

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2010AP3019-CR

Cir. Ct. No. 2007CF2248

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOSEPH HAMMER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
GLENN H. YAMAHIRO, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. The State of Wisconsin appeals from a postconviction court order granting Joseph Hammer's motion for a new trial and ordering a hearing to vacate the judgment of conviction. At issue in Hammer's postconviction motion was trajectory rod evidence that the trial court permitted

into evidence at trial, even though the State admitted that it failed to produce the evidence during discovery, in violation of WIS. STAT. § 971.23(1)(g) (2009-10).¹ The postconviction court concluded that the trial court erroneously exercised its discretion by admitting the evidence, not based upon the discovery violation, but because the evidence lacked sufficient foundation and because admission of the evidence prejudiced the defense.² We do not directly address the propriety of the postconviction court's reasoning that the evidence lacked foundation because the issue of proper foundation was never raised before the trial court and because we conclude that other grounds exist for affirming the reversal by the trial court. We affirm the postconviction court because the State admits it violated the discovery statute and because we agree with the postconviction court that admission of the trajectory rod evidence was not a harmless error. *See State v. Tolefree*, 209 Wis. 2d 421, 424 n.3, 563 N.W.2d 175 (Ct. App. 1997) (We may affirm the postconviction court on grounds other than those addressed by that court.). Consequently, we remand the case back to the trial court for proceedings consistent with the postconviction court's order.

BACKGROUND

¶2 In April 2007, Jeanette Korhonen and her boyfriend, Thomas LaRonge, were living in the lower unit of a house located at 2032 South 17th Street on the south side of Milwaukee. Hammer's sister, Tammy Malone, lived

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² The Honorable William Sosnay presided over trial, admitted the challenged trajectory rod evidence, and entered the judgment of conviction. The Honorable Glenn H. Yamahiro entered the order granting Hammer's postconviction motion for a new trial.

across the street. Korhonen, Hammer, and Malone had been acquaintances during childhood and had known each other for years. However, the relationship between Korhonen and Hammer had been tense after Korhonen and her cousins purchased marijuana from Hammer a year earlier and were dissatisfied with their purchase. According to Korhonen, a week after the purchase, the windows in Korhonen's home were broken. She saw Hammer running from the scene, and she reported him to the police. From then on, Korhonen and Hammer had not been on good terms.

¶3 On April 29, 2007, Korhonen and LaRonge were sitting on their front porch while Hammer was outside of his sister's house across the street. According to Korhonen, Hammer asked her to come across the street, but she declined, and LaRonge told Hammer that, if he wanted to talk, he should come over to Korhonen and LaRonge's house. Eventually, Hammer, Korhonen, and LaRonge met in the middle of the street where they had a verbal altercation. The altercation was never physical and involved only yelling. Hammer eventually left, but Korhonen heard him say, "I'm coming back. I'm coming back."

¶4 A short time later, a car driven by a friend of Hammer's passed by Korhonen and LaRonge's house and then stopped. Korhonen and LaRonge later testified that they saw Hammer exit the car, pull out a gun, and begin shooting. Neither Korhonen nor LaRonge were hit by the bullets. The police found six bullet casings in the street, but they did not find any bullets or bullet holes in Korhonen and LaRonge's house or porch.

¶5 The house next door to Korhonen and LaRonge's was set further back from the street and had a front yard. During the police investigation, the police observed three holes in the siding of the house two doors down from

Korhonen and LaRonge's house, the house next to the house set back from the street. The police speculated the holes were created by bullets from the shooting, but took no action to confirm their suspicions.

¶6 The State charged Hammer with two counts of attempted first-degree intentional homicide and the case went to trial. After voir dire, but just before opening statements, the State turned over to the defense a series of photographs taken by police of the house two doors down from Korhonen and LaRonge's house. The pictures depicted the three alleged bullet holes in the siding of the home, with "some green rods in them." The "green rods" were trajectory rods and were used by police to determine the angle at which the bullets allegedly entered the home.

¶7 The defense objected to the admission of both the testimony about the trajectory rod investigation and the photographs of the investigation³ because the State had not informed the defense of any such investigation until that morning, in violation of WIS. STAT. § 971.23(1)(g), Wisconsin's discovery statute, and because admission of the evidence would undermine Hammer's defense that the State had no physical evidence that he intended to kill Korhonen or LaRonge.⁴ The defense told the trial court that, prior to that morning, the State had only informed the defense that the police had *observed* what "appear to be three bullet

³ We note that while the photographs of the trajectory rod investigation were marked as exhibits and entered into evidence, they were not included as part of the record transmitted to us on appeal.

