as the majority decision of the court.

conclude that the circuit court committed an error of law or that the decision is not one that a reasonable court could have reached based on the facts in the record. Accordingly, I agree with and join in Judge Hagedorn's concurrence finding that the circuit court's decision to grant a new trial was reasonable within the bounds of the law. Concurrence, ¶¶42-43. It is my opinion, however, that the newly discovered evidence addressed above is the basis for the granting of a new trial in the interest of justice.

¶35 I would affirm the circuit court's decision based on our authority under WIS. STAT. § 752.35. Section 752.35 provides this court with discretionary authority to order a new trial where "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *See also* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19-20, 456 N.W.2d 797 (1990). Under the first prong, "the real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial." ***State v. Maloney***, 2006 WI 15, ¶14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436. For the reasons stated above, I agree that the issue of identity was not fully tried in this case and that Scheidell is entitled to a new trial in the interest of justice.

Law of the Case

¶36 Finally, the State claims that the "law of the case" doctrine governs the decision in this case and "controls the issue of the similarity of the attacks." The law of the case doctrine is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." ***Univest Corp. v.***

General Split Corp., 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989). "However, the law of the case doctrine is not a rule to which this court is bound by any legislative enactment, nor is it a rule to be inexorably followed in every case." ***Id.*** at 38-39. Our supreme court has recognized that we "may disregard the doctrine in certain circumstances when 'cogent, substantial, and proper reasons exist.'" ***Id.*** at 39 (citation omitted); ***State v. Moeck***, 2005 WI 57, ¶25, 280 Wis. 2d 277, 695 N.W.2d 783. This is especially true where a new trial is granted in the interest of justice. ***Moeck***, 280 Wis. 2d 277, ¶25 ("Courts have the power 'to disregard the rule of "law of the case" in the interests of justice' and to reconsider prior rulings in a case.") (citation omitted).

¶37 We conclude that the law of the case doctrine was properly disregarded in this case. With the introduction of the newly discovered evidence of the *known* identity of the perpetrator in K.C.'s sexual assault, we no longer have the same case that was previously before our supreme court; the facts have changed. If we employed the law of the case doctrine so strictly that it applied even where the facts of the case have changed, the doctrine would have a chilling effect on the newly discovered evidence standard.

CONCLUSION

¶38 For the forgoing reasons, we affirm the decision of the circuit court vacating Scheidell's conviction and granting a new trial.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶39 HAGEDORN, J. (*concurring*). I agree with much of Judge Reilly's analysis. But there is a simpler, more straightforward way to resolve this case. The circuit court found not only that a new trial was warranted on the basis of newly discovered evidence, but also on the independent ground that vacating the conviction was appropriate in the interest of justice. This conclusion is a discretionary decision, and one that I would uphold as reasonable. Because nothing more is needed to decide this case, I join Judge Reilly's decision solely on the ground that the circuit court did not erroneously exercise its discretion in ordering a new trial in the interest of justice.

¶40 In ***State v. Henley*** 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350, the Wisconsin Supreme Court held that circuit courts may only order a new trial in the interest of justice when the motion is brought under a proper procedural mechanism. ***Id.***, ¶63 & n.25. Here, Scheidell brought his motion under WIS. STAT. § 974.06. ***Henley*** affirmed that a motion for a new trial in the interest of justice under § 974.06 is available if the defendant establishes a "sufficient reason" for failing to raise the issue earlier. ***Id.***, ¶63 n.25; *see* § 974.06; ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). It is plain to me that this new DNA evidence constitutes a sufficient reason. Thus, Scheidell has validly brought a motion for a new trial in the interest of justice, which the circuit court granted.

¶41 While the State hems and haws on the proper standard of review,[1] the law is clear that a circuit court's grant of a new trial in the interest of justice is a discretionary decision. *See* ***Totsky v. Riteway Bus Serv., Inc.***, 2000 WI 29, ¶46, 233 Wis. 2d 371, 607 N.W.2d 637; ***Behning v. Star Fireworks Mfg., Co.***, 57 Wis. 2d 183, 186, 203 N.W.2d 655 (1973); ***Van Gheem v. Chicago & Northwestern R.R. Co.***, 33 Wis. 2d 231, 236, 147 N.W.2d 237 (1967); *see also* ***McCoy v. Terhorst***, 188 Wis. 512, 517, 205 N.W. 420 (1925) (explaining that "[i]t must clearly appear that there was an abuse of judicial discretion before we reverse"). When we review a decision for an erroneous exercise of discretion, we review the record in an effort to find reasons to sustain the circuit court's decision. ***Behning***, 57 Wis. 2d at 187; ***State v. Alles***, 106 Wis. 2d 368, 391, 316 N.W.2d 378 (1982) (explaining that an appellate court may search the record to determine whether the circuit court reached the correct result, even if for the wrong reasons); ***Burkes v. Hales***, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991) (explaining that, as "the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions") (citation omitted).

¶42 Rather than defer to the reasonable judgment of the circuit court, the State asks us to exercise our own discretion under WIS. STAT. § 752.35 and use that authority to reverse the circuit court's decision. The State also implies, without legal support, that the circuit court cannot order a new trial in the interest of justice based upon the same issues raised on newly discovered evidence

[1] The State argues that the level of deference owed to the circuit court is not entirely clear. It does not, however, identify a single case reviewing a circuit court's decision to grant a new trial in the interest of justice under any standard but erroneous exercise of discretion.

grounds. But this is not a case where we are asked afresh to consider whether to grant a new trial in the interest of justice under our discretionary authority codified in § 752.35.[2] It does not matter whether we would make the same decision or not. The only question is whether this was a reasonable decision within the bounds of the law. It clearly was.

¶43 Accordingly, I join Judge Reilly's decision in affirming the circuit court's decision to order a new trial in the interest of justice as an appropriate exercise of discretion.[3] For all the reasons more comprehensively discussed by Judge Reilly and the circuit court, it is undoubtedly reasonable to conclude that this new evidence casts doubt upon whether justice was done in the original proceeding. Though there is much in Judge Reilly's opinion to commend, I would affirm on this independently sufficient ground alone.

¶44 I am authorized to state that Judge Mark D. Gundrum joins this concurrence.

[2] In addition to affirming the circuit court's exercise of discretion, Judge Reilly also independently reaches the same result under WIS. STAT. § 752.35. I do not reach this question.

[3] I also agree with Judge Reilly that applying the law of the case doctrine would be inappropriate here where the circuit court permissibly determined that a new trial in the interest of justice was warranted.