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October 22, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2011AP1803-CR State of Wisconsin v. General Grant Wilson
(L.C. #1993CF931541)

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

General Grant Wilson appeals a judgment convicting him of first-degree homicide and attempted first-degree intentional homicide, both while possessing a dangerous weapon. He also

appeals an order denying his motion for postconviction relief.[1] Wilson argues that he was denied a meaningful opportunity to present a complete defense during his criminal trial because the circuit court would not allow him to introduce evidence that someone else killed Evania Maric, the victim. *See* ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986). We summarily reverse the judgment of conviction and order denying postconviction relief, and remand for further proceedings.

Maric was repeatedly shot with two different guns while seated in a parked car in front of an illegal "after hours" club between 5:00 a.m. and 5:10 a.m. on April 21, 1993. Willie Friend, who was dating Maric, was with Maric in the car when she was shot, but fled without being injured. Friend told the police that Wilson, who had also been dating Maric, opened fire on both of them, killing Maric. Friend was the only person to link Wilson directly to the crime. Wilson adamantly denied killing Maric and said that he was at home asleep when the murder occurred.

The State charged Wilson with first-degree intentional homicide for killing Maric and attempted first-degree intentional homicide for shooting at Friend. At trial, Wilson's lawyer, Peter Kovac, repeatedly attempted to introduce evidence implicating Friend and/or his brother Larnell Friend, who operated the "after hours" club where Maric was killed, but the circuit court refused to allow the evidence. The jury reached an impasse the first day of deliberations but, on further deliberation, convicted Wilson of the crimes. Wilson moved for postconviction relief,

[1] Wilson was convicted of these crimes in 1993, but this is his direct appeal from his conviction. We reinstated his right to a direct appeal on September 14, 2010, after we ruled that he received ineffective assistance of appellate counsel.

arguing that he should be granted a new trial because the circuit court did not allow him to introduce the evidence pointing to a third-party perpetrator. The circuit court denied the motion.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *See* ***Crane***, 476 U.S. at 690 (citation omitted). This includes "the right to present witnesses in [one's] defense." ***State v. Denny***, 120 Wis. 2d 614, 622, 357 N.W.2d 12 (Ct. App. 1984). "[A]n essential component of procedural fairness is an opportunity to be heard." ***Crane***, 476 U.S. at 690. Evidence that a person other than the defendant committed the charged crime is relevant to the issues being tried, and thus admissible, "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." ***Denny***, 120 Wis. 2d at 624.

In an offer of proof, Wilson called Mary Lee Larson, Maric's friend, who testified that Friend was physically violent toward Maric in the weeks before the murder and had threatened to kill her:

> [WILSON'S LAWYER, PETER KOVAC]: Did you, within the two weeks before Eva's death, ever hear Willie Friend make any threats against Eva?
>
> [LARSON]: Yes.
>
> [KOVAC]: What did you hear? Who was there, where was it and what did you hear?
>
> [LARSON]: It was in my house in the kitchen. Willie and Eva were sitting there, and me and my girlfriend Barb.
>
> THE COURT: And what?
>
> [LARSON]: Were sitting at my kitchen table. Willie and Eva had come over. And Willie stated right to me and my girlfriend that he had to keep Eva in check. If--

THE COURT: He said what?

[LARSON]: Eva. He said he had to keep Eva in check.

THE COURT: Oh.

[LARSON]: If he didn't keep – if she wouldn't be in check, he'd kill her, and she knew it.

BY MR. KOVAC:

[KOVAC]: And did Eva respond to that?

[LARSON]: She said yes, he would.

[KOVAC]: Okay. Did you – During this time or about this time, did you ever observe any physical contact between Eva and Willie?

[LARSON]: Yes, I had.

[KOVAC]: What did you observe in that regard? Tell us.

[LARSON]: It was at a motel room. And he went and was slapping her right in front of us.

[KOVAC]: Okay.

[LARSON]: There was quite a few of us there.

[KOVAC]: All right. Thank you.

Kovac informed the circuit court that Barbara Lange, another of Maric's friends, was also prepared to testify that she saw Friend hitting Maric in the weeks before the murder and heard Friend threaten to kill Maric.[2] During the offer of proof, Officer Michael Dubis also testified that he had questioned Mary Larson and Barbara Lange in connection with the homicide, and

[2] Lange subsequently testified about other matters at trial, but the circuit court would not allow Kovac to ask her questions about Maric's relationship with either Willie or Larnell Friend.

they had both told him that they observed Friend slapping Maric shortly before the murder and they both thought Friend was involved in Maric's death, not Wilson.[3]

Expressing skepticism with the ***Denny*** decision, the circuit court refused to allow the evidence. The circuit court acknowledged that the testimony was relevant to Wilson's defense theory because it tended to show that Friend had a motive for killing Maric, but concluded that the evidence should not be allowed, reasoning:

> [THE COURT]: The issue is really not who did it. The issue is whether the defendant did it. That's the State's burden, to show that the defendant committed this offense. The statement by this witness about what happened sometime previous is, I believe, hearsay. And even though it might support what the defendant wants to put in a theory of defense, that Willie Friend had a motive and a reason for doing it and had on some occasions even threatened her, I understand that that's the defense position and that's the theory of defense. The issue is whether the defendant committed this offense or not.