⁴ In order to prove that Hammer committed attempted first-degree intentional homicide, the State had to prove, beyond a reasonable doubt, that Hammer *intended* to kill Korhonen and LaRonge during the incident in question. *See* WIS. STAT. §§ 939.32(1) & 940.01(1); *see also* WIS JI-CRIMINAL 1070.

strikes” in a neighboring house, but that the State had not informed the defense that the police had *investigated* either the origin of the holes or the trajectory of any bullets that may have created the holes. The defense further explained that the trajectory rod evidence bolstered the State’s case and harmed the defense because:

the argument can be made that the way the houses are laid out, the house right next to [Korhonen and LaRonge’s house] is ... set far back, there is no, really, house right next to [Korhonen and LaRonge’s house]. So the bullets [if shot at Korhonen and LaRonge’s house from the street] could go right through [Korhonen and LaRonge’s] porch and into that wall [in the house two doors down, or] theoretically could.

The State informed the court that it first received the photographs of the trajectory rod investigation that morning, and that it was “always shocked” at what shows up the first day of trial.⁵

¶8 The trial court stated:

Well, it shouldn’t [shock you]. Having done this, I can tell you why it happens. After the case is issued, it’s like Las Vegas until the preliminary or day of the trial and when everybody starts to get ready for the case, unless there is some unusual circumstances. That’s why those things have to be tied up at or before the time the case is issued. Because after it’s issued, they don’t happen unless everybody gets going and gets prepared for trial. And that’s why they come up at this point. This is not meant as a criticism. It’s an observation, because it’s been going on since the beginning of time and is one of those things that should not happen, but it does. We have it in every trial.

⁵ Hammer also mentions, in passing, a police report of the trajectory rod investigation that he received later during the trial, after opening statements. However, the State informed the trial court that it did not intend to use the report during the trial and Hammer has not argued that the State did in fact use the report contrary to its representations. Consequently, we do not consider the report in rendering our decision.

I am going to allow it, however, because it has been produced before the trial. I'm not sure what the defense's position is, per se, in terms of that evidence or those photos, other than that they didn't receive it before and, had they received it before, what they would have done with it any different than what they're going to do now as very capable counsel as both of you are. You're going to approach it in the same way that you would if you had received it three months ago.

¶9 Trial commenced, and, as relevant to this appeal, Korhonen, LaRonge, Officer Joshua R. Koopmeiners, Detective Douglas Williams, and Detective Dale Bormann, Jr., all testified.

¶10 Korhonen testified that, about fifteen minutes after her verbal altercation in the street with Hammer, she observed a car stopping a couple of houses down from her home. She observed Hammer get out of the passenger side of the car and walk towards her house. Korhonen testified that Hammer “[h]ad a beer in his left hand and was fumbling for something, pulled a gun out, and started shooting at us.”

¶11 Korhonen could not say for certain how close Hammer came to her, but said “pretty damn close,” “[d]irectly in the middle of the street.” She testified that when the first shot was fired, LaRonge grabbed Korhonen's hand and they “ran. ... [LaRonge] ran first. ... I was stuck out there in between the porch ... and [Hammer] pretty much kept shooting. And then when [Hammer] got to the front of the house, he just started still shooting and there was no bullets in it.” Because Korhonen could not make it into the house, after she heard the gunshots, she crouched down in the corner of the porch with her hands balled up in fists and placed over her eyes. Korhonen testified that Hammer did not say anything while shooting, but that he was aiming at “[m]e and my boyfriend [LaRonge].”

¶12 Korhonen testified that she was not shot during the incident and that she did not observe any damage to her house or porch. Korhonen looked for physical evidence of Hammer's shooting at her home, but did not find bullet holes or bullets.

