COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1907 **Cir. Ct. No. 1999CF715**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. BINTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. In 2000, David Bintz was convicted of first-degree intentional homicide, as party to the crime. Six years later he moved for a new trial on the grounds of newly discovered DNA evidence. The circuit court denied

the motion, concluding the DNA evidence does not present a reasonable probability that a different result would be reached in a new trial. We affirm.

BACKGROUND

¶2 Sandra Lison, a bartender at the Good Times Tavern in Green Bay, disappeared after her shift on August 2, 1987. The following morning, employees found her car in the parking lot and almost $2,600 missing from the register. Two days later, her body was discovered in the Machickanee Forest north of Green Bay. Her nylons and slip were pulled off, her underwear was partially removed, and all but two buttons on her dress were unbuttoned. The medical examiner determined the cause of death was strangulation, though she had been beaten as well. He also determined, based on semen on Lison's underwear, dress, and in her vagina, that she had sexual intercourse shortly before she died. He determined there was a seventy-five percent probability the intercourse occurred within twenty-four hours of her death, with a ninety percent probability it occurred within forty-eight hours of her death.

¶3 As part of the murder investigation, police canvassed the area around Good Times and spoke with Bintz, who lived near the bar. Bintz stated he drove his brother Robert Bintz and friend Vince Andrus to Good Times to buy beer the evening Lison disappeared. He said he made a threatening telephone call to the bar later that evening because he and his brother were angry about the price Lison charged them. Bintz was not, however, pursued as a suspect. Police continued to investigate the murder, but it went unsolved.

¶4 Eleven years later Bintz was incarcerated for a conviction unrelated to this case. One night, Bintz's cellmate, Gary Swendby, awoke when he heard Bintz yell in his sleep, "Kill the bitch, Bob. … Make sure she's dead." Swendby

later asked Bintz about what he had said, and Bintz confessed he had participated in Lison's murder. Bintz divulged details of the crime to Swendby and other prisoners on several later occasions.

¶5 Swendby reported the information he learned from Bintz to correctional officers, who relayed it to the police. Detective Robert Haglund interviewed Swendby, and Swendby signed a statement describing what Bintz had told him. According to the statement, Bintz and his brother had been angry about the price Lison had charged them for beer, so they went back to rob her and took about $2,000 from her. Because they feared she would identify them, they killed her, put her in the trunk of a car, disposed of her body in woods north of Green Bay, and then destroyed the car.

¶6 Haglund confronted Bintz with Swendby's statement, and Bintz confirmed its truthfulness. Haglund then asked Bintz if he was present when Lison was killed, and Bintz replied he was not. When Haglund pointed out to Bintz his responses were contradictory, Bintz pointed at Swendby's statement and said, "that's what I said. That's what I did. You got it right there. What more do you need." Later, Bintz told Haglund his brother killed Lison by hitting her in the stomach and head and strangling her. Both Bintz and his brother were charged with first-degree intentional homicide, as party to the crime.

¶7 At the trial, the jury heard testimony about forensic analysis of the semen from Lison's dress, underwear, and vaginal swabs and of a bloodstain on her dress. A crime lab analyst testified DNA testing determined all of the semen samples came from the same man, but it excluded the Bintz brothers and their friend, Andrus, as sources.

¶8 The analyst also testified the lab was unable to extract DNA from the bloodstain on Lison's dress. However, Haglund testified that a 1987 blood analysis of the stain excluded Lison and the Bintz brothers as sources of the bloodstain.

¶9 Bintz argued the lack of connection between him, the semen, and the bloodstain proved his innocence. He argued the condition of Lison's body—with her nylons off, underwear partially removed, and dress mostly unbuttoned—indicated she had been sexually assaulted. This theory was further supported, he contended, by evidence of leaves and dirt in her underwear, and pieces of grass in her pubic hair. Bintz asserted that, combined with the bloodstain and proof of recent sexual intercourse, this evidence strongly suggested Lison had been violently assaulted in the woods and then murdered. Because Bintz was not the source of either the bloodstain or semen, he argued he could not be the killer. Further, because his brother and Andrus were not sources either, he contended he could not have been party to the crime.

¶10 The State countered that while Lison likely had sexual intercourse within a day or two of her murder, the intercourse was consensual and unrelated to the crime. For support, it relied on Lison's autopsy, which did not reveal any indication of forced intercourse. The postmortem examination revealed wounds consistent with her body having been dragged, and the State argued that not only could this account for the state of her clothes, but it also contradicted Bintz's theory that Lison was assaulted and murdered in the woods. The State also contended the degraded condition of the bloodstain on her dress indicated it predated, and was therefore unrelated to, Lison's murder.

¶11 Thus, the State's theory was, as Swendby had related, that Bintz and his brother were angry with Lison for overcharging them, so they robbed and killed her. To that end, it presented the testimony of Swendby and other inmates regarding inculpatory conversations Bintz had with them. The State also presented Haglund's testimony about what Bintz said when confronted with Swendby's statement, and of the police officer to whom Bintz admitted making a threatening call the night Lison disappeared. The jury found Bintz guilty.

¶12 Six years later, Bintz obtained additional DNA testing. Specifically, a DNA analyst determined the bloodstain almost certainly "is a mixture of DNA from the victim, the male who contributed the sperm found on the victim's vaginal swab, and a 3rd unknown, unrelated individual." In other words, Lison's sexual partner most likely contributed to the bloodstain.

¶13 Bintz moved for a new trial, arguing this evidence undermined the theory the State presented at trial, and that he should therefore be granted a new trial. The circuit court disagreed, concluding the new evidence was not material and did not add much to the trial evidence. Bintz appeals the order denying his motion.

ANALYSIS

¶14 To be entitled to a new trial on the basis of newly discovered evidence, a defendant must first prove four factors by clear and convincing evidence: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citations omitted). If the defendant

proves all four factors, then "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.***, ¶44.

¶15 The State concedes the circuit court erred by concluding the new DNA evidence was not material.[1] Therefore, the only question on appeal concerns the court's determination that there was not a reasonable probability Bintz would not be convicted in a new trial. We review a court's conclusion of whether newly discovered evidence warrants a new trial for an erroneous exercise of discretion. ***State v. Edmunds***, 2008 WI App 33, ¶8, 308 Wis. 2d 374, 746 N.W.2d 590. We will uphold a court's exercise of discretion "if it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision." ***Id.*** The correct legal standard here "is whether there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." ***Id.***, ¶22 (internal punctuation and citation omitted).

¶16 Bintz's argument is essentially two-pronged. The first part concerns what the new DNA analysis adds to the theory Lison was sexually assaulted. He contends the new evidence is so probative that when added to the old evidence, it supports the conclusion that Lison had been sexually assaulted. The second part of Bintz's argument attacks the integrity of the evidence on which he was convicted. The circuit court rejected both of these arguments, concluding the new evidence added very little to what the jury already knew, and that the "alleged defects in the State's case … were in fact … argued to the jury." It continued:

> All of the questions that are argued to me about the State's case were really submitted to … this jury, and so … I am not satisfied that adding this evidence into the mix that

[1] The circuit court found the other three factors were present.

> there is a reasonable probability … that another jury would arrive at a different result.

1. Value of the new evidence

¶17 As stated, the circuit court determined the new evidence added little to what the jury already knew. This determination was reasonable and based on relevant facts in the record. The jury knew Lison had sexual intercourse within a day or two of her murder and that Bintz had been excluded as a source of the semen. The jury also knew there was a small bloodstain on Lison's dress containing blood from an unknown individual. Therefore, the jury could have concluded from the evidence presented at trial exactly what Bintz is arguing it could reasonably conclude now: that an unknown assailant—responsible for both the bloodstain and the semen—sexually assaulted Lison and then killed her.

¶18 Nevertheless, Bintz contends the new DNA analysis now compels the conclusion his theory of Lison's murder was correct—but he does not explain how. Instead, he reiterates simply that "the evidence available at trial supports the theory Lison was sexually assaulted."

¶19 What Bintz ignores is that the evidence presented at trial also supports the opposite theory: that Lison was not sexually assaulted. The medical examiner who conducted Lison's autopsy, Dr. Darrell Skarpohl, testified he found no bruises, abrasions, swellings, or lacerations on Lison's labia or external vaginal cavity. He also testified he found no evidence of trauma to Lison's internal genitalia. While Skarpohl acknowledged his findings did not conclusively prove either that the intercourse was consensual or forced, he testified he found no

physical evidence showing it was forced.[2] Skarpohl also testified that postmortem injuries to Lison's body were consistent with her body having been dragged, supporting the inference this was how Lison's clothes were partially pulled off and dirt and leaves got into her underwear.[3]

¶20 More problematic for Bintz, though, is that he fails to explain how evidence of a connection between the bloodstain and Lison's sexual partner—a connection not excluded by the original evidence—creates a reasonable probability a jury would not convict him now. Instead, he simply asserts that the new evidence would require proof of the following: (1) Lison had consensual intercourse with an unknown male within two days of the murder; (2) the intercourse was so violent it drew blood from her partner; and (3) afterwards, Lison neither changed clothes nor washed herself.

[2] Bintz repeatedly offers the misleading assertion that Skarpohl told police that he "definitely felt that [Lison] had been sexually assaulted." The context for this claim is a case activity report written by Agent Louis Tomaselli, who reported that Skarpohl told him "when he observed the body he definitely felt that she had been sexually assaulted." However, the report goes on to explain that Skarpohl then obtained a number of vaginal swabs. It concludes: "[H]is examination did not reveal any unusual tears or bruises to the victim's vaginal or rectal area and he therefore felt that she possibly had sex, but it was not of a violent nature wherein any objects were used on her." When Skarpohl was asked at trial about whether he had told Tomaselli he definitely felt there may have been a sexual assault, he responded that he did not remember this. He clarified, "Well that's what he said I said. … Certainly sexual assault is a possibility, you know. I can't exclude that." Skarpohl's testimony concerning his conclusions was unequivocal: that there was no evidence to prove the intercourse was forced, but he could not absolutely exclude the possibility.

[3] Bintz argues that detectives could not find evidence around the crime scene that Lison had been dragged. But the jury knew this at Bintz's trial and evidently determined the evidence she had been killed and transported to the woods outweighed the evidence she was sexually assaulted and killed where her body was found. The new DNA analysis does not make it more likely a jury would determine the lack of drag marks on the ground outweighed Skarpohl's conclusion Lison had sustained post-mortem injuries consistent with being dragged.

¶21 We disagree. First, Bintz's argument depends on the inferential leap that the reason DNA in the dress bloodstain matched the DNA of her sexual partner is that the intercourse was so violent it drew blood from her partner.[4] More importantly, though, the jury was already asked to reconcile evidence of both a bloodstain and semen of unknown provenance with the hypothesis that neither were related to the crime. While proof the semen and bloodstain contained DNA from the same man might lend more weight to the inference they were connected to her murder, this is not substantially different from evidence the jury already considered.

2. Integrity of the trial evidence

¶22 Bintz's arguments about the integrity of the trial evidence also fail to explain why the new DNA analysis casts doubt on the likelihood a jury would now convict him. Instead his theory seems to be that *any* new evidence supporting his theory creates a reasonable probability of a different result because the State's case was weak from the beginning. To this end, he minimizes the value of "jailhouse informant" testimony and Bintz's own incriminating statements to investigators.

[4] The State implied the degenerated condition of the bloodstain indicated it predated the crime. Bintz suggests the new evidence debunks this. Evidence linking the DNA in the bloodstain to the semen, however, is not evidence the stain and the semen were left contemporaneously.

¶23 Bintz argues the testimony of jailhouse informants is unreliable in general and was flawed in this specific case.[5] But the only link Bintz suggests between the credibility of the informants and the new DNA analysis is that the new evidence strengthens his case and it is therefore less likely a jury would believe the testimony of inmates who testified about his guilt. This is a dubious conclusion. The new DNA evidence may establish a fact favorable to Bintz's theory of the case. But it only undermines the credibility of the inmate witnesses to the extent it proves Lison had violent sexual intercourse shortly before she died.

¶24 Bintz also argues his statements to investigators are unreliable because of his cognitive limitations and the stress he was subjected to during interrogation. But this issue was fully litigated as well. The jury heard testimony about Bintz's mental abilities as well as the details of his interrogation. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990) (trier of fact is free to choose among conflicting reasonable inferences from the evidence).[6]

¶25 While Bintz cloaks his argument in the proposition that the new evidence creates a reasonable probability a jury would reach a different result, what he is really arguing is that the original evidence on which he was convicted was flawed. That is not the standard for whether new evidence warrants a new

[5] Bintz cites scholarly articles as well as data to show that jailhouse informant testimony is "one of the most dangerously unreliable kinds of evidence." However, he cites no authority for the notion that a jury's determination of a jailhouse informant's credibility is not entitled to the same deference we would accord its determination of any other witness. The jury is the ultimate arbiter of credibility, ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990); therefore, we generally defer to the jury's determination of whether any witness—inmate or not—is believable.

[6] Bintz also argues evidence of the threatening telephone call he made to Good Times provided little evidence of intent to commit a homicide. Like the value of the jailhouse informant testimony and his own incriminating statements, however, this too was fully litigated at trial.

trial. The standard is whether the new evidence, when considered with the old evidence, creates a reasonable probability a jury would reach a different result. The circuit court determined it did not. We conclude this decision was reasonable, and based on the relevant facts and the proper legal standard. Accordingly, the court's denial of Bintz's request for a new trial was not an erroneous exercise of discretion.

¶26 In the alternative, Bintz asks that we exercise our discretionary power, under WIS. STAT. § 752.35, to grant a new trial in the interest of justice. Because we are persuaded the new DNA analysis adds little to the evidence presented and issues litigated at trial, we conclude the real controversy has been fully tried. We therefore decline to grant Bintz a new trial.

By the Court.—Order affirmed.

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