The State concedes, as it must with this record, that the circuit court's reasons for refusing to admit the evidence were not a proper exercise of discretion, but contends that the circuit court's decision should nevertheless be upheld because it was ultimately correct, even if its reasoning was wrong. Turning to the ***Denny*** test for the admissibility of third-party

[3] The circumstances surrounding Officer Dubis's testimony during the offer of proof are unusual. Wilson's lawyer, Kovac, informed the circuit court that he did not learn until after trial began that Larson and Lange told the police that Friend had threatened Maric's life shortly before the murder because this information was not included in the police report summarizing the police interview with the two women. Kovac moved to dismiss on the grounds that the State failed to disclose exculpatory information. At that point, the prosecutor stated that the police officer who prepared the report, Officer Michael Dubis, was sitting next to her and "would testify that he's the person who interviewed this woman and that she never told him about any threats by Willie Friend against the victim." When the circuit court placed Dubis under oath, Dubis testified that both women told him about the incident several weeks before the murder during which Friend hit Maric in front of them and both told him they thought Friend was behind the murder, not Wilson, but Dubis also testified that he did not recall them telling him about a second incident, which is when the women said that Friend threatened to kill Maric.

perpetrator evidence, the State acknowledges that Wilson's offer of proof was arguably sufficient to establish that Friend had a motive. The State also acknowledges that Friend was present at the shooting scene, establishing that Friend had a direct connection to the crime based on his proximity. However, the State contends that Wilson did not establish that Friend had the opportunity to kill Maric. The State points to the testimony of Carol Kidd-Edwards, the only citizen eyewitness to the shooting, in support of this argument, and to the physical evidence, which the State contends corroborates Kidd-Edwards' testimony. Wilson takes the opposite view, arguing that Kidd-Edwards' testimony shows opportunity, and is consistent with his theory that Friend was involved with the murder.

Kidd-Edwards testified that she was dressing for work early in the morning when she heard about five loud gunshots. She threw herself on her bedroom floor because she did not know where the shots were being fired. When they stopped, she stood and looked out her window. She saw a man whom she later identified as Friend, whom she had never met but recognized from the neighborhood, running from a car parked across the street two houses north of her house. As Friend fled, she saw another man come from a "blind spot" in her view because of the angle at which she was looking at the street. The man came from the passenger's side around the front of a car stopped in the middle of the street next to the victim's parked car. The man walked toward the driver's side of the victim's car as he was loading a gun and shot repeatedly into the victim's car at close range. These shots were more rapid and not as loud as the first shots Kidd-Edwards heard, and Kidd-Edwards testified that she believed from the sound that the second gun was not the same as the first gun. Kidd-Edwards described the man as about six feet tall with a slight build, which she noticed because he wore a black leather waist-fitted jacket that tapered to the waist. She said that the man then walked in front of the car from which

he had come—he did not run—and went to the passenger's side, which was outside of her view. She then heard the car door shut and the car immediately drove away.

Contrary to the State's assertion, Kidd-Edwards' testimony does not establish that Friend did not have the opportunity to commit this crime. Her testimony places Friend at the scene when the first round of shots was fired, and is consistent with Wilson's contention that Friend was involved in the murder by luring Maric to a place where she would be ambushed. As for the physical evidence, it does not preclude Friend's involvement. There were bullet strikes in the concrete on either side of the sidewalk where Friend ran away. This evidence supports the State's contention that Wilson was shooting at Friend, but it also supports Wilson's contention that the intent was for Friend not to be harmed, but make it look as if he was in harm's way. Our review of the evidence shows that Friend had the opportunity to commit this crime, either directly by firing the first weapon or in conjunction with others by luring Maric to the place where she was killed. Under ***Denny***, Wilson should have been allowed to introduce evidence that Friend was involved in Maric's murder.[4]

The State contends that any error in excluding evidence that Friend was involved in Maric's murder is harmless. An error is not harmless in a criminal case if "there is a reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis. 2d 525, 543,

[4] Wilson also attempted to introduce evidence implicating Larnell Friend in the murder. In an offer of proof, Kovac contended that Maric had been working as a prostitute, that Larnell Friend was her pimp, that she was trying to get out of the business, and that Larnell Friend wanted her to continue to work for him and threatened to kill her as a result. This information was based on statements given to the police by Maric's mother. We do not address whether the circuit court should have allowed evidence pertaining to Larnell Friend's possible involvement in the murder because we conclude that Wilson is entitled to a new trial based on the circuit court's exclusion of evidence as to Willie Friend. If a decision on one point disposes of an appeal, we will not decide the other issues raised. ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716.