¶13 LaRonge corroborated Korhonen's testimony. According to LaRonge, he observed Hammer get out of the passenger side of a car that stopped one house north of the home he and Korhonen shared. When LaRonge saw Hammer pull out the gun, he grabbed Korhonen's hand, but the two were separated, and LaRonge ran into the house while Hammer was still shooting. LaRonge testified that he was outside while four shots were fired, and he was inside while two shots were fired, but that, despite running away from Hammer and being in the house for at least two of the shots, he saw and heard six shots, muzzle flashes, or sparks coming from Hammer's gun. LaRonge testified that Hammer was firing the gun "[t]owards us," but admitted he did not know if Hammer intended to kill them.

¶14 Officer Koopmeiners testified that, around 8:45 p.m., he and his partner were the first police officers to respond to the scene of the shooting. They secured the scene and looked to recover possible evidence. Officer Koopmeiners found six bullet casings in the middle of the street in front of Korhonen and LaRonge's house, but he did not find any bullets.

¶15 Detective Williams testified that he arrived at the scene the night of the shooting around 10:00 p.m. He testified that while searching for bullets, he located what he thought could be bullet strikes on a house a few doors down from Korhonen and LaRonge's house. The State used the trajectory rod photographs to help Detective Williams depict for the jury where the three alleged bullet holes

were located in the neighboring house. Detective Williams testified that he did not believe any alleged bullets penetrated the interior of the neighboring house, but that he did not take the siding off the house to look for bullets. Detective Williams admitted that he was not a ballistics expert and did not have any training in trajectory.

¶16 Detective Bormann testified that he too arrived at the scene around 10:00 p.m. the night of the shooting. He also testified that no bullets were recovered from Korhonen and LaRonge's home or from anywhere else.

¶17 Detective Bormann further testified that two days after the shooting he returned to the scene to look at the holes Detective Williams had located on the house two doors down from Korhonen and LaRonge's home. Detective Bormann explained that he and his partner placed trajectory rods in the holes to show the path the alleged bullets may have taken to strike the house. By looking at the angle of the rods, Detective Bormann testified that he believed the bullets came from approximately in front of Korhonen and LaRonge's house. The State used the photographs of the trajectory rod investigation to assist Detective Bormann testify about the investigation.

¶18 Detective Bormann testified that he was not a ballistics expert, did not have any training in the use of trajectory rods, and there was no scientific basis for his opinion as to how the alleged bullet holes were created. Detective Bormann also testified that he did not officially know whether the holes that the trajectory rods were placed in were bullet holes and that neither he, nor any other police officer that he was aware of, pulled the siding off the neighboring home or entered the home to try to recover any bullets, even though they had the ability to do so.

¶19 The jury found Hammer guilty of two counts of attempted first-degree intentional homicide, and the trial court sentenced him to eighteen years of initial confinement followed by twenty years of extended supervision. Judgment was entered accordingly.

¶20 In June 2010, Hammer filed a postconviction motion for a new trial on the grounds that the State did not comply with his discovery demand in violation of WIS. STAT. § 971.23, prejudicing his defense and violating his due process right to a fair trial. Hammer argued that had the State timely notified him of the trajectory rod investigation he could have retained an expert witness to rebut the evidence and more effectively cross-examined witnesses, such as Detective Bormann. The State, in its response to Hammer's motion, conceded that it violated the discovery statute by failing to divulge that the police performed a trajectory rod investigation ten months before trial but argued that the error was harmless.

¶21 In a written decision and order, the postconviction court granted Hammer's motion for a new trial but not on discovery grounds as the parties argued. Instead, the postconviction court concluded that the trial court erroneously exercised its discretion by not excluding the trajectory rod evidence because it lacked foundation. The postconviction court stated:

The problem with the trajectory rod investigation evidence is that there was no foundation for it, and therefore, the court finds that it should not have been admitted at trial. It was never established that the holes found in the other house were connected with the shooting incident. No bullets were recovered from the holes (let alone bullets from the defendant's gun) and it was never determined that the holes were actually *bullet* holes or when they were made.

The postconviction court went on to state that “[t]he trajectory rod evidence severely undermined the defendant’s defense, which was predicated upon the *lack* of ballistics evidence, and the defendant had no opportunity to rebut this evidence with a true ballistics expert.” The postconviction court added that the “trajectory rod evidence offered the missing link in the State’s evidence because it placed the defendant facing the front porch and shooting at the victims.” The postconviction court concluded by saying, “[t]here is no way of knowing how this evidence contributed to the jury verdict, and therefore, the court cannot conclude that the admission of this evidence was harmless error. Accordingly, the court finds no way of rectifying this situation short of ordering a new trial.” The State appeals.

DISCUSSION

¶22 The State argues that the trial court properly exercised its discretion when it admitted the trajectory rod evidence, despite the State’s admission that it failed to produce the evidence during discovery as required by WIS. STAT. § 971.23(1)(g), because Hammer was not prejudiced by admission of the evidence. The State goes on to contend that the postconviction court then erred in granting Hammer a new trial based upon its *sua sponte* conclusion that the State failed to present sufficient evidence to lay a proper foundation for the trajectory rod evidence, an issue that was never raised by the parties either before the trial court or the postconviction court. However, whether we choose to address the admission of the trajectory rod evidence as a discovery matter or a lack-of-foundation matter, the State submits that ultimately the issue before this court is whether admission of the trajectory rod evidence prejudiced the defense. Because we conclude that admission of the trajectory rod evidence did prejudice the defense and because the State admits that it violated the discovery statute, we affirm the postconviction court.

¶23 Our review of an alleged discovery violation presents questions of law, each of which we review *de novo*. *State v. Harris*, 2008 WI 15, ¶15, 307 Wis. 2d 555, 745 N.W.2d 397. First, we must determine if the State actually violated the discovery statute. See WIS. STAT. § 971.23; *State v. DeLao*, 2002 WI 49, ¶14, 252 Wis. 2d 289, 643 N.W.2d 480. If the State violated its statutory obligations under § 971.23, we next determine if the State showed good cause for its violation. *Harris*, 307 Wis. 2d 555, ¶15. Finally, if the State does not show good cause, we must determine whether the defendant was prejudiced by the untimely disclosure. *Id.*

¶24 Here, the State concedes that it failed to inform the defense about the trajectory rod investigation or produce the photographs of the investigation in a timely matter as required by WIS. STAT. § 971.23(1)(g), and the State does not offer any explanation for its failure to do so. Instead, the State argues that admission of the evidence was harmless. We disagree.

¶25 The Wisconsin Supreme Court “has formulated the test for harmless or prejudicial error in a variety of ways.” *Harris*, 307 Wis. 2d 555, ¶42. The court has recognized the test set forth in *Chapman v. California*, 386 U.S. 18 (1967), which states that an “error is harmless if the beneficiary of the error proves ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Harris*, 307 Wis. 2d 555, ¶42 (citation omitted). The Wisconsin Supreme Court later declared the standard to be “whether the State’s nondisclosure of the evidence sufficiently undermines the court’s confidence in the outcome of the judicial proceeding.” *Id.* “‘In recent years, [both] the United States Supreme Court and [the Wisconsin Supreme Court], while adhering to the *Chapman* test, have also articulated alternative wording,’” stating that the “test for

harmless error asks whether it is ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.’” *Harris*, 307 Wis. 2d 555, ¶43 (citations omitted).

¶26 We consider several factors when determining whether an error was harmless or prejudicial: “the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature ... and the overall strength of the State’s case.” *Id.*, ¶45. Keeping these factors in mind, we conclude that under any of the tests articulated above, the admission of the trajectory rod evidence in this case was not harmless.

¶27 First, the trajectory rod evidence severely undermined Hammer’s defense. Hammer’s defense at trial was that the State failed to prove beyond a reasonable doubt that Hammer *intended* to kill Korhonen and LaRonge the day of the shooting. The defense hinged on the fact that Korhonen and LaRonge were unreliable witnesses and that the State had no physical evidence to corroborate their testimonies that Hammer was shooting *at* them with an intent to kill, as opposed to away from them in an attempt to scare them. The photographs and testimony of the trajectory rod investigation placed Hammer in the street and aiming his gun at Korhonen and LaRonge on their porch, corroborating their testimonies and giving an aura of science to the State’s theory that Hammer was shooting to kill.

¶28 Second, we agree that neither Korhonen’s nor LaRonge’s testimonies were particularly persuasive with regard to Hammer’s intent to kill.

While both Korhonen and LaRonge testified that they believed Hammer was shooting *at* them, both also testified that they had a history of bad blood with Hammer and that their ability to observe Hammer during the shooting was compromised. For instance, Korhonen testified that after the first shot she ran and crouched down in a corner of the porch with her hands balled up in fists and placed over her eyes. LaRonge testified that at the sight of the gun, he ran into the house away from Hammer and was in the house for at least the final two shots, leaving a factfinder to question how he allegedly observed six muzzle flashes or sparks from Hammer's gun. Moreover, both Korhonen and LaRonge testified that neither of them was injured during the shooting and they did not find any bullets or bullet holes on their porch or in their home to corroborate their stories that Hammer was aiming at them.

¶29 Third, the State's failure to provide Hammer with the evidence of the trajectory rod investigation in a timely manner prohibited him from effectively rebutting the evidence with an expert witness. The purpose of the discovery statute "is to enable [the defense] to prepare for trial," *State v. Schroeder*, 2000 WI App 128, ¶9, 237 Wis. 2d 575, 613 N.W.2d 911, and "to save [the trial] court time in trial and avoid the necessity for frequent interruptions and postponements," *State v. Revels*, 221 Wis. 2d 315, 330, 585 N.W.2d 602 (Ct. App. 1998) (citation, quotation marks, and brackets omitted). Hammer was unable to properly prepare here because of the State's admitted violation.

¶30 Hammer contends that, had he been aware that the State had performed an investigation of the holes in the neighboring home, he would have called John Thorpe, a firearms and toolmark examiner for International Forensics Services, who had previously worked in that capacity for the State Crime Lab in

Wisconsin and the United States Army Criminal Investigation Laboratory, to testify on Hammer's behalf. In an affidavit submitted to the postconviction court, Thorpe states that he reviewed portions of the record, including the police reports and photographs of the police trajectory rod investigation, and that, in his opinion:

the trajectory rod investigation conducted in this case, could not and cannot reliably yield the conclusions that it purported to yield, for the following reasons:

- a. the size of the bullet holes was not determined;
- b. the size of the trajectory rods was not given;
- c. bullets were never recovered from the scene;
- d. without measurement of the holes in question, the proper size trajectory rod could not be determined, allowing for an incorrect reading of the alleged bullet path;
- e. a trajectory rod that was too small would yield an incorrect trajectory;
- f. a trajectory rod that was too large would damage the questioned holes, allowing for an invalid trajectory determination and precluding any further examination;
- g. the fact no bullets were recovered indicates that the holes in question are assumed to be bullet holes based on the cartridge cases found in the street;
- h. [t]he approximate trajectory of the bullets could have been determined by qualified crime scene processing personnel, however, the lack of performing d. through g. would indicate that the crime scene was not properly processed; and
- i. the approximate location of the alleged shooter in this case could have been determined by using the ejection pattern of the firearm in question.

Hammer could have used Thorpe's testimony to undermine the detectives' investigation of the holes in the neighboring home, thereby undermining their conclusion that the holes were created by Hammer while shooting at Korhonen and LaRonge on their porch. However, Hammer was denied that opportunity when he was not presented with the evidence in a timely manner.

¶31 In sum, we cannot conclude beyond a reasonable doubt that the admission of the trajectory rod evidence at trial did not lead to the guilty verdict. *See Harris*, 307 Wis. 2d 555, ¶42. Without the trajectory rod evidence, the principal evidence of Hammer's intent was Korhonen's and LaRonge's testimonies and they both admitted to feuding with Hammer and to having a compromising view of the shooting. The only other evidence was the presence of holes, which may or may not have been bullet holes, of an undetermined age, in a neighboring house's siding—hardly corroboration of the witnesses' testimonies as to aim and intent. By admitting the trajectory rod evidence without proper notice, the trial court permitted an aura of scientific corroboration to the testimony of Korhonen and LaRonge, which significantly harmed the defense, and denied Hammer the opportunity to rebut the harmful evidence. Thus, we cannot say, beyond a reasonable doubt, that the admission of the trajectory rod evidence did not lead to the guilty verdict.

¶32 Furthermore, we find it troublesome that it took the State ten months to turn evidence of the trajectory rod investigation over to the defense. While the trial court seemed to accept this discovery violation in due course, we do not. WISCONSIN STAT. § 971.23(1)(g) requires the State to turn over to the defense “within a reasonable time before trial” “[a]ny physical evidence that the [State] intends to offer in evidence at trial.” The State failed to do so here, without any

good reason, and Hammer was prejudiced as a result. Consequently, we affirm the postconviction court, albeit, on different grounds, and remand the case back to the trial court for proceedings consistent with the postconviction court's order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