370 N.W.2d 222 (1985). "If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state. The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction." ***Id.*** (citation omitted).

Friend and Wilson were both romantically involved with Maric. Friend was the only person to directly link Wilson to the crime. Friend testified that Wilson threatened Maric earlier on the night of the shooting, and that Maric had been afraid of Wilson for several months. In direct contradiction, Wilson testified he and Maric had a good relationship, they were open about dating others, and she was not afraid of him. He introduced nine taped phone messages that Maric left him shortly before her murder, the last of which was only two days before she died, in which Maric seems at ease, makes casual conversation, and states that she loves Wilson "madly" and misses him because he had been away on vacation. Wilson also testified that Maric told him that if "something ever happened to her, that there would be the place," referring to the illegal club owned by Larnell and Willie Friend, whom he had never met.

Friend identified Wilson from a photo lineup, but testified that the shooter was left-handed and wore gold wire-rim glasses. Wilson testified, and called others to testify, that he had never worn gold wire rim glasses. Wilson testified, and called colleagues from the Army Reserve to testify, that he is right-handed and shoots a gun right-handed. Friend admitted at trial that he had made a telephone call from the courthouse before the preliminary hearing in which he had stated to his mother that he "had to get his story together" about what happened the night of the murder.

Two of Maric's friends, Mary Lee Larson and Barbara Lange, were willing to testify at trial that Friend was physically violent with Maric and threatened to kill her in the weeks leading up to the murder, and both told the police that it was their opinion that Friend was behind the murder, not Wilson. In his statement to police, Friend stated that he and Maric had not been in his brother's club the night of the murder. At the preliminary hearing, Friend testified the same thing. At trial, however, Friend admitted that he lied in his statement to the police and in his testimony at the preliminary hearing, and that they had, in fact, been in the club in the hours before the murder.

The only citizen witness to the shooting, Carol Kidd-Edwards, testified that she saw Friend running from the car after the first five shots were fired, one of which was likely the bullet that killed Maric, according to the pathology report. Kidd-Edwards testified that the person who shot the second round of gunfire was slightly built, which Wilson argued was inconsistent with a description of him because he has a large build. She testified that the shooter walked to the passenger side of the car after the shooting, which was inconsistent with the State's argument that Wilson acted alone in committing this crime of passion, but arguably consistent with Wilson's argument that Friend and unnamed confederates killed Maric and framed him.

Kidd-Edwards testified that the car that drove away was a gold-toned Lincoln and that she looked carefully at the license plate in an attempt to remember it, but that she could not remember the numbers and letters. She also testified that the license plate was a regular license plate. Wilson drove a gold-toned Lincoln, but his license plate was a specialty plate that read "G-Ball." Friend testified that he knew that Wilson drove a gold-toned Lincoln before the murder. Wilson presented evidence that there were many different gold Lincoln Continental cars belonging to people in the area near where the murder occurred.

The physical evidence showed bullet strikes on the ground to either side of Friend as he fled. This is consistent with the State's theory that Wilson shot at Friend, but is also consistent with Wilson's argument that Maric's murder was a set up "hit" and attempt to frame him, with bullets landing everywhere, but none hitting Friend, despite the fact that Wilson is a skilled marksman.

As this brief partial summary of the evidence shows, the evidence introduced at trial was contradictory. Given the conflicting evidence, the State cannot meet its burden of showing that there is no reasonable possibility that the error contributed to the verdict. We therefore reject the State's argument that the error was harmless. Wilson is entitled to a new trial. He was denied his constitutional right to present a complete defense during his criminal trial because the circuit court did not allow him to introduce evidence that Friend was involved in the murder despite having shown that Friend had a motive, the opportunity and a direct connection to the crime. *See* ***Denny***, 120 Wis. 2d at 624.[5]

[5] In support of its harmless error argument, the State also points to "the fact that Wilson repeatedly lied to police about his ownership of a .44 caliber weapon, the type of gun used to kill Eva Maric" and his "belated admission at trial that he did in fact own a .44 Smith and Wesson Magnum" until shortly before the murder. We agree with Wilson that this argument "goes widely off the mark." The State's ballistics expert, Monty Lutz, testified that the .44 caliber bullets involved in the shooting were fired from a Stern Rouger revolver, not a Smith and Wesson revolver, the type owned by Wilson. The defense's ballistics expert, Richard Thompson, concurred with Lutz's assessment, explaining that different markings are left on bullets depending on the gun manufacturer and the markings left on the .44 caliber bullets used in the shooting were consistent with a Stern Rouger revolver, not a Smith and Wesson revolver.

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily reversed and this action is remanded for further proceedings. *See* WIS. STAT. RULE 809.21 (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